Persuasive Brief Writing in Antitrust Cases: How to Win the Paper War

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Antitrust trials are fast becoming an endangered species. Antitrust civil cases, with their treble damages and fee shifting, have historically been less likely than the typical federal court case to go to trial. Now, fewer and fewer federal civil cases of *any* kind are going to trial. For example, in 2006, only 1.3 percent of federal civil cases ended in trials, down from 11.5 percent in 1962.

Instead of going to trial, cases are increasingly being settled or resolved on motions to dismiss or for summary judgment. And in antitrust cases, such motions have become even more prevalent, a result of several recent Supreme Court decisions that seemingly make it more difficult for antitrust plaintiffs to plead and prove antitrust claims for everything from horizontal and vertical price-fixing to monopolization and price discrimination.

So for antitrust lawyers on both sides, the ability to write an effective, persuasive brief has never been more important. Given the courts' overcrowded dockets, motions are often decided solely on the papers or after only very limited oral argument. Settlement often results when the parties reassess their positions after rulings on motions.

Effective brief writing also matters in those cases that do go to trial. Many courts now require extensive pretrial briefs. Cases that are tried often have their outcomes altered by post-trial motions or on appeal. And, while I don't recommend reading an oral argument or jury statement, having briefed your position will help make your oral presentation more effective. The process of writing and re-writing that's required to complete a brief forces you to scrutinize your position for factual and legal accuracy, logical consistency, persuasiveness, and plain common sense.

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GENERAL GUIDELINES

The brief-writer's goal is simple: to persuade the court that your client deserves to win. The way to do this is by making it as easy as possible for the court to come out your way. At the same time you want to make it difficult – ideally, impossible – for the court to find for your opponent. Your job is to provide a short, clear, neat, accurate, and easy to follow road map that shows the court why it can fairly reach only one conclusion – a ruling for your client. At the same time, you must show why a ruling for your opponent would be wrong.

The Golden Rule: Consider Your Audience. How do you go about this? First, remember the golden rule – put yourself in your reader's place and think about how you'd like to be treated. A trial court may have a docket of hundreds, or even thousands, of cases, all of which demand its attention. It has a never-ending calendar of trials, requests for TRO's and preliminary injunctions, motions, and day-to-day issues. You'll be lucky if the court reads your brief once. You must write it so that it can be absorbed – and the reader persuaded – on a single reading. The last thing any judge wants is fifty or more pages of disorganized, repetitive, vituperative, unsupported argument. While an appellate court has perhaps a little more time to devote to your case, you still do your client no favor by writing an overlong, disorganized brief.

Remember also that you are writing not just for the judge(s) but for their clerks. The clerks tend to be young lawyers, often fresh out of law school. It is a mistake to assume too much familiarity with the law on the clerk's part. So you must present your argument in a way that will be both easily comprehensible to, and easily summarized by, inexperienced lawyers.

Don't Forget Your Other Audiences. It's worth remembering that you have other audiences who must be considered, foremost among them your client. Clients have become increasingly hands-on in the litigation process over the last twenty years. Many demand to see a draft of any brief before it's filed. Depending upon the length and importance of your brief, you should make a point of getting a substantially complete draft to your client *at least* two or three days before the brief must be served.

This is not a bad thing. It forces you to get the brief done ahead of time, giving yourself extra

time to reflect, revise, and edit. It shows the client you care about what he or she thinks. Most importantly, it can help prevent you from making errors that the client identifies after the fact.

Junior lawyers usually have a fourth audience – the senior lawyer(s) responsible for the final product. They too should follow the golden rule and get a draft to the senior lawyer early enough to allow her ample time to review and revise the draft. Put bluntly, providing a draft to a senior lawyer at the last minute is not a good career move.

A. THE ABC'S: ACCURACY, BREVITY, CLARITY, SIMPLICITY

The ABC'S of effective brief writing are accuracy, brevity, and clarity:

Accuracy. Accuracy is paramount. It's the foundation of credibility. And without credibility you cannot hope to win. As one judge put it: "Credibility is the coin of the realm in court." If the court discovers that it cannot trust or believe you, your chances of prevailing are negligible. The court must be able to rely on the accuracy of every statement of fact and law in your brief. Every error of fact, every misinterpretation or mis-cite of the record or legal authority undermines your credibility and reduces your chances of winning. Even mere sloppiness hurts your credibility. It signals the reader that you don't care enough to check your work and makes him wonder what else may be wrong.

