Writing Effective Appellate Briefs in Complex Cases

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> *"Briefs are written for one audience and one audience only—judges and their law clerks. They have the most limited readership of any professional writing."*
>
> *Judge Ruggero Alidsert*

This CLE paper was also written for one audience: lawyers whose job it is to distill a mess of complex facts and law, such as those found in many administrative cases, into an appellate brief.

The truest answer to the question "How do I write an effective brief?" is the lawyerly, "It depends." An effective brief-writer should be flexible, adapting his tools and techniques to best fit the problem of his case. This paper collects some of our thoughts about the brief-writing process with the hope that you might find a few more tools for your kit.

We have divided the paper into two sections. The first section discusses how to tailor your brief to the peculiar needs of the appellate court, with special focus on how those needs evolve as the case moves through the appellate process. The second section gives some tips for writing about technical subjects (businesses, scientific processes, or regulatory regimes) for an audience of judges and law clerks that may include legal generalists.

I. Write With an Eye to How Your Brief Will Be Used.

An effective brief is one that persuades the court. What makes a brief more likely to achieve that goal?

A. As Appeals Move Through the Texas Appellate System, Each Court Has Its Own Peculiar Uses for Your Brief.

It is a mistake to recycle the same brief as an appeal moves through the appellate system. In the administrative context, that temptation can be especially strong because the briefing in the district court must largely conform to the appellate rules. That similarity may lead to inertia and a

desire to rest on the hard work already expended in once writing the facts and the argument. But recycling a brief misses the valuable opportunity to refine your argument in light of how both sides' positions have continued to develop and how each court has reacted to them. And it ignores the different formal tasks facing each court in the Texas system.

Although administrative cases handled under the Travis County local rules afford the judges with a full array of briefing similar to that provided to a court of appeals, the district court's role remains much as it is in more conventional civil cases—to declare a winner by rendering judgment in favor of one side of the other. It need not, however, explain the steps of its reasoning process through any written opinion; indeed, if it does write such an opinion, that work product is deemed not precedential and would typically be disregarded at the appellate stage.

The process in the district court is in some ways structured to elevate the oral advocacy over the written. A hearing is usually granted as a matter of course, and the hearing affords an opportunity to go over the structure of the argument in some detail. That hearing also affords the chance for counsel to synthesize the case and refute the other side's contentions. In the appellate courts, by contrast, the brief must accomplish all of those goals because there is no expectation of an oral argument and, when granted, it rarely affords time for counsel to salvage an ineffectual brief.

The court of appeals, like the trial court, has no choice about whether to reach the question whether the judgment between the parties is correct. But the appellate brief has a function that a typical district court brief does not—it forms the basis of a written opinion. It is in helping the court of appeals "show its work" that an appellate brief can make the biggest impact.

In the Texas Supreme Court, an effective brief should also take into account the Court's discretion over whether to reach the merits of a petition. In choosing whether to review your case, the Court often pays much more attention to the reasoning stated by the court of appeals than by the particular outcome of your case. It is, after all, the legal holding that becomes the precedent that can affect the jurisprudence of the State. An effective brief places your dispute into that larger context in a way that motivates the Court to hear the case.

It is only after the Texas Supreme Court crosses the prudential threshold of deciding to hear the case that it pickes a winner and pens and opinion. Briefs must therefore help the Court with two distinct tasks—(1) placing the case in the larger context of Texas jurisprudence to motivate the Court to grant the petition and (2) eventually "showing its work" through a careful opinion that will become Texas law.

A lawyer who ignores those differences by filing substantially the same brief in all three courts is missing the opportunity to maximize the effectiveness of his briefing.

B. An Appellate Brief Is Not Only Used To Make an Initial Decision About the Merits But Also Serves as a Reference Tool for the Court and Its Staff.

While Judge Aldisert is surely right that a brief has "one and only one audience," that judicial audience has different uses for the brief at different times. There are at least two distinct phases with very different needs: (1) the phase identifying the issues and reaching a preliminary vote on the case and (2) the phase writing and perfecting the judicial opinion.

It is not enough to convince the court that you are correct—an effective brief should help it write an opinion in your favor. Your brief should be written with that opinion-writing process in mind. If you have written a cogent statement of the standard of review, a clear discussion of the governing statute, and a statement of facts focused on the most material facts, you may well receive the court's highest compliment—plagiarism.

