



Litigation Practice Tip - February 2022

Your argument is not a winner if the judge can't find it: 13 tips for organizing your brief

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I once attended a seminar presented by several Court of Appeal senior research attorneys, that is the people who actually write most of the appellate opinions. Somebody asked what the research attorneys looked at first when reading a brief. I was hoping that the answer would be my favorite, the Introduction, and expecting that it would be the Statement of Facts. Instead, the consensus answer was the seemingly humble Table of Contents.

On reflection, this made sense. In the most persuasive briefs I have read, the argument flows logically from beginning to end, and I can understand it all just by reading the Table of Contents. But too many other briefs I have read may have contained good arguments, but they were buried, or repeated too many times, or it was hard to figure out where they fit in.

Good organization is critical. **Here are some tips on achieving that goal, starting with organization of the brief as a whole, then moving to organizing each of your arguments.**

1. The first step is to outline your arguments.

Whether or not this takes the form of a draft outline with formal headings and subheadings, don't start writing until you have a good idea of what the main arguments will be, along with their order, and what the sub-arguments will be for each.

2. Limit your issues.

In some cases, you might be able to articulate ten legal arguments on why your client should prevail. Avoid the temptation to do so. I once helped represent a party intervening in defense of an affordable housing project attacked on environmental grounds. When I started reading the plaintiffs' opening brief, knowing little about the law on Environmental Impact Reports, I was dazzled by the plaintiffs' first argument and was worried. The second argument was a little weaker, which made me feel a little better. By the time I got to the ninth or tenth argument, I thought, "come on, no EIR could be this bad; this is unfair nit-picking." The judge agreed.

It is not true that your brief is as strong as your strongest argument. Instead, the brief is as strong as the *average* strength of your arguments. So don't bring down your average with weaker arguments; just because you can make them doesn't mean you should.

3. Generally lead with your strongest argument.

I assume this is obvious. I said "generally" because, as will be discussed below, you can't

always do so.

4. Lead with your narrowest path to victory.

Judges don't like to go out on a limb unless they have to. So if one of your arguments is based on statutory interpretation and your other argument requests that the court declare a statute or regulation unconstitutional, lead with your statutory argument. Similarly, if you are in state court and potentially can make arguments based on state and federal law, almost always lead with your state law argument.

5. Don't ignore logic.

If it's a damages case where liability is controverted, you have to start with why defendants are liable before discussing damages. Similarly, an attorneys' fees brief needs to start with why you are entitled to a fee award before you discuss amount.

6. Write strong headings and sub-headings as argumentative sentences.

I have seen otherwise good briefs use headings written as sentence fragments that inform the reader of the topic without advancing the overall argument. This is a mistake; never miss an opportunity for persuasion, and headings present that opportunity. They should be written in complete sentences followed by a period; and advance the overall argument with a reference to favorable law, facts, or both.

For example, suppose you are listing the government's defenses of an illegal policy, and knocking them down one by one, including the argument that changing the policy would cost too much.

- One possible heading would be: **Fiscal concerns**. It lets the reader know where you are in the brief, but does nothing else.
- A slightly better heading would be: **The policy is not justified by fiscal concerns**.
- But an even better heading would be: **The policy is not justified by fiscal concerns, as the evidence shows that invalidating the policy will actually save money, and fiscal considerations cannot justify an otherwise illegal policy.** [1] (Assuming, of course, the facts and the law justify the heading.)

7. Use sub-headings liberally.

Subheadings help you break down your argument into its logical parts. Briefs with subheadings are much easier to follow. Writing experts have suggested that an argument should never go longer than four pages without a sub-heading.

8. Stay in your lane.

Once you have a good organization, follow it. Suppose, for example, you are briefing a preliminary injunction motion, where two of the arguments are that (1) the balance of interim harms favors the plaintiffs and (2) plaintiffs will probably win on the merits. In your discussion of interim harms, don't veer off to claim you will win on the merits. That's distracting to the reader.

9. In a reply brief, don't automatically adopt your opponent's outline.

If you have written a well-organized opening brief, stick with that organization in your reply, i.e., closing brief. Respond to your opponents' arguments within the framework of your arguments to keep control of the narrative.[2]

Now let's turn to the organization of the arguments themselves.

10. Keep moving from the general to the specific.

Remember that boring IRAC your under-paid and under-appreciated legal research instructor taught you in law school? IRAC stands for (1) issue;(2) rule; (3) analysis; and (4) conclusion. It really works; indeed, it works so well that legal writing experts, not to be outdone in the acronym game by their colleagues in other areas, have devised numerous refinements and modifications.[3]

Regardless of nomenclature, all agree that legal reasoning takes the form of a syllogism. [4] At some point, you state and maybe explain the governing rule of law, then you analyze and apply it to the facts of your case, and then you conclude.

11. State your argument and present your favorable cases first before discussing your opponent's arguments or unfavorable cases.

You should not ignore potential opposing arguments or unfavorable cases, but neither should they take top billing in your opening brief.

12. Read lots of appellate opinions on your topic to make organizing easier.

For example, often you will notice that the courts like to apply multi-part tests, such as for determining whether a defendant is subject to equitable estoppel or whether a preliminary injunction should issue. Follow that organization, preferably with subheadings.

13. Edit especially for organization.

When you edit your first draft, pay special attention to whether the brief is well organized. Here are four warning signs that the brief needs further work:

- The brief keeps repeating the same arguments, sometimes in the same words.
- You have a heading with only one subheading (e.g., I. with a I.A., but not a I.B.). The purpose of subheadings is to explain how your argument breaks down into logical parts. If there is only one subheading, that suggests there is only one part to the argument, so you don't need a subheading at all. Or maybe there are two logical parts, in which case you need a I.B.
- The text under a heading doesn't match the heading. If the heading promises more than the text delivers, or something different than what is in the text, you need to change the heading, change the text, or reorganize the brief.
- The brief has lots of argumentative footnotes. Usually, that means that you wanted to say something, but couldn't figure out where it fit in. That's time to reorganize so that a good argument will end up in the text where the judge is more likely to read it. And, of course, a weaker argument will be deleted. [5]

[1] Note that I used **regular sentence capitalization** rather than the less readable **Initial Caps** or the even less readable **ALL CAPS**. Though the use of regular sentence capitalization for argument headings is not yet the prevailing standard in legal writing, it should and eventually will be.

[2] See my Practice Tip on reply briefs, "[How to Write a Reply Brief](#)" (Sept. 2020).

[3] These reportedly include

- CRAC: Conclusion, Rule, Application, Conclusion;
- CRuPAC: Conclusion, Rule, P (Rule proof or explanation), Application of Rule, Conclusion;
- IREXAC: Issue, Rules, Explanation, Application, Conclusion; and
- TREAC: Topic sentence that states a conclusion, Rule, Explanation, Application, Conclusion.

Daniel P. Selmi and Rebecca A. Delfino, *Principles of Appellate Advocacy* 83 (2d ed. 2021).

[4] An example of a syllogism is "(1) Wiener dogs are incorrigible; (2) Poochy is a Wiener dog; (3) therefore, Poochy is incorrigible." Apologies, though I doubt they are necessary, for any dachshund owners who may be offended. No apologies to Pooch, who wears his incorrigibility as a badge of pride.

[5] See my practice tip on footnotes: [Don't start off on the wrong footnote: the best and worst uses of footnotes](#) (Apr. 2021).

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