Brevity. Brevity is almost as critical. Not every brief can be under five pages. But you must strive to make your brief as short as possible consistent with completely and accurately presenting your case. This is not easy – it takes hard work. You must push yourself to rigorously edit and rewrite your own work. As you do so you must constantly ask yourself: Is this fact really necessary? Is this argument really necessary? How can I say this in fewer words? Do I really need to say this again? Think of the famous author who concluded a letter to a friend with the apology: "I'm sorry to have written such a long letter. I didn't have time to write a short one."

Put another way, deal with the court on a need-to-know basis. As you edit, ask yourself: Does the court really need to know this? If the answer is no, leave it out. The court will thank you.

There are no prizes for longest brief. And a longer brief is *not* more persuasive simply by virtue of its length. The longer the brief, the more it suggests that the lawyer is insecure about his position or

has been unwilling to take the trouble to do what it takes to present his position lucidly. A short, simple, pointed brief, on the other hand, signifies confidence – a belief that the lawyer's position is so obviously right that it needs little elaboration.

Clarity. Clarity is also essential. Remember, it's your job to make it easy for the court to find for your client. If the court cannot follow your factual narrative or understand your argument, you cannot expect it to find for your client. Losing lawyers love to complain about stupid judges or juries. In reality their defeats are often caused by their own unwillingness (or inability) to make their case clear and easily comprehensible. It's your job, not the court's, to sort through and make sense of the motley mess of facts that make up a case. And it's your job, not the court's, to sift through all of the potentially applicable law and decide what statutes and decisions apply and why.

Like brevity, clarity requires careful and repeated rewriting and editing. We'll discuss several tools you can use to make your presentation clear and simple. But the single most important tool is logical organization. The best – and simplest – way to present a brief is to start with a preliminary statement, which is in fact your conclusion. Next comes a statement of *all* relevant facts presented in chronological order. Last comes the argument, which contains one or more points, each of which begins with a short and clear citation of all of the law you intend to rely on followed by a brief explanation of why that law applied to your facts requires a ruling for your client. The conclusion then simply describes the relief you seek.

B. WRITING STYLE

Writing style also plays an important role in creating a persuasive brief. You don't need to be Shakespeare to write a persuasive brief. Some of the most effective briefs I have seen are little more than outlines. You do need to develop a style that promotes brevity, clarity, and simplicity. A brief that is short, clear, and easy (or even fun) to read will leave the court far more kindly disposed to your client than one that is long, turgid, and confusing.

Read voraciously. Not just legal opinions and other briefs, but other pieces of persuasive and argumentative writing. Read everything from the classics to fiction to editorial essays to book and movie

reviews to advertising copy. It doesn't matter so much *what* you read as *how* you read. Think about what works, what persuades you, and why. Think about how you can use what works in your own brief writing. Just as important, think about what doesn't work, why, and how to avoid the writer's mistakes.

This is not a style manual – there are already plenty of those and they are worth study. Nevertheless, there are several fundamental stylistic rules that apply to brief writing that will help you achieve your goals of accuracy, brevity, clarity, simplicity, and, ultimately, persuasiveness:

-- Use short, declarative sentences.

-- Use the active voice (*i.e.*, avoid the passive voice).

-- Omit needless words; keep adjectives and adverbs to a minimum.

-- Don't overuse transition words (*e.g.*, however, nevertheless, furthermore, moreover, indeed, etc.) to start sentences or paragraphs.

-- Make sure that the antecedents for your pronouns are clear so the reader knows who is doing what to whom and when.

-- Avoid long strings of prepositional phrases.

-- Use tenses carefully to avoid confusing the sequence of events.

-- Use the simplest, most common word that conveys the necessary meaning; avoid legalese, obscure economic terms, other jargon, and Latin words and phrases (*e.g.*, "before" not "prior to;" "after" not "subsequent to;" "toward" not "in the direction of;" "now" not "at this point in time").

-- If you must use specialized economic terms, define them in plain English.

-- Use lots of "white space," *i.e.*, use short paragraphs and numerous headings and subheadings, to make your text appear less intimidating.

-- Neatness counts.

-- Avoid string cites.

-- Minimize (or eliminate) footnotes.

-- Minimize the use, and length, of block quotes and introduce every block quote with a short summary of the quote.

-- Don't break up a sentence with a citation or footnote.

