CHAPTER OUTLINE

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SECTION A  Introduction

The word brief has two meanings in the law: first, a written legal argument submitted to an appellate court, and second, an analytical summary of a single court opinion. We devoted the first part of this book to the skills of identifying the components of an opinion in order to arrive at the latter type of brief. In this chapter, we examine the former, the appellate brief.

An appellate brief is a sophisticated, highly stylized, and often lengthy document submitted to an appellate court containing arguments on why a lower court was correct or incorrect and hence should be affirmed, modified, or reversed. (Every attorney admires a well-written appellate brief. Those outside the profession, however, are not always as impressed. Kafka is said to have commented that an attorney is a person who writes a 10,000-word document and calls it a “brief”!) The predominant characteristic of the appellate brief is advocacy. The structure of the brief, the phrasing of the issues, the organization of the analysis—in short, every aspect and every word of the brief—are dictated by considerations of advocacy.

The art of appellate brief writing is a complex and difficult subject that has been treated extensively by leading scholars, judges, and practitioners. Because of its complexity, we will not examine every aspect of the brief in detail here. Our goal is limited to providing a basic introduction to the structure and components of an appellate brief.

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Before considering the more technical aspects of drafting an appellate brief, we need to understand the procedural context in which brief writing takes place. Consequently, the following section briefly explores the scope and limitations of the appellate process.

SECTION B  Appellate Process

When a court reaches a final decision in the dispute, at least one of the parties is often unhappy with that decision. If the dissatisfied party believes that the adverse decision is the result of an error of law that the court or agency made, it may be possible for that party to ask a higher court to review the decision in order to correct the alleged error. This process of review is called an appeal. The person bringing the appeal is the appellant. In some courts this party is called the petitioner, the one seeking or petitioning for review. The party against whom the appeal is brought is the appellee or respondent.

Appellate review, however, is not boundless. Certain kinds of appeal are discretionary in that the appellate court may refuse to hear the appeal unless it feels that the issues raised by the appellant merit its attention. Even where the appeal is a matter “of right,” with no discretion on the part of the appellate court to refuse to hear it, certain well-established limitations on the scope of appeal are common to most kinds of cases. In general, appellate review (whether it is discretionary or of right) is limited to the:

- Record developed below
- Issues raised below
- Issues of law
- Material errors
- Final orders

1. Record Below

Appellate courts exist primarily to review the determinations of lower courts and to correct errors and abuses that occurred within these tribunals. Appellate courts generally limit their consideration to the record of what occurred below. The record is the official collection of all the pretrial and trial proceedings consisting of pleadings, exhibits, orders, and word-for-word testimony that took place during these proceedings. With rare exceptions, appellate courts refuse to consider matters outside this record. For example, an appellate court generally does not take into consideration new evidence that the parties did not present to the trial court.

2. Issues Raised Below

Similarly, appellate courts will not review issues unless those issues were first raised before the lower court. The controlling principle is that the trial court should have had an opportunity to make the correct decision before a party may assert on appeal that the court erred. Thus, if a party on appeal wants to raise the issue of whether a trial court properly admitted a certain document into evidence, the party must have objected to the admission of
that document during the trial as the precondition of a consideration of that issue by the appellate court. If the objection was not made during the trial, the right to raise it on appeal is considered **waived**.

3. Issues of Law

Courts at the trial level are empowered to consider and resolve factual issues (i.e., what actually happened) and legal issues or issues of law (i.e., what rules of law are applicable to these facts, and how these rules apply). In general, appellate courts may consider and decide only the latter type of issue.

4. Material Errors

Not every error of law made by a trial court affects the decision the court reached. Suppose, for example, the trial court erroneously decides that certain testimony is admissible when it should have been excluded as hearsay. If there has been additional competent and uncontradicted testimony to the same effect, the court's error will probably be considered **harmless error** because the exclusion of the hearsay would not have altered the result. If, on the other hand, there had been no other evidence to the same effect and if the hearsay testimony arguably influenced the jury's verdict, then the error would be considered **material**. Appellate courts correct only material errors (i.e., those errors that may have influenced the court's decision), and disregard what they consider to be harmless error.

5. Final Orders

With limited exceptions, appellate courts will hear appeals only from final orders of the lower court. Generally, this means that all the proceedings before the lower court must have been completed before an appeal is allowed. For example, suppose that several weeks before trial, a defendant makes a motion to dismiss, which the trial court denies. The defendant is generally not permitted to appeal this decision until the trial is over and a final order has been entered (i.e., until all the proceedings before the trial court have been completed). This rule enables the appellate court to review all the alleged errors made by the lower court at once, rather than allowing the litigation to drag out endlessly with each error being appealed one by one. Moreover, an error committed by the trial court early in the litigation may turn out to be harmless in the light of subsequent developments.