This is also the stage at which your attention to detail becomes critical. During this opinion-writing phase, the court and its staff will be reviewing every key record citation and authority on which you rely. If your characterizations of items in the record are not scrupulously accurate, your entire account of the case may be called into question. If your citations to legal authorities are imprecise or overclaimed, the court may shift away from your legal theory. Even something as simple as inaccurate (or missing) pinpoint citations can lead the court to question the thoroughness of the research underpinning your brief.

If your brief does not hold up to the degree of scrutiny to which it will be subjected during the opinion-writing phase, it is far less likely to persuade the court. Such a brief can snatch defeat from the jaws of victory.

Inaccuracies and faulty descriptions in your brief undermine your credibility, even if they are perceived as merely sloppy rather than deliberate.

C. The Parts of an Effective Brief

1. All of the required parts of your brief should be treated with care; they are required for a reason.

One of the perennial questions asked of judges is, "What part of a brief do you read first?" Rare indeed is the judge who says that they read the appellant's brief through, then read the appellee's brief through, then read the reply brief. Instead, judges give a variety of answers. Some say that they begin with the summary of argument, or the issues presented, or the statement of facts, or that they scan the table of contents, or (in the case of the Texas Supreme Court) that they first read the court of appeals's opinion. Some judicial readers start, not with the opening brief, but with the reply brief on the theory that the parties will finally have joined issue on key questions. The choice seems to be very idiosyncratic and personal; it is rare to hear even two judges on the same court give the same answer.

To a writer, it should not matter how any particular judge answers. Each judge is different, and as brief-writers we must accommodate *all* of the judges on the court. The easiest way to do that is to make *every* entry point into the brief tell the story that we want told.

So much care goes into the writing and editing of the little bound books that we call appellate briefs that their authors may find it disheartening to think that their intended audience (the appellate court) may never sit down and read them cover-to-cover in the "correct" order. But that does not mean that the briefs will not be read carefully—only that they are more likely to be treated as a reference book about the case than as a page-turner that one might finish in a single sitting. When the court turns to writing its opinion, your brief becomes a reference tool—a way to identify citations in the record and authority for the competing propositions of law.

Both of those needs—the court's need to form a first impression to get into the case and the court's need to write an appellate opinion—suggest that each part of your brief should be able to stand alone. To take some examples: Your statement of facts should not, without explanation, jump into using the abbreviations in the glossary on the assumption that the

reader fully internalized that list—many readers do not look at the glossary until they are already confused. The summary of argument should not presume that the reader has already carefully read the facts—the reader may not start reading the facts until they know for what issues they need to be looking. The issues presented should not presuppose a technical knowledge of the subject matter—the reader may glance at the issues long before parsing the statement of facts.

2. Table of Contents

The Table of Contents is a surprisingly important part of the brief that is, quite commonly, left as an afterthought to be filled in by law-firm staff at the eleventh hour.

The Table of Contents has at least two functions. Because it collects the argument headings onto one page, it can serve as a roadmap and overview of your entire argument—a place where the court can see the logical evolution of the arguments being advanced. And, more obviously, it is a section to which the court or its staff may turn frequently during the opinion-writing process to locate particular parts of your argument.

You should take care to write meaningful headings to your arguments so that you do not squander the chance to have the Table of Contents tell your story for you. Because you want the court to be able to quickly scan your table—and to get your message quickly—you should format your table in a way that makes it very easy to read. It is commonly observed that text in all caps is difficult to read. It is also commonly observed that using too many formatting tricks (italics, underlining, and bold) can impede the reader's ability to quickly scan the text.

A Table of Contents should do much more than parrot your issues presented. (This may be the effect if, for example, you do not use minor headings within your brief.) Such a table will forgo the chance to preview for the court the persuasive reasons behind your main points, while also impeding the court from later using the table to find key supporting arguments.

3. Index of Authorities

Particularly in an area of law with which the court is fairly familiar (such as administrative-law cases in the Austin Court), the Index of

Authorities can serve the unexpected function of giving the court a preview of the substance of your argument. That's because the court can easily scan to see which of the major cases in the field your brief discusses—and which it omits.

The Index of Authorities must be accurate—not only because it suggests the level of care taken in your research, but also because the table will be used by the court during the opinion-writing process. Because so much of the opinion-writing process revolves around analogy to and distinguishing precedent, an accurate table can point the Court to your side of the story. If your table is not accurate or is difficult to use, the court may quite justifiably be frustrated with your brief.

4. Issues Presented

Choosing Your Issues. One of the most common complaints of appellate judges is that briefs raise too many discrete issues. Lawyers defend the practice by saying that that they do not know which issues the court might find attractive. The response of one judge: "You *should* know!"