-- There's no need to be overly formal (*e.g.*, you can use contractions), but avoid being too colloquial

-- Avoid personal attacks on opposing counsel; attack their reasoning, their evidence, or their legal authority instead.

-- Persuade with facts, logic, common sense, and legal authority not vitriol and derision.

A Word On The Drafting Process. There are two schools of thought when it comes to the drafting process. One says start by including as much material as possible in the first draft and then winnowing out excess material as you edit and rewrite. The other school – of which I am a strong proponent – says start with a very sketchy outline and then add only what you think is absolutely necessary. I find this method more efficient and more conducive to producing a brief that obeys the ABC's. If for no other reason, it's much more difficult to remove material once it's been inserted, especially when more than one person is working on the brief and no one knows for sure who first inserted the material or why.

THE COMPONENTS OF A MOVANT'S OR APPELLANT'S BRIEF

The movant's or appellant's (or main) brief contains three primary sections: the preliminary statement, the statement of facts, and the argument. In addition, depending upon the local rules or customs, the main brief may contain sections such as questions presented, summary of argument, jurisdictional statement, procedural history, and standard of review. This section focuses on the three primary sections, but provides guidance for the others as well.

A. THE PRELIMINARY STATEMENT

The first thing to know about the preliminary statement (or introduction) is that it should be written – or at least finished – last. That's because it's really the *conclusion*: a summary of the reasons why your client is entitled to relief. You cannot write this section properly until you have finished writing your fact statement and argument. You won't really know what your argument is until you've finished. It will evolve as you edit, rethink, and rewrite.

But just because the preliminary statement should be written last doesn't mean it should be dashed off at the last-minute. It's a critical component of the brief. It's your chance to grab the court's

attention and make a good first impression. It's not a place for detail or intricate legal or factual argument. Instead, it's a place to tell the court why fairness, common sense, and the law demand a ruling in your favor.

*1. **Keep It Short.*** Accordingly, the preliminary statement must be *short,* carefully thought out, and finely polished. Strive to keep it under two pages. It helps to think of it as an executive summary for the court or as a story you'd tell over dinner or drinks – something that quickly and memorably tells the reader why you should win.

That's why an overly long and detailed preliminary statement doesn't work. It can also leave the court confused about whether it's reading the brief itself or the introduction. (There is nothing more discouraging to a reader than to have read seven pages thinking he's reading the brief only to realize that he's still in the introduction and hasn't even really gotten started.) A too-long preliminary statement also lengthens the brief by forcing you to repeat yourself later.

So don't overload the preliminary statement with specifics. And don't provide cites to the record or to cases. You can refer to a case by name without citing it if it's vital to your argument. Otherwise, save the specifics for later.

*2. **Elements Of The Preliminary Statement.*** The preliminary statement should contain the following three items:

-- an identification of your client;

-- a description of your client's motion or appeal *including the relief sought*; and

-- a brief summary of the reasons your client is entitled to relief.

Resist the advice of those who urge you to "put all the good stuff up front." You don't have to include every "good" fact or every argument in the preliminary statement. Just summarize your position succinctly so the court knows where you're headed, what to look for as it reads through the brief, and what you want the court to do and why.

A Note On Questions Presented

Some appellate courts require the inclusion of "Questions Presented." Like the preliminary

statement, drafting of the questions presented is best left to the end. They too will contain the very core of your argument, subject to refinement as you rework and rewrite.

Ideally, each question will consist of one sentence that begins "whether," and is structured so that a "yes" answer will yield the result you seek. For example, if you represent a plaintiff seeking to overturn an adverse jury verdict: "Whether the court below wrongly excluded evidence of X Corp.'s meetings with competitors?"

The court may not allow you to use this format. Some appellate courts have very specific rules about how to phrase the questions presented. Some even require a discursive answer. However you go about it, approach the questions presented – like you approach every other section of the brief – as an opportunity to drive home your position.

Some lawyers advocate cramming as much of your argument as possible into the questions presented. I don't. The result is too often a long, impenetrable sentence that will either annoy the judge (if he tries to work his way through it) or that he will just skip once he realizes how much work is involved in trying to understand it. You're better off with a short simple statement. You can amplify later.

B. THE STATEMENT OF FACTS

The statement of facts is the single most important section of your brief. It's where you win. By the time the court has finished reading the statement of facts it must be persuaded that fairness, logic, and common sense demand a ruling for your client. The argument then becomes a simple matter of presenting the law and showing the court why it supports that ruling. Put another way, if, after reading your fact statement, the court is not convinced that your client is entitled to relief, the best legal argument in the world won't help.