There are limited instances in which an appellate court allows an appeal of an issue in a case that is not yet final, called an **interlocutory appeal**. In effect, the lower court formally identifies (i.e., certifies) a question that it would like the appellate court to resolve now. Also in some complex federal litigation, there may be a **bifurcation** of the trial, in which some issues are tried separately from others. For example, the court may first try the issue of liability and, if necessary, try the issue of damages at a later date. An appeal may be allowed on the liability issue while the trial court resolves the damage issue.

In addition to these five general limitations on the scope of appeal, there are laws governing many aspects of the appeal, such as:
• Posting a bond covering the costs of appeal (a bond is a sum of money deposited in court to insure compliance with a requirement)
• Time permitted to file the briefs
• Notice requirements to the adverse party
• Method of transmitting the record from the lower court to the appellate court
• Payment of the costs of appeal
• Requirements of special appeals such as mandamus
• Stays (i.e., a delay in enforcement of an order) and injunctions pending appeal

The nature of these requirements may vary a great deal from state to state and to some extent may even differ among courts of appeal within a single judicial system. You should, of course, familiarize yourself with the statutes and procedural rules of court applicable in your jurisdiction. Failure to comply with their requirements may result in the dismissal of an otherwise valid appeal.

SECTION C  Organization and Content of the Appellate Brief

The form of the appellate brief is usually mandated by rules of court. Typical of such rules for federal courts is Rule 28 of the Federal Rules of Appellate Procedure, which provides:

(a) BRIEF OF THE APPELLANT. The brief of the appellant shall contain under appropriate headings and in the order here indicated:

(1) A table of contents, with page references, and a table of cases (alphabetically arranged), statutes and other authorities cited, with references to the pages of the brief where they are cited.

(2) A statement of subject matter and appellate jurisdiction....

(3) A statement of the issues presented for review.

(4) A statement of the case. The statement shall first indicate briefly the nature of the case, the course of proceedings, and its disposition in the court below. There shall follow a statement of the facts relevant to the issue presented for review, with appropriate references to the record....

(5) An argument. The argument may be preceded by a summary. The argument shall contain the contentions of the appellant on the issues presented and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on. The argument must also include for each issue a concise statement of the applicable standard of review....

(6) A short conclusion stating the precise relief sought.

(b) BRIEF OF THE APPELLEE. The brief of the appellee shall conform to the requirements of subdivision (a)(1)–(5), except that none of the following need appear unless the appellee is dissatisfied with the statement of the appellant:

(1) the jurisdictional statement;

(2) the statement of the issues;

(3) the statement of the case;

(4) the statement of the standard of review.
(c) **REPLY BRIEF.** The appellant may file a brief in reply to the brief of the appellee, and if the appellee has cross-appealed, the appellee may file a brief in reply to the response of the appellant to the issues presented by the cross appeal. No further briefs may be filed except with leave of court.

(g) **LENGTH OF BRIEFS.** Except by permission of the court, or as specified by local rule of the court of appeals, principal briefs shall not exceed 50 pages, and reply briefs shall not exceed 25 pages, exclusive of pages containing the corporate disclosure statement, table of contents, table of citations and any addendum containing statutes, rules, regulations, etc.

The following components are often found in many appellate briefs. In the remaining sections of this chapter, we examine each of these components:

- Cover Page
- Table of Contents
- Table of Authorities or Index
- Jurisdiction Statement
- Questions Presented
- Constitutional Provisions, Statutes, and Regulations Involved
- Statement of the Case
- Argument
- Conclusion
- Appendix

Occasionally you may find appellate briefs that combine some of the above components. The same labels are not always used. Again, you must check the rules for specific appellate courts.

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### SECTION D Cover, Table of Contents, and Table of Authorities

1. **The Cover**

   The *cover* of the appellate brief is the equivalent of the heading on a memorandum of law; its purpose is to identify the document. The cover should include:

   - Name of the appellate court
   - Case or docket number assigned to the appeal
   - Names of the parties
   - Name of the court from which the appeal is being taken
   - Type of brief (e.g., appellant's, appellee's, reply, etc.)
   - Name of address of counsel submitting the brief
2. The Table of Contents

The **table of contents** is an outline of the major components of the brief, including the various **point headings** (see discussion below) and subheadings of the argument, along with the pages in the brief on which they are covered. The function of the table of contents is to provide the reader with quick and easy access to each portion of the brief. Because the exact wording of the point headings and the pages on which they are covered are not known until the brief is completed, the table of contents is one of the last sections of the brief to be written. The excerpt in Figure 18.2 from the respondents’ brief in *Doe v. McMillan* illustrates the structure of a table of contents.
3. The Table of Authorities

This part of the appellate brief is called a **table of authorities**, or sometimes an index. It consists of a listing of:

- Each primary and secondary authority (see Figures 1.2 and 1.3 in chapter 1) cited and relied upon in the brief
- The full citation to each authority
- The page or pages within the brief on which each authority is mentioned or discussed

The table of authorities (or index) is normally placed at the beginning of the brief, immediately following the table of contents. Group the various authorities into categories, listing separately all the opinions, all the federal constitutional provisions, all the state constitutional provisions, all the statutes, all the regulations, etc. Secondary authority such as legal treatises and legal periodical articles are also grouped together. Within each category, there should be a clear organization. Opinions, for example, should be cited in alphabetical order. Constitutional and statutory provisions, on the other hand, are listed in the order in which they appear in the Constitution or code, usually in numerical order. Figure 18.3 illustrates this structure.