Presenting more issues dilutes the power of each. Even raising issues of marginal merit diverts the court's time and attention from the more meritorious ones. So long as the Appellant's substantive arguments are "fairly included" in the issues, the Court can reach them. Thus, broader issues give the Court more latitude to rule in the Appellant's favor. Less obviously, raising sketchy issues undermines the court's confidence in your other arguments. When a court sees a list of undifferentiated issues in a "shotgun" pattern, it presumes you have little confidence that any of them will hit the mark. It is accordingly the rare case in which you should offer more than three or four issues.[1]

In the Texas Supreme Court, you must also choose issues that grab the Court's attention out of a stack of competing petitions. In a typical week, the Justices are confronted with one or two dozen petitions competing for

[1] The question of *which* issues should make your cut is beyond the reach of this article. Bruce Bennett has written a helpful article discussing which issues are relatively more likely to succeed in light of the standards of review applied in administrative cases. Bruce Bennett, *The Top Five Points of Error*, 4 TEX. TECH. J. OF TEX. ADMIN. LAW 55 (2002).

attention. The Court will deny most of those without even requesting a response. To pique the Court's interest, your issues must seem significant and must inspire confidence that your complaint has merit.[2]

Choosing What Style To Use. Lawyers love to disagree over the best style for writing issues presented. Some suggest writing an interrogative, perhaps preceded by "whether." Others suggest writing a multi-sentence syllogism that leads inexorably to your conclusion. Still others suggest writing the issue as a declarative sentence. Our view is very pragmatic—use the style that works best for a particular case, or a particular issue, in a particular court. The key is that the substance of the issue should reflect how you want that court to think about your case.

To a court of appeals, the ideal issue may be a syllogism that connects the facts of the case to a well-settled proposition of law, suggesting a straightforward way to rule for you. This way of framing issues naturally gives the issue a narrow, error-correction feel.

To the Texas Supreme Court, on the other hand, a question phrased to suggest error correction—just a misapplication of settled law by the court of appeals rather than some novel proposition of law worthy of the Supreme Court's attention—can make a petition sound relatively insignificant to the jurisprudence. A more typical question for the Texas Supreme Court would identify a disagreement among the courts of appeals or some open question of statutory or constitutional law. For that reason, if you are the respondent, you may want to frame issues that are *less* appealing to the Court—such as by making them seem fact-bound or to turn on application of well-settled principles of law.

You accordingly need to frame your questions with the forum in mind. While open-ended questions might appeal to a court with discretionary

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[2] If you want to see what the Court confronts in a typical week, we suggest that you consult a paper written by two staff attorneys at the Court that, in an appendix, collects the actual Issues Presented from the 17 petitions for review that were circulated to the Justices in one such week. *See* Cassandra Burke Robertson & Amy J. Schumacher, *Sample Issues/Points Presented*, Chapter 5 of PRACTICE BEFORE THE SUPREME COURT OF TEXAS (2005). Reviewing just the issues from those cases in a vacuum drives home the importance of having issues presented that give a complete, deep picture of your case rather than just a procedural complaint about the proceeding below.

review, they do little to assist the court of appeals. To a court of appeals, such questions might merely invite the court to seek an alternate resolution that avoids venturing new law in a murky area.

5. Statement of Facts

Material Facts, In the Right Legal Context. The Statement of Facts is not a digest of everything that happened between the parties. Rather, it should focus the court on the facts that are *material* to the legal dispute. Materiality turns on what issues you have raised—and what issues your opponent has raised or is likely to raise. If a fact does not bear on the outcome of the legal tests being urged on the court, it may needlessly distract the court.

Using the Statement of Facts to Discuss the Regulatory Framework. In the usual array of common-law cases, it may be fairly easy to spot which facts are the "material" ones. But in cases that are affected by a complicated statutory framework—particularly if that framework is a less familiar one, such as a federal statutory scheme—it may be helpful to have a section of your statement of facts that puts the facts in the right legal context.

This sort of organization is especially valuable if the court does read the statement of facts first—it will permit them a chance to evaluate *which* facts might be material to its ultimate disposition of the case. It also highlights one particularly useful thing to do in the Statement of Facts—discuss the relevant legislative history of a statute. The narrative nature of legislative history often lends itself particularly well to this sort of treatment.