It's often said that the statement of facts should not be argumentative. This is only partly true. While the fact statement should not *appear* argumentative, neither should it be a purely objective recitation of the relevant evidence. Instead, you, as an advocate, must choose what evidence is relevant

and present it in the light most favorable to your client. At the same time, you must maintain your credibility, scrupulously avoiding any inaccuracies or suggestion of dishonesty. Achieving these seemingly contradictory goals is one of the most challenging and creative aspects of brief writing.

You must understand your legal theory and include all facts relevant to that theory. While there may be "bad" evidence, there is no such thing as a "bad" fact. Evidence can be explained away as inadmissible, biased, or disputed. But every relevant fact, *i.e.,* evidence that is indisputable for whatever reason, must be dealt with. If there is even one relevant fact that is inconsistent with your legal theory, you need a new legal theory.

Stick with short declarative sentences and the active voice. The passive voice sounds weak and uncertain and is especially dangerous in the fact statement. The judge must understand who has done what to whom. He must not get the impression you are trying to hide, or gloss over, "bad" facts. And, because the judge must be able easily to follow the sequence of events, you must also take extreme care to use tenses properly.

1. Organizing the Statement of Facts

The first questions you face when starting to prepare your fact statement are: Where do I start? How do I organize this mass of material? What do I need to use and what can I omit? Fortunately, there are some general guidelines that – while they do not provide all the answers – will at least help overcome these initial hurdles.

Start by identifying the parties and the claims. Then tell your story in chronological order. As for which evidence and facts to use, you won't know for sure until the brief is finished. Start with what you think is the beginning of the relevant story. Follow it with only the material that is essential to your story. As you work through the statement, and later, as you complete your research and refine your argument, you may decide that you need to add a few facts to complete the story. Even better, you may realize that some, or even many, of the facts you at first thought were important are actually unnecessary.

a. Identify The Parties By Name

It's generally a good idea to begin the fact statement with a brief description of the parties and

their role in the lawsuit (*e.g.*, "Plaintiff/Appellant John Doe is a . . ."). The court, which may have several hundred (or even thousand) other cases on its docket, may not remember exactly who is who. If it does, it can skip it. Moreover, the court may well have a new clerk who is unfamiliar with the case or the parties.

Use Names Throughout. Unless the court rules require otherwise, always identify the parties by name – rather than by status – throughout your brief. Whatever you do, don't mix and match terms. Referring to a party by a different name at different times, *e.g.*, as a plaintiff, movant, appellant, *etc.*, is extremely confusing. If you must refer to a party as plaintiff or defendant, do so consistently throughout.

Names are better. Not only do they remain constant – thus avoiding confusion – their use also helps in the process of persuasion. Titles are dry and impersonal. Names add flavor and identity to the parties. Names help you achieve your goal by helping the judge identify with, sympathize with, and ultimately rule for, your client. Your task is much easier if the judge has in mind an actual human being or entity.

b. Tell the Story Chronologically.

Adherence to chronological order – supplying dates frequently – is by far the most, indeed the only, effective means of presenting facts. One reason: it makes your job much easier. You don't have to waste a lot of time worrying about what goes where. More importantly, it makes the judge's job much easier. He doesn't have to work to reconstruct the sequence of events. And it enhances your credibility by showing that you want the court to understand what happened.

Don't succumb to the temptation to stray from the chronological. At best, it doesn't help. At worst, it confuses and annoys the court by making it harder to follow the sequence of events. It suggests either that you have not worked out the sequence fully yourself or that you have something to hide. Either way, your chance of persuading the judge shrinks dramatically.

What goes into your chronology will vary with the context. If you are moving for summary judgment, begin with a brief description of the complaint's allegations and claims. Then present a chronology consisting only of undisputed facts drawn from deposition testimony, documents, interrogatory responses, admissions, and affidavits.

If you represent an appellant seeking to overturn a jury verdict, your fact statement will again begin with a brief summary of the complaint's allegations and claims to set the scene. Next comes a statement of relevant procedural history of the case leading to the trial. You then need to provide as detailed a description of the trial, and of the testimony and rulings at trial, as are necessary to support your argument.