### SECTION E  Jurisdiction Statement

This section of the brief contains a short statement explaining the subject-matter jurisdiction of the appellate court. For example:
This Court has jurisdiction under 28 U.S.C. § 1291 (1967).

The jurisdiction statement may point out some of the essential facts that relate to the jurisdiction of the appellate court, such as how the case came up on appeal. For example:

On January 2, 1978, a judgment was entered by the U.S. Court of Appeals for the Second Circuit. The U.S. Supreme Court granted certiorari on February 6, 1978. 400 U.S. 302.

Later in the brief, a statement of the case often includes more detailed jurisdictional information.

<table>
<thead>
<tr>
<th>Table of Authorities</th>
<th>Page</th>
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<tr>
<td>CASES</td>
<td></td>
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<tr>
<td>Smith v. Jones, 24 F.2d 445 (5th Cir.1974)</td>
<td>2, 4</td>
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<tr>
<td>Thompson v. Richardson, 34 Miss. 650, 65 So. 109 (1930)</td>
<td>3, 9</td>
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<tr>
<td>Etc.</td>
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<tr>
<td>CONSTITUTIONAL PROVISIONS</td>
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<td>Art. 5, Miss. Constitution</td>
<td>12, 17</td>
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<td>Art. 7, Miss. Constitution</td>
<td>20</td>
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<td>Etc.</td>
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<td>STATUTES</td>
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<td>Miss. Code Ann. § 23(b) (1978)</td>
<td>2, 8</td>
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<td>Miss. Code Ann. § 45 (1978)</td>
<td>23</td>
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<td>Etc.</td>
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<td>LEGAL PERIODICAL ARTICLES</td>
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<td>Colom, Sex Discrimination in the 1980's, 35 Miss. Law</td>
<td>7</td>
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<td>Journal 268 (1982)</td>
<td>19</td>
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<td>Etc.</td>
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</table>

**FIGURE 18.3** Sample Table of Authorities

**SECTION F  Question(s) Presented**

The question or questions presented provides the first major opportunity for advocacy in the appellate brief. The label used for this part of the brief varies. It may be called “Questions Presented,” “Points Relied upon for Reversal,” “Points in Error,” “Assignments of Error,” “Issues Presented,” etc. Regardless of the label, its substance is essentially the same: It is a statement of the legal issues that the party wishes the appellate court to consider and decide.

The location of the statement of the issues within the brief, and even the content of the statement, may be regulated by rules of court. The United States Supreme Court Rules, for example, provide that the questions presented must go on the first page after the cover, and that they should be expressed “in the terms and circumstances of the case but without unnecessary detail”. Rule 14(1)(a). Furthermore, this rule mandates that no other information is to be included on the page containing the questions presented. Consult the rules of court in your own jurisdiction for similar instructions.

The skill of identifying and stating legal issues has been treated elsewhere in this text (see chapters 7 and 16). Although the statement of the issues in an appellate brief is based on the errors of law that the appellant claims were made by the lower court, the techniques of identifying and stating those
issues are essentially the same as in other legal writing. Issue statements are very much a tool of persuasion. Often, the issues are what the judge turns to first in reading the brief. The phrasing of the issues can significantly affect his or her perspective in reading and evaluating the remaining portions of the brief.

A legal issue has two components: one or more rules of law, and facts that raise a question of the applicability of those rule(s) of law. We have already examined how advocates can phrase the same issue differently in a memorandum of law (see chapter 16). The same advocacy dynamics play a role in the phrasing of the rule of law and the fact components of issues in appellate briefs.

1. Advocacy in the Rule-of-Law Component of the Issue

There are two major advocacy techniques of stating the rule-of-law component of an issue.

The first is the selective use of quotations from the rule(s) of law being applied. You will often find that certain portions of a rule of law tend to favor the client, while other portions are less favorable or are actually damaging. In drafting an issue, include a brief quotation or other reference to the favorable language in the rule(s) of law involved in the issue. While it is not possible to "duck" the plain wording of a rule, your emphasis of the favorable language may encourage the reader to approach your argument on that issue in a "positive" frame of mind, making him or her more receptive to your interpretation of the damaging language in the rule.