But, although including a discussion of the legal framework in your Statement of Facts can be very helpful to framing the other facts in a meaningful way for the court, it has some pitfalls. The most obvious pitfall is that you must be careful not to lapse into argument in the statement of facts. The description of the statute must be matter-of-fact and noncontroversial.

A less obvious pitfall is that the court might *not* start reading with the Statement of Facts. After all, many start with the Summary of the Argument or flip through the headings into the Argument itself. If so, the court may not have occasion to read your helpful explanation of the statute before it tries to work through your argument sections. You should not

assume that what you say about the law in the Statement of Facts will be fully retained by someone reading the Argument section of your brief. The solution is to make your brief modular—just as you should repeat key material facts in your Argument section, you should repeat the key parts of your discussion of the law.

6. Summary of the Argument

This may well be the most critical part of the brief. There is no requirement that the Summary of the Argument be, strictly speaking, a digest of what follows. Instead, it can offer a bigger-picture view of your case, taking your very best shot at persuading the court that you are right. At the very least, it is the place in which you have the most liberty to talk through your theory of the case without the constant interruptions of case citations, record citations, and footnotes. (Indeed, if your summary of the argument contains any of those things, you should reconsider whether it is serving its highest purpose.)

It is also the one place where you can easily talk about the relationships between your various arguments—such as whether they are independent reasons to hold for your side and which should logically be decided first. This sort of roadmap greatly assists the court decipher the rest of the brief.

The Summary of the Argument should of course preview the remainder of the brief. The court will expect that. But the most important function is to convey the themes that underpin your argument.

7. Standards of Review

Most administrative law briefs are written for Texas state courts, which do not require a separate section on Standard of Review. But it can be a good idea to include one nevertheless. A separate section allows you to alert the reader that standards of review play a special role in administrative law. In an administrative case, the "substantial evidence rule" is the overarching standard of review; you may want to briefly explain to your reader that this is standard differs somewhat from a typical appellate standard because it also regulates the relationship between the departments of state government—the agency rendering the administrative decision and the reviewing courts.

Within the broad umbrella of substantial-evidence review, individual claims of error may implicate a variety of standards of review. You should explain to your reader which ones are at play in your case. For instance, challenges to the strength of the record are reviewed under the highly deferential lack-of-substantial-evidence standard, while evidentiary rulings are reviewed for abuse of discretion. If you preview these in a separate section before you begin the body of your argument, your reader will better understand your handling of them in the individual issues that follow. Be sure that in each individual issue, your brief explicitly applies the appropriate standard of review in your analysis.

But stating the standard of review at the beginning of the brief does not mean you can ignore it in the rest of the brief. Apart from the obvious fact that each of your contentions must be woven into the standard of review, the nature of the standard of review is itself sometimes a pivotal issue in the case. The administrative-law process is meant to insulate agencies, to a limited extent, from judicial control. Part of your task in challenging or defending an administrative decision is to place it into the broader context of administrative governance in Texas.

8. Argument

Organizing the Argument. Each of your roman numerals should ideally begin with a one-paragraph summary. This paragraph should give the court a very clear sense of where this part of your brief fits within the overall structure—how this part relates to the preceding issue, whether it constitutes an independent ground to reverse or to affirm, etc. And the paragraph should very clearly convey the ultimate punch line so that the court knows what to expect when it reads on.

The conventional wisdom that you should lead with your strongest argument is now so pervasive that it has almost become mandatory. If you lead with a weak argument for some doctrinal reason (such as keeping the elements of a test in the "right" order), you run the risk of losing the court's attention quickly. The exception is that questions going to the court's subject-matter jurisdiction are expected to be presented first to recognize that they are a threshold that the court must cross to reach the other issues.

Citing Authority in the Courts of Appeals. It should go without saying that the quality of authority you cite is far more important than its

quantity. For that reason, "string" citations—authority of equal value for a settled proposition of law—only add visual clutter to a brief.

The highest quality of case-law authority is controlling authority—decisions of the Texas Supreme Court or the United States Supreme Court, or a statute or constitutional provision that is on-point. The next best authority is prior decisions of the same court of appeals.

Everything else is persuasive authority that demands some extra explanation. Even if you are citing the decision of a sister Texas court of appeals, or of the courts of a different State, you should explain why the reasoning of that decision is correct and should be followed. It is not sufficient to summarize the facts of that other case—that adds little to your argument without explaining why those facts were the legally operative parts of the decision. Remember that the staff will read the cases; your brief adds value by explaining the *relationship* between the cases, not by merely summarizing them. If you do want to point the court to a collection of cases, it will often be more effective to drop a string citation, with useful parentheticals, into a footnote. This will provide the detail you want without distracting from the flow of the argument.