If you are appealing from a written opinion of the court below the opinion becomes an important part of your statement of facts. You should include as detailed a description of that opinion as necessary to demonstrate that the lower court erred. Do not describe the court's actions as errors here (except perhaps in a heading – see below). Save that for the argument. Just describe the opinion in a way that makes it obvious that the rulings were wrong.

An appellate brief should also briefly describe how the appeal came to be taken, including a statement of the basis of appellate jurisdiction and a statement (backed up by a record cite) that the appeal was timely filed. If your appeal is not of right, you must also include an explanation why the court should consent to hear your appeal.

c. The Five W's and an H.

It helps to keep in mind the old reporter's litany of five w's and an h. For each event you should at least consider telling the judge who, what, when, where, why, and how. This does not mean you should overload your brief with irrelevant detail. Just the opposite. As you write the brief you must decide which facts are necessary, which are helpful, and which are extraneous. Leave out the extraneous ones. As you rewrite and rethink your brief and argument, you should think hard about further paring to eliminate even some of those which are merely helpful.

Sometimes you don't know, or there is no evidence as to, one or more of these facts. Then you must decide whether to draw the court's attention to these gaps. *The absence of evidence is often as important as – or more important than – its presence.* (Remember the Sherlock Holmes story *The Hound of the Baskervilles* where the key to the mystery was the fact that the dog didn't bark.) Indeed, the undisputed absence of evidence supporting an element of a claim is the key to obtaining summary

judgment. Pointing out these absences is one of the best ways to use the fact statement to persuade.

There often won't be evidence as to *why* someone did something. At times it can be helpful to suggest an explanation. This, too, requires care and judgment. Be sure you make it clear what is evidence and what is your editorializing. But don't go overboard. Too much of this can put you across the line into argumentation and tarnish your credibility.

2. NON-ORGANIZATIONAL DO'S AND DONT'S

There is much more to writing a persuasive statement of facts than following a chronological outline. The following guiding principles should also be helpful:

-- include *all* of your facts in the statement of facts, *i. e.*, don't introduce facts for the first time in the argument or save them for the reply brief;

-- provide record support for every factual proposition; and

-- make liberal use of headings and subheadings.

a. Tell Your *Whole* Story in the Statement of Facts – Don't "Save" Facts for the Argument.

It is more persuasive, less confusing, and more efficient, to include every fact and every piece of evidence you intend to cite in the statement of facts. Put another way, don't introduce evidence or facts for the first time in the argument. Remember, you want to convince the judge and the clerk that your client is in the right by the time they have finished reading the fact statement. Given that goal, it makes no sense to save any evidence for the argument. Put everything in the chronology, where it can be seen in the context you want to convey.

Front-loading the facts is also far less confusing to the reader. When confronted with a fact for the first time in the argument, the reader is likely to ask, "Have I seen this fact before? Why not? Where does it fit in the sequence of events?" More importantly, he may ask himself, "What does this new fact mean? Does it change my opinion of who's right?" In other words, citing to new evidence in the argument is inconsistent with your goal of making life easy for the judge. And the judge could view it as deliberately misleading, a blow to your credibility.

Finally, when you put all of your evidence and record cites in the fact statement, you avoid

having to include record cites in your argument. You can simply repeat important aspects of the facts in summary fashion, saving time and work and cutting down on the number of cites you need to check.

b. Don't Save Facts for the Reply Brief.

Just as you should avoid saving factual material for your argument, you should also be very leery of saving material for the reply brief in the hope of either springing a surprise or avoiding problems. While your opponent may overlook something important, it is risky to count on it. It is much easier to demonstrate how "unfavorable" facts or evidence really don't harm your position in the context of a complete chronology of the facts that require a finding for your client.

This way, you, rather than your opponent, get first crack at explaining the significance of the factual material. Use that first crack to put your adversary on the defensive. You also get the last chance to explain it in your reply – if one is permitted. If you don't deal with the "bad" evidence up front, your opponent gets to take the offensive in his responding brief. You are left on the defensive with only your reply to deal with the evidence. This undercuts the effectiveness of your reply brief, where the goal is to be in control of the subject matter and on the attack.

In its extreme form, the "saving" of facts or arguments for a reply becomes sandbagging One obvious sign of sandbagging is a reply brief that is longer than a party's main brief. While this tactic may have surface appeal, it's generally a bad idea. To begin with, many courts regard it as cheating and have been known to sanction attorneys for the practice.