A second method of achieving this end is to summarize or paraphrase the requirements and effects of the rule(s) in your statement of the issue. This technique is illustrated in the following opposing statements of an issue presented to the United States Supreme Court in a case on elections:

Appellant's Statement of Issue

Whether the totality of the general election ballot certification requirements imposed on minority political parties by the Texas Election Code, including provisions forcing such parties to obtain the notarized signatures of approximately 22,000 registered voters who have not previously participated during the same election year in a major party primary election or nominating convention, but limiting the time for obtaining such signatures to a period of approximately 55 days following the major party primary elections, and further requiring that a candidate formally file for office approximately nine months before the general election and approximately three months before the primary elections, abridges the rights of free association, liberty, due process and equal protection guaranteed by the First and Fourteenth Amendments?

Appellee's Statement of the Same Issue

Is it constitutionally permissible for the Texas Election Code to require that before the nominees of any new political party, or a political party whose nominee for governor at the last general election received less than 2% of the total vote cast for governor, or a previously existing party which did not have a nominee for governor in the last general election, can be placed upon the general election ballot, there must be a showing that the number of people participating in the party's precinct conventions or signing petitions to have the party's nominees on the general election ballot, was at least 1% of the vote for governor at the last general election?

The rule of law in this issue is a statute—the Texas Election Code. Note the different approach in each version of the issue. The appellant, who is seeking
to have the statute ruled unconstitutional, emphasizes those aspects of the statute that it believes are unreasonable: the high number of signatures required, the short period of time available to obtain those signatures, etc. The appellee, on the other hand, ignores the time limitations completely and describes the rule of law in a manner that makes it seem much more reasonable. Note in particular the advocacy evident in the parties' description of the number of signatures required. The appellee describes the requirement as being "at least 1% of the vote for governor at the last general election," a figure that on its face would seem minimal and quite reasonable. The appellant, on the other hand, translates this percentage into the approximate number of signatures ("22,000") that would be necessary under this standard. The result is a figure that is more impressive and that tends to maximize the apparent unreasonableness of the requirement.

2. Advocacy in the Factual Component of the Issue

Compare the use of facts in the following two statements of the same issue in opposing appellate briefs:

Petitioner's Statement of the Issue

Does the warrantless search of the contents of a briefcase made at the time of arrest pursuant to an arrest warrant for an alleged misdemeanor, in the absence of exigent circumstances, violate the Fourth and Fourteenth Amendments of the United States Constitution?

Respondent's Statement of the Same Issue

Whether an officer serving an arrest warrant for, among other things, carrying a concealed weapon, may constitutionally remove from the arrestee/driver's side of the car, a case from the floor of the car between the arrestee's feet and, feeling a bulky object like a weapon, may open the case and remove the weapon when he has previously been told the arrestee carried the weapon in just such a case?

Both parties describe the same situation or transaction in these issue statements, but there are significant differences. Each party begins by presenting a favorable fact. The petitioner begins its statement of the issue by stressing that no warrant was obtained for the search, a fact that is relevant to its contention that the search was unconstitutional. The respondent, on the other hand, begins by noting that the arrest that preceded the search was made with a warrant. In addition, the parties differ greatly in the extent to which they describe the facts. Petitioner, in an effort to minimize highly damaging facts, describes the arrest warrant broadly as being one "for an alleged misdemeanor," while the respondent emphasizes the damaging nature of the same fact by describing the circumstances in much more detail.

One final point should be mentioned concerning the statement of the issues. As we discussed in chapter 16, you must state and analyze some issues on the assumption that the court decides against you on issues treated early in your presentation. The appellate brief should not be limited to those issues you are confident of winning. If the court eventually decides against you on an issue, other issues (which we have called contingency issues) may then arise that you must present in the light most favorable to the client. Suppose that the trial court found the defendant (the client) guilty of robbery and sentenced him or her to twenty years in prison. At least two issues could exist: the legality of the conviction and the legality of the sentence. In the discussion of your first issue, you will focus on the impropriety of the conviction. If the appellate court eventually rules against you on the conviction issue (which, of course, you will not know at the
time you are writing the appellate brief), you must be ready for the sentence issue (e.g., you may argue that the criminal statute does not authorize a sentence of over fifteen years for anyone convicted of robbery). Hence, the portion of the appellate brief in which you discuss the sentence issue might begin with a comment such as:

In the event that this court determines that the conviction was valid, the question then becomes whether the sentence....

SECTION G  Constitutional Provisions, Statutes, and Regulations Involved

After stating the issues, you give the exact text (word for word) of any constitutional provisions, statutes, regulations, or other rules of law that will be analyzed in the brief. If there are many of these rules of law, or if any of them are very long, you can include them in the appendix of the brief. You would simply note in this early portion of the brief that the rules of law are printed in full in the appendix.