Citing Authority in the Texas Supreme Court. In the Texas Supreme Court, the only truly controlling case-law authority is decisions of the United States Supreme Court on questions of federal law. Everything else is, in some way, persuasive authority.

When citing prior decisions of the Texas Supreme Court, it is usually sufficient to state the holding and apply it to the present case. There are exceptional situations—such as with very old authority or in areas in which the law has been in flux—in which you may need to justify the reasoning of the prior Texas Supreme Court decision. And any reliance on intermediate court of appeals decisions requires a cogent explanation of why the Texas Supreme Court should embrace that reasoning.

Although somewhat less in the administrative context, the Texas Supreme Court may be interested in the state of the law in other states. But such sister-state authority is not controlling—it just provides a sense of comfort and context. Probably the best way to present such authority—assuming it favors you (if it doesn't, then you should be prepared to argue that a different result makes sense in light of some other aspects of Texas law)—is to write your big picture in the text of the brief, explaining how

you would like the Court to make use of that authority. You can put the specific list of cases, along with citations and appropriate parentheticals, in footnotes dropped from that paragraph. In our office, we will sometimes also attach a short, non-argumentative appendix containing those cases in a table.

9. Prayer

Take care in drafting your prayer for relief. At least in the Third Court, the clerk's office is likely to use the prevailing party's prayer as the template for the ultimate judgment. Indeed, the Third Court has specifically requested that a party seeking temporary relief or supersedeas include the orders that need to be issued within the prayer. Use the type of precise terminology in the prayer that you would want reflected in the judgment itself.

10. The Appendix

In the court of appeals, an appendix is required for an Appellant's Brief. If your case involves a complicated statute, you can make this appendix more valuable by typesetting or reformatting the relevant parts of the statute into an easier-to-read format than is found in the statute books—one not broken up by annotations, comments, notes, and other items that prevent the reader from actually reading the operative text. This may be the Court's best opportunity to see all of the statutory language you think is important together in one place. Now that the Administrative Code is online on the Secretary of State's website and the official text of the statutes is online at the Legislature's website, you can download the text and format it without great cost or effort.

You should also consider what optional items you might want to include in the appendix. In court-of-appeals briefing, for example, you might want to include relevant passages from the administrative record, given that the administrative record is most likely not paginated. At the very least, knowing what a document looks like will make it easier for the staff to locate it in the record.

In the Texas Supreme Court, the petition for review also requires an appendix. The Justices have commented that they may read these petitions at home or in other situations where they might not have ready access to a law library, which counsels both (1) providing the Justice what

he or she needs to understand the basics of your argument while (2) not making the petition too unwieldy. Notably, unlike either the court-of-appeals briefing or the briefing on the merits in the Texas Supreme Court, the petition for review is *not* used as the basis for opinion-writing. Accordingly, your focus in choosing optional items for the appendix should be on immediate comprehension by the Justices, not on dotting the i's and crossing the t's with details that are more suited to merits briefing.

C. Special Considerations About Reply Briefs

In the court of appeals, the reply brief very well might be the first brief that a staff member picks up. It is not unheard of for a staff member—when confronted with a dense set of briefs—to begin with the reply brief. This can be a coping mechanism for dealing with the volume of the caseload, because a reply brief often brings focus to the most critical disputes between the parties. Peeking ahead to the reply brief also lets the reader know how some of the issues in the Appellant's Brief have evolved. With that in mind, you should write the key parts of your reply brief to be understandable even if it is the first brief that a reader picks up.

The situation may differ, however, in the Texas Supreme Court, where the internal calendars do not wait for the reply brief. At the petition stage, the Court's self-imposed internal-vote deadline runs from the filing of the Response Brief, not the reply, so a number of the Justices may have already cast their votes about the petition before your reply supporting the petition is even filed. And at the brief-on-the-merits stage, the internal deadline for the "study memo" is measured from the Respondent's Brief. It is not impossible that the law clerk or staff attorney may already be working on the study memo based just on the Petitioner's Brief and the Respondent's Brief before you can file a reply.

In either court, the reply brief is a chance to recapture how the legal issues are framed. You can highlight the important concessions made by the other side or the areas of agreement that favor your side. You can refute those aspects of your opponent's arguments that you did not anticipate in your opening brief. Instead of repeating your arguments from before (which will quickly bore the court), you should point the Court to where in your opening brief you have already anticipated some of your opponent's arguments (which will serve as a valuable cross-index for the court).