Even worse (from your client's perspective), the court may either disregard the material or allow your adversary to serve a surreply to address the new facts and arguments raised in your reply. You will thus have lost the very real advantage of having the last word. Judges and clerks often read the last brief first as a shortcut to determine what's really at issue.

Finally, a long reply brief relinquishes its biggest advantage: the opportunity to write a short, pointed recap that highlights your case and skewer's your opponent's without the need for long explanations and masses of factual and legal detail. Don't surrender this opportunity lightly.

c. Cite to the Record for Every Factual Proposition.

You must cite to the record for every factual proposition. You cannot persuade the court if you don't have evidence to support your factual propositions. The court will not simply take your word for it. Unsupported propositions also allow your opponent to tee off on you. Lawyers love nothing better than an opportunity to attack an opponent's brief as lacking in evidentiary support. By the same token, an accurate, fully supported fact statement goes a long way toward establishing your credibility with the court and, ultimately, toward persuading the court.

In most cases you should also make clear to the court what the evidentiary source of the fact was. Sometimes it's clear from the record cite. Often it's not. If the source is important, be sure to tell the court who said it and under what circumstances (*e.g.,* on deposition, on direct, or under cross-examination.) The same is true for documentary or other demonstrative evidence.

Methods for citing to the record vary from jurisdiction to jurisdiction and lawyer to lawyer. Some use footnotes. Others include cites after every sentence, or even in the middle of sentences – a practice I don't recommend. My preference – where it is not confusing or misleading – is to collect the cites for each paragraph at the end of that paragraph. This technique allows the reader to follow the flow of the narrative without interruption. At the same time, it doesn't require the reader to refer to footnotes. It also promotes the use of short paragraphs.

Check and recheck your citations. They must be accurate. The citations must refer to the correct page or document. More importantly, the cited material must support the factual proposition in the text. Nothing is worse for you client's chances – or for your reputation – than sloppy citations to the record. They annoy the judge and the clerk and make them work too hard. Inaccurate citations also provide free ammunition for your adversary, allowing him to attack both your credibility and your case. If sloppiness is pervasive – or if the mis-citations give the appearance of having been designed to mislead the court or your adversary – the court could even impose sanctions.

d. Use Headings Liberally

Make liberal use of headings and subheadings in your fact statement. As a rule of thumb, don't go for more than a page without a new heading or subheading. Headings help guide the reader through the narrative. When compiled in the table of contents they also provide a quick, easy way for the reader to review and recall what he has read.

The headings used in the fact statement should generally be shorter than those used in the argument. They need only be long enough to guide the reader and act as a memory refresher. A simple **"X Corp.'s Monoply Position,"** or **"The Conspirators Meet for the Final Time,"** is often plenty.

I prefer the present tense for the headings and subheadings even though the text is in the past tense. The present tense provides a nice sense of immediacy. But it would be impossible – and misleading – to maintain it throughout a complete narrative of past events.

You can also use the headings, which require no record support, to judiciously begin to inject a little argument into your fact statement. The headings can point the reader toward the legal conclusion you want him to reach, for example: **"The Conspirators Agree on Prices,"** or even **"X Corp. Ties Widgets to Its Unique Software."**

e. Use – But Don't Overuse – Your Word Processing Tools

Use the tools available from your word processing program to improve your brief's appearance and enhance its persuasiveness. These tools, which include bold-face, italics, and bullet points, help make the brief look more polished, professional, and carefully planned. Use these techniques sparingly. The *occasional* use of italics, bold-face, or underscoring can help emphasize the facts that you want the judge to focus on. Overuse risks appearing bombastic, condescending, or overly argumentative, or diluting your emphasis.

Bullet points are also useful in presenting the chronology. They are especially useful when you want to recount and emphasize a simple series of events. For example:

- On June 4, 1992, Mrs. Smith bought a can of defendant's tuna. (Record Cite.)
- On June 6, 1992, Mrs. Smith opened the tuna and prepared a salad. (Record Cite.)

- That evening she served the salad to her family for supper. (Record Cite.)
- By 2:00 a.m., all four were dead. (Record Cite.)

This technique is also useful when summarizing important facts in the argument section of the brief. Again don't overuse it. If you do, you risk having the judge feel you are oversimplifying or talking down to him.

C. THE ARGUMENT

The statement of facts shows the court *why* it should rule for your client. The argument tells it *how*. When presenting the