SECTION H  Statement of the Case

The statement of the case, sometimes called the statement of the facts, generally consists of the following four components:

- A summary of the dispute
- A statement of the prior proceedings
- A brief summary of the judgment of the lower court and the court's reasoning
- A narrative of the essential facts of the case

As indicated earlier, some of this information may also be included in the jurisdiction statement.

It is a good practice to organize these components in the order they are listed above. The first three steps provide the court with an overview of the nature and status of the dispute and hence a context in which to read the factual narrative. The following statement from a brief filed in Garrett Freightlines, Inc. v. United States conforms to this pattern. (Tr. refers to pages in the transcript of the trial record. A transcript is a word-for-word account of a proceeding.)

These are actions based upon the Federal Tort Claims Act, 28 U.S.C. § 1346(b), initiated by the appellants, Garrett Freightlines, Inc. and Charles R. Thomas in the United States District Court for the District of Idaho. The appellant alleged that appellee's employee, Randall W. Reynolds, while acting within the scope of his employment, negligently caused injury to appellants. The United States denied that the employee was acting within the scope of his employment.

On March 27, 1973, appellant Garrett made a motion for limited summary judgment as to whether Reynolds was acting within the scope of his employment when the collision occurred. The actions of Garrett and Thomas were consolidated by order of the court, and appellee later moved for summary judgment (Tr. 204).
The District Court held that under the authority of dicta in *Berrettoni v. United States*, 436 F.2d 1372 (9th Cir.1970), that Reynolds was not within the scope of his employment when the accident occurred and granted appellee's motion for summary judgment. It is from that order and judgment that the injured now appeals.

Staff Sergeant Reynolds was a career soldier in the United States Military and, until November 9, 1970, stationed at Fort Rucker, Alabama. On or about July 30, 1970, official orders directed that Reynolds be reassigned to the Republic of Vietnam. In accordance with, and as a part of official orders, Reynolds was granted 45 days' delay en route leave which was authorized by his superiors (Tr. 240). Reynolds was also granted seven days' travel time not charged as leave. At the conclusion of leave and travel time, Reynolds was to report at Oakland, California, for transportation to Vietnam. Travel pay was authorized on an automobile mileage basis from Fort Rucker to Oakland for travel by private automobile by the service-man (Tr. 301). Yet, Reynolds' household furniture was shipped at government expense to Portland, Oregon, at his designation. There is no doubt that Reynolds' Military Superiors were aware of his intentions to drive via Portland, Oregon—where he would leave his wife and spend the largest portion of his leave (Tr. 480). There is also no question but that Reynolds alone had the option of choosing the route which would take him to Oakland.

Reynolds and his wife left Fort Rucker on November 9, 1970, in accordance with his reassignment orders. The car, driven by Reynolds, collided on November 13, 1970, on the fifth day of travel, with a vehicle owned by the appellant Garrett and driven by appellant Thomas near Burley, Idaho (Tr. 320, 411).

The facts in the brief must be based upon the record below. You should attempt to describe them in a clear, concise, and easy-to-read fashion. Avoid tedious and unnecessary inventories of the transcripts and exhibits; translate the evidence and findings into a vivid narrative that holds the reader's attention. Above all, be accurate in your statement of the facts. False or misleading statements of fact, or the omission of an important but adverse fact, may well cause the court to question the accuracy and reliability of your entire brief.

Within the framework of these guidelines, there is a great deal of room for effective advocacy in stating the facts in the light most favorable to the client. Compare the following excerpts from the opposing briefs submitted to the United States Supreme Court in *Hardy v. Vuitch*:

**Petitioner's Statement**

Respondent, a physician licensed to practice medicine in the State of Maryland, was tried before a jury in the Circuit Court for Montgomery County, Maryland, on a charge of performing an abortion in a place other than a licensed and accredited hospital on November 23, 1968. Article 43, Section 139, et seq., Annotated Code of Maryland, 1971 Replacement Volume. The witness in that case, Rebekah Jayne Dodson, 19 years old, testified that she became pregnant and decided to have an abortion (Tr. 27). She was referred to Respondent's office, where she was examined by Respondent on November 21, 1968. Pursuant to his instructions, she returned to his office on November 23, with $300, at which time he performed an abortion. A pathologist, called to testify by Dr. Vuitch, who had examined placental tissue which had been removed from Miss Dodson, conceded that it was connected with a twelve week pregnancy (Tr. 32, 41).

**Respondent's Statement**

Dr. Milan V. Vuitch is duly licensed to practice medicine and surgery in the States of Maryland and New York, and the District of Columbia. He practices in the District where he is Medical Director of Laurel Clinic, Inc., and President of Laurel Hospital, Inc. Dr. Vuitch is a member of the District of Columbia Medical Society and the American Medical Association. He resides in Silver Spring, Maryland, with
his wife and three sons. His medical training and extensive surgical experience are
detailed in the Record (Tr. 14).