II. Some Thoughts on Editing Technical Briefs for an Audience That May Include Legal Generalists

On the whole, appellate courts are composed of, and function as, legal generalists. The Justices confront a varied docket that would make it impossible for the court to maintain expertise in all areas. Their staff attorneys (including law clerks) usually maintain a similar breadth of focus. And the appellate courts are also quite appropriately concerned about how the particulars of a case fit into the fabric of the broader law, because each appellate decision can affect the jurisprudence in ways that go well beyond the dispute between the parties.

This picture is somewhat different in administrative cases, in which the appeals are concentrated in the Austin Court of Appeals, which is known for its expertise in administrative-law matters. But even in administrative cases, there is still some concern about writing for generalists. With the effects of docket-equalization transfers, you may find yourself litigating administrative-law questions in an appellate court that has not had the opportunity to develop a similar level of expertise in that area. There are also advantages to writing a brief clearly enough that even a junior member of the court's staff, who may be placed in a position to work through your authorities or to help a Justice prepare a draft of an opinion, can readily understand your argument.

Whatever your audience, conveying technical information clearly is absolutely critical because the force of your logic only move the court *after* that logic is understood.

If a brief is too technical in approach, it may prove impossible for the court to form a favorable first impression about the merits. At the very least, the court will have to do substantially more work to translate and digest the insights of your brief—leading to frustration on the part of the court and diverting focus from the merits of your arguments. And if your opponent's brief does not suffer the same deficiency, you allow them to seize the court's attention and perhaps to capture how the issue is framed.

In the Texas Supreme Court, there is an added benefit to writing briefs for generalists—they are more easily seen as being of broad importance to the jurisprudence. After all, if a brief requires a decoding key to comprehend, its broader importance to the jurisprudence may be missed.

Moreover, the Texas Supreme Court places particular reliance on law clerks for "study memos" to assist it in identifying petitions worthy of being granted. If your highly technical brief comes across as a puzzle to that secondary but still critical audience, you lessen the chances of your case being granted.

A. Explain Enough Legal and Factual Context To Help the Reader Make Sense of Your Arguments.

The legal issues in your case do not exist in a vacuum. They have a procedural legal context, a business or industry context, a regulatory context, and perhaps a historical context. The trick is giving the court the right amount of information to place the case into the right perspective and (ideally) a framing of the questions favorable to your client, without giving too much more.

1. To get a better sense of what does (and does not) need further explanation, enlist a reader who is not as familiar with the field.

As someone who has been appropriately immersed in the details of your case, you may have difficulty identifying which parts of the context will already be apparent to a general reader and which parts of it will lead to confusion if they are omitted. What questions would you have, if you had not developed expertise in this area? What questions do new acquaintances ask when you tell them what you specialize in? At a recent conference, several former United States Solicitors General reported that they don't consider themselves ready to explain a legal issue to the United States Supreme Court until they can make their (non-lawyer) family members understand the issue well enough to form an opinion about it. By far the best way to solve this problem is to outsource it—enlist the help of a reader who has not yet been steeped in the nuances of the case.

2. Don't assume that the reader has at their fingertips the legal scheme in which your appellate questions arise.

Your legal issue needs at least *some* context in order to make sense. It is a very good idea to give an overview of the regulatory regime in which the dispute arises, especially the parts of the system that frame your ultimate legal question. You should research whether the court has written an earlier opinion describing the particular regulatory framework in which

you are working. If so, you can borrow heavily from that treatment, as you can expect the court to do in its opinion. If it has not previously written such an opinion, however, the court may wish to include a bigger-picture, explanatory explanation of the regulatory system at hand. To that end, it may well be worth your while to explain not only the legal framework, but also any scientific or technical concepts at play in the case. After all, any given member of the court or its staff may not be familiar with the physics of subterranean waste disposal, or with the geologic properties of the particular kind of sandstone in which a natural gas deposit is found. Otherwise, the Court will have to do its own research *without* the benefit of your client's point of view and your industry expertise.

The "glossary" required under the Travis County local rules—while undeniably helpful—is not alone sufficient to ensure understanding. The court is more likely to use it as a reference tool *after* they reach an unfamiliar term; it is unreasonable to expect someone reading the glossary to have total recall of those terms after a first read. If your readers *are* forced to flip back and forth from the critical parts of your argument to consult the glossary, you lose their attention momentarily and distract them from the force of your argument. Energy spent decoding your brief could be better spent thinking about the merits of your legal argument. Some of the tools described in the next section might help reduce the need for such disruptions.