In July, 1969, Dr. Vuitch was tried on the charge of having violated Md. Code
Ann., Art. 43, § 139, by performing a therapeutic abortion in a location which was
not a general community hospital licensed by the State and accredited by the pri-
vate, out-of-state-agency known as the Joint Commission on Accreditation of Hos-
pitals (Tr. 30). There was no charge, nor any basis for charging, that Dr. Vuitch had
other than excellent surgical qualifications, or that his medical facility was not well-
equipped. There was no allegation nor evidence of malpractice, nor any other sug-
gestion of impropriety. There was no evidence that the alleged patient could have
secured a therapeutic abortion within her means and without substantial delay at a
hospital. Neither the alleged patient nor her companion was charged with an
offense. No Maryland law requires that any other medical procedure, regardless of
complexity, be performed in a given type of clinical or hospital facility.

The trial led to a conviction, which was sustained throughout the Maryland
appellate process, after which Dr. Vuitch sought and obtained a federal writ of
habeas corpus upon the ground that the convicting statute was unconstitutional.

Petitioner, seeking to uphold the conviction, begins by stating that the respon-
dent, a doctor, had been convicted of performing an abortion outside a hospi-
tal in a jury trial. Petitioner then proceeds to describe the incident in a rela-
tively cold and matter-of-fact manner. Note in particular how petitioner
stresses the age of the woman and the amount of the fee, facts that suggest the
doctor was taking advantage of an innocent young woman for his own finan-
cial gain. The respondent (doctor), on the other hand, begins by elaborately
describing his professional credentials, a fact that detracts from the alleged
criminal nature of the act. His statement is drafted to focus on his competency
to perform an abortion under such circumstances, and even suggests that the
woman might otherwise have been unable to obtain the abortion at an accred-
ited hospital. Note also the way the two parties characterize the abortion.
While the state refers to it simply as an "abortion," the doctor describes it as a
"therapeutic abortion." Each side uses every opportunity to portray facts in a
light most sympathetic to its position.

SECTION I  Argument

The core of the appellate brief is the section that is often called the argu-
ment. Here the parties analyze what they believe to be the controlling author-
ities on each issue in the brief. The argument, usually placed after the state-
ment of the case, constitutes the bulk of the brief.

The argument is organized around point headings which are assertions by
a party of the conclusions it is asking the court to adopt on the issues. The
party's hope is that the appellate court will adopt or incorporate these point
headings in the holdings of the court when it eventually writes its opinion.

Each point heading is presented and discussed, one at a time, in the body
of the argument. (As we saw earlier, the point headings are also printed in the
table of contents at the beginning of the brief.) For relatively simple issues in
the appellate brief, there is usually only one point heading. When the issue is
more complex, you will often find a separate point heading devoted to each
major premise in the analysis of that issue.

The most common method of writing a point heading is to rephrase an
issue as an affirmative statement—capitalizing the first letter of all the impor-
tant words. Here, for example, is an issue in an appellate brief:
Is the consensual appointment of a liquidating agent, who is not vested with title to
the debtor’s property and whose appointment does not affect the rights of creditors,
the commission of an act of bankruptcy under Section 3a(5) of the Act, 11 U.S.C. §
21a(5)?

An appropriate point heading for the argument on this issue could be formu-
lated by rephrasing this issue as follows:

The Consensual Appointment of a Liquidating Agent, Who is Not Vested with Title
to the Debtor’s Property and Whose Appointment Does Not Affect the Rights of
Creditors, is Not the Commission of An Act of Bankruptcy.

Beneath each point heading in the argument is a discussion of the authority
that demonstrates why the assertion made in the heading should be adopted
by the court. The most effective authority, as we saw in chapter 14, is mandato-
ry primary authority (e.g., controlling statutes and case law). In addition,
the brief will use persuasive primary and secondary authority as deemed
appropriate to the advocacy objectives of the client. The techniques of apply-
ing these kinds of authority are covered elsewhere in this book. The following
themes reinforce this coverage in the context of the appellate brief:

- Using legislative history
- Using similes and metaphors
- Directly attacking your opponent’s position
- Evaluating the probable result
- Invoking tradition

1. Argument Using Legislative History

When an issue involves the application and interpretation of a statute, a
major concern of the court will be to determine the intent of the authors of
this law. Among the factors a court may consider in determining this intent is
the legislative history of the statute (i.e., the various documents that record
the legislature’s deliberations on the statute in question). We discussed some
techniques of using legislative history in legal writing in chapter 15. Despite
the significant limitations on the utility of legislative history, it can be an effec-
tive tool of advocacy in constructing a legal argument. The following excerpt
illustrates how the petitioner in Edelman v. Jordan used legislative history in an
appellate brief that successfully persuaded the United States Supreme Court
to deny retroactive welfare benefits to the respondents in that case:

An examination of the committee report establishes an intent on the part of Con-
gress to provide only for present need. There is no indication that Congress intend-
ed to fund payments for past needs when payments were not received by welfare
recipients as a result of error and/or omission on the part of State welfare officials,
or as a result of the construction given a federal statute by a State welfare official.