B. To Smooth Out the Difficult Patches in Your Brief, Use a Set of Editing Tools That Focus on Giving the Reader One New Piece of Information at a Time.

When you (or someone with whom you have shared your draft) identify a problem area in your brief, what do you do? First, double-check that the passage is both accurate and precise; it may be that you have made a substantive misstep in your draft. But if you have a substantively accurate passage that is nonetheless difficult to read, some of the following tools may be of assistance.

1. Be careful with the use of abbreviations—help the reader by giving other clues along the way.

In apologizing for the density of abbreviations in one of his opinions, Justice Rehnquist expressed some frustration at the "alphabet soup" of modern administrative law:

> The terminology required to describe the present controversy suggests that the 'alphabet soup' of the New Deal era was, by comparison, a clear broth.[3]

Abbreviations are often a necessary evil in administrative cases, but an evil nonetheless. There often are more abbreviations than a reader (especially a generalist reader) can keep at the top of his mind. For that reason, where you can avoid abbreviating, avoid it. For example, instead of abbreviating the name of the administrative body, one can often simply refer to it as "the Board" or "the Commission"—a shorthand that is much easier to read than a string of initials that do not form a word.

Following that practice also allows your brief to refer to only one side of the case using cryptic initials, permitting the reader to distinguish the two sides, even without remembering what the particular initials stand for—it is enough to know that one side is "ABC" and the other is "the Board." Indeed, at least one Justice on the Third Court long maintained that sort of rule for opinion-writing, allowing only one party in each opinion to be referred to by initials or by its procedural identity.

Confusion is particularly likely if initials are used to represent labels *other than* party names—such as business or scientific processes, document or form names, or types of regulated activity. Using initials as shorthand violates the expectations that a generalist may have formed that strings of initials represent parties, particularly corporate parties. A brief-writer can minimize the number of times that a reader is asked to translate initials into those other concepts through techniques including referring to "the process" or "the report" when doing so would not be ambiguous (such as if there is only one process or report at issue or if they are readily distinguishable with a common adjective, *e.g.*, "the refining process" or "the licensing report").

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[3] *Chrysler Corp. v. Brown*, 441 U.S. 281, 287 n.4 (1979). This example was identified by Bryan Garner. *See* Bryan A. Garner, "Initialese," DICTIONARY OF MODERN LEGAL USAGE 447 (2d ed. 1995).

Clarity can also be improved by applying a similar rule to remove, where possible, terms of art that hinge on subtle changes in the endings to the same noun stem—for example, words ending "-ee," "-or," or "-ant." These words ask the reader to keep a mental map of the underlying categories in his or her mind and, whenever the brief invokes an "-ee" or "-ant," to consult that map to translate the term into party names.

Making the reader conduct such a frustrating exercise of translation diverts the reader's attention from the merits of your argument. Just as you should not refer to the parties as "appellee" or "appellant"—a practice that also diverts the court's attention to translating abstract categories into party names—you should avoid forcing it to translate the parties into substantive categories such as "assignee" or "mortgagor."

2. The definition and its corresponding abbreviation can be linked together through apposition—a phrase set off by dashes, commas, or parentheses—if it does not distract from the overall flow of your discussion.

You can save your readers the trouble of turning back to a glossary by providing the necessary aspects of the definition in the text of your brief. While Justice Rehnquist decried the "alphabet soup," the passage in his opinion to which he was referring shows a technique for making a collection of abbreviations clear:

> The Defense Logistics Agency (DLA) (formerly the Defense Supply Agency) of the Department of Defense is the designated compliance agency responsible for monitoring Chrysler's employment practices. OFCCP regulations require that Chrysler make available to this agency written affirmative-action programs (AAP's) and annually submit Employer Information Reports, known as EEO-1 Reports. The agency may also conduct 'compliance reviews' and 'complaint investigations,' which culminate in Compliance Review Reports (CRR's) and Complaint Investigation Reports (CIR's), respectively.

Although that passage is very dense with abbreviations, all but two of them are insulated from the reader by parentheses. Indeed, all but one of the abbreviations is accompanied by the relevant part of its definition. For a technical term only used once or twice in your brief, providing that definition real-time in the text can be an excellent way to convey the

needed information to the reader without asking them to ever remember a definition.