For example, the House Ways and Means Committee on H.R. 7260, 74th Cong., 1st
Sess., in Report Number 615, on the Social Security Act states as follows at page 3:

The need for legislation on the subject of Social Security is apparent at this time.
On every hand the lack of such security is evidenced by human suffering, weak-
ened morale, and increased public expenditures. This situation necessitates two
complementary courses of action. We must relieve the existing distress and
should devise measures to reduce destitution and dependency in the future.
(Emphasis added)
2. Argument Using Similes and Metaphors

Similes and metaphors are figures of speech used to compare one object with another. In a metaphor the writer directly identifies the two objects, equating the one with the other:

Plaintiff, in attempting to argue that this transaction falls within the protection of the statute, is attempting to force a square peg into a round hole; it cannot be accomplished without doing great violence to both the peg and the hole.

A simile does not directly equate the two objects. It simply draws the comparison using the terms like or as:

Plaintiff's contention, like the sword of Damocles, hangs by the slenderest of threads.

Similes and metaphors will never win an argument; they are, in fact, no argument at all. They are useful in adding color and impact to an assertion, making your point much more vivid and memorable to the reader. These devices, however, should be used sparingly and cautiously. An argument inundated with trite and poorly chosen figures of speech is likely to irritate the reader.

3. Argument Directly Attacking Your Opponent’s Position

The direct attack is an extreme form of counteranalysis. The more persuasive your opponent's argument appears to be, the greater the need to present effective counteranalysis demonstrating that its position is an incorrect, or a less desirable, interpretation of the law. Note the direct attack in the following excerpt from a respondent's appellate brief:

Petitioner's position would mean that while federal courts may invalidate and enjoin state legislation without running afoul or the Eleventh Amendment, federal courts may not require state officials to make restitution incident to the enjoining of illegal state regulations because of the Eleventh Amendment. To suggest that the former is not a suit against the state but the latter is, is capricious and illogical.

Another form of attack is to state your opponent's argument, but quickly and forcibly show that there are strong policy reasons why this argument should not be accepted by the court. This approach is outlined in (4) and (5) below.

4. Argument Evaluating the Probable Result

Opinions act as a form of guidance to the public on what to do to avoid violating the law. Important opinions have a far-reaching impact not only on the parties before the court, but on society as a whole. Courts, of course, are aware of this impact. In reaching a decision, they may consider the broader social implications of that decision. After you have presented your arguments on the relevant mandatory and persuasive authority, you might argue that if your opponent's position is adopted, the result would:

- Be unfair
- Be impractical
- Be unduly burdensome
- Be unenforceable
- Be against public policy
• Leave the party with no remedy
• Permit the wrongdoer to profit from his or her wrong

In *Leftowitz v. Turley*, the reply brief of the appellees used arguments of this kind:

Taking into account the expansion of government activities in all fields, it takes little imagination to conclude that the disqualification to contract with the government may be a catastrophic limitation upon architects, engineers and others involved in government contracting. Also, such disqualification of a professional must certainly cast a shadow upon his reputation outside of the sphere of governmental contracting. Speaking in purely economic terms, disqualification from public contracting may be much more severe than individual loss of employment, and, unquestionably, the effect of disqualification upon professionals such as architects and engineers is much more serious than loss of employment on a sanitation truck.

5. Argument Invoking Tradition

Courts, like most institutions, have a great deal of respect for tradition, particularly as embodied in well-established principles of law. Generally, the longer a rule of law has been recognized, the more authority it has and the more reluctant the courts are to reject it. The response to this position is to argue that times and practices have changed, and that the rule is therefore no longer appropriate.

There is a second and more important reason, however, for judicial reluctance to discard well-established rules: fairness. If people have been regulating their conduct to conform to the rule, it might be unfair to alter that rule in midstream.

The following excerpt illustrates how counsel for former President Nixon used an argument based on tradition in describing the doctrine of separation of powers to the United States Supreme Court:

The concept of separation of governmental powers is deeply rooted in the history of political theory, finding its early expression in the works of Aristotle who recognized the fundamental distinction between the legislative, executive and judicial functions. Although subsequently elaborated upon by many historians and scholars, the principle of separation of the branches of government was most familiar to colonial America in the writings of Locke and Montesquieu. The doctrine of separation of powers, as a vital and necessary element of our democratic form of government, has long been judicially recognized. *United States v. Klein*, 13 Wall. (80 U.S.) 128 (1872). As early as 1879, this Court stressed the integrity and independence of each branch of the government.

SECTION J  Conclusion

At the end of your argument on each issue, you state your conclusion. Generally this consists of a single paragraph that briefly summarizes the major steps in your analysis and the result that flows from your analysis.

In addition to these summary conclusions as to individual issues, the brief should have an overall conclusion at the end. In most instances, this final conclusion is no more than a terse, ritualized statement asking the court to take favorable action on the appeal. It often consists of no more than a single sentence:
For all the foregoing reasons, respondent (or petitioner) respectfully requests this court to affirm (or reverse) the judgment of the court below.

Note that this statement makes no attempt to summarize the party's argument on the various issues. Such a summary appears only in the individual conclusion to each major point or issue.

SECTION K  Appendix to the Brief

At the end of the brief, an appendix is often included. It typically includes copies of:

- Long statutes or other rules of law referred to in the brief
- Relevant portions of the pleadings and other papers filed by the parties
- Transcripts of relevant portions of the proceedings below
- Exhibits introduced as evidence
- The full text of the lower court's judgment
- The full text of the lower court's opinion, if any

The determination of which items in the record should be included in the appendix depends on two factors: (a) the rules of court, and (b) the needs of the party.

Most rules of court specify that certain items such as the lower court's judgment must be included in the appendix of the brief. You should carefully read and comply with the rules in your own jurisdiction. The second factor to consider is the needs of the individual party. Include in the appendix whatever portions of the record you intend to rely on. If, for example, the appellant claims that the trial court erred in admitting certain testimony, it must include those portions of the transcript that contain its objection to the evidence as well as the transcript of the testimony itself.

Even though some items in the appendix may have their own internal page numbering, number all the appendix pages consecutively to permit easy reference to the various items in it.

ASSIGNMENT 18.1

(a) Locate an appellate brief written by the highest state court in your state. Here are some ways to find one:

- Check local law libraries to see if they keep copies of such briefs.
- If the court is near you, call the law library of the court and ask if it makes any appellate briefs available to the public.
- Call the clerk of the court and ask if you can come in and read an appellate brief on any current case.
- Find a recent reporter volume that prints the full text of the opinions of your state courts (see Figure 1.11 in chapter 1). Turn to any opinion in this reporter volume. The names of the attorneys who litigated the case are printed at the beginning of the opinion (see Figure 1.13 in chapter 1). Find an
opinion that was litigated by an attorney who practices law in your city. Get
this attorney's name and number from the phone book or from a law direc-
tory. Call the attorney and ask if you can come by to read the appellate brief
the attorney submitted in the case that led to the opinion printed in the
reporter volume.

Once you locate the appellate brief, answer the following questions:

(i) What kind of appellate brief is it?
(ii) What court was it written for?
(iii) Who is the attorney who wrote it?
(iv) Make a list of all of its sections (e.g., cover, table of contents, argument, and
appendix). State the function of each section. What differences are there
between the sections of this appellate brief and the sections of the appellate
brief described in chapter 18?

(b) Locate an appellate brief filed in the United States Court of Appeals with
jurisdiction over your state (see Figure 1.8 in chapter 1), or in the United
States Supreme Court. Answer the same four questions (i through iv).

CHAPTER SUMMARY

An appellate brief is a document submitted to a court of appeals stating
why what the lower court did was correct or incorrect and hence should be
affirmed, modified, or reversed. Appellate review is either discretionary or
"of right," depending on whether the appellate court must hear the appeal. It
is usually limited to a consideration of the record below and issues raised
below, the issues that involve the application of rules of law to facts, the
errors that were material, and the orders that are final. Many courts have their
own rules on the organization and content of the appellate brief. The rules
cover such matters as the order in which materials are presented in the brief,
the maximum length of the brief, the headings that should be included, etc.

The cover contains the name of the appellate court, the case or docket num-
ber, the parties, the type of brief, and the name of the attorney who is submit-
ting the brief. The table of contents lists all the major components of the brief,
the point headings and subheadings, and the pages in the brief where each is
found. The table of authorities gives the full citation of all primary and sec-
ondary authority discussed in the brief and the page numbers where they are
discussed. The jurisdiction statement consists of a short statement explaining
the subject-matter jurisdiction of the appellate court. The section on questions
presented contains the legal issues the party wishes the appellate court to
address. The full text of the rules of law to be discussed in the brief is provid-
ed next. Then comes the statement of the case, which summarizes the dispute,
the prior proceedings, and the lower court judgment and reasoning. It also
provides the essential facts of the case. The heart of the brief is the argument,
in which the parties argue the law through a series of point headings. The
conclusion briefly summarizes the major arguments and states what the party
is seeking from the court. The appendix at the end of the brief contains long
statutes or other rules of law, parts of the pleadings, transcript excerpts, etc.