For a technical term used more often, you might try refreshing the reader's memory at the beginning of new discussions—such as the summary of the argument, or a new roman numeral in the argument section. If you were writing a brief about the same regulatory regime above, you might have the following in a later portion of your brief:

> The CRR—one of the Compliance Review Reports compiled by the agency—indicated that Chrysler had failed to make satisfactory progress.

Putting that definition in the *middle* of the sentence gives the reader exactly what they need to process the remainder of the sentence without breaking the flow.

This technique for providing definitions or other details seems to work well with em dashes—these longish dashes, the width of the letter "M"—and sometimes slightly less well with commas or parentheses.[4]

3. Don't try to introduce subtleties through varying adjectives in the middle of your sentence, or your reader might not process them at all.

If your technical passage is explaining the difference between two technical concepts, you might consider rewriting the sentences *both* to be scrupulously parallel *and* to end with the key phrase the represents the contrast.

If a reader confronts two sentences, phrases, or clauses that seem to have been deliberately written in a parallel way, the natural thought is that

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[4] Commas are so grammatically flexible that it might take the reader a moment to recognize that they are being used to set off a definition. If you write complex sentences, your definitions might also get lost in the sea of commas on the page.

Parentheses might be the preferred way to convey this information in other fields, but in law parentheses are frequently used in citations. A reader moving through a passage dense with both definitions and citations might have a very difficult time switching back and forth between the two uses of the parentheses.

a comparison of some sort is intended.[5] To learn what that relationship is, the reader may immediately glance back at the previous sentence.

You can make it very easy for your reader by ending each of those sentences, phrases, or clauses with the feature that is being compared or contrasted. It has been widely observed by teachers of writing, as well as by appellate advocates, that the "punch word" of a written sentence should come at the end.[6] The natural pause that follows the end of a sentence gives the reader a chance to absorb that final word or concept. And, to a reader of English, a word in that ultimate position carries a natural emphasis.

Use that to your advantage in discussing technical subjects. When you are introducing new concepts or terms, place them in that final position in a sentence to give them this emphasis. If you have particularly dense passages of technical jargon, make sure that the final position in each sentence contains the one idea that you want your readers to take away.

For that reason, if you have a series of ideas to convey, you should consider how to rewrite the passage into different sentences. Each sentence can, after all, only carry so much information. If you exceed that capacity, the reader will not be able to as easily sort out what matters.

4. Don't try to vary your terms of art just for literary effect—that can mislead the reader into thinking that you are drawing a distinction between two different, unfamiliar concepts.

In technical writing, the thesaurus is not your friend. If you vary your choice of terminology in explaining new concepts, a reader may expect that to carry a change in meaning. For a reader trying to come to an understanding of a new area, this can be confusing. Such a reader may not be cognizant of the subtle relationship between the concepts involved in your slightly varying terms. The problem is intensified in legal writing

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[5] This suggests, of course, that you should be careful *not* to write in parallel where you do not intend the reader to make this sort of comparison between two concepts. In other parts of your brief, you should vary your sentence structure to prevent such a misperception.

[6] Karl Llewllyn, *A Lecture on Appellate Advocacy*, 29 U. CHI. L. REV. 627, 628 (1962); *see also* Joseph M. Williams, STYLE: TOWARD CLARITY AND GRACE 67-79 (1990).

because of the expectation—inculcated in law school and enshrined in canons of construction—that a change in terminology conveys a shift, however, subtle in meaning.

Identifying this problem in your own writing can be difficult, because *you* understand what you meant. You may understandably be more concerned with improving the brief's style than on increasing its clarity. But, especially in the portions of a brief that are explaining a new set of concepts of factual relationships to the reader (such as the statement of facts or the summary portions of the argument), you should take care to keep your vocabulary consistent lest you mislead the reader into thinking your subject is even more complex than it is.

III. Some Final Thoughts

It has been said that "writing about music is like dancing about architecture—it's a really stupid thing to want to do."[7] Writing about writing may not be all that different. As professional writers, lawyers may come to share H.L. Mencken's view that:

> With precious few exceptions, all the books on style in English are by writers quite unable to write. The subject, indeed, seems to exercise a special and dreadful fascination over school ma'ams, bucolic college professors, and other such pseudoliterates . . .[8]

Luckily, legal briefs are not written for a pedagogical audience, but a practical one—the court that must decide the case. Briefs that are effective in assisting the court with its appointed task are far more likely to be effective for our clients.

[7] Attributed to Elvis Costello, among others.
[8] *See* Williams, *supra* note 6, at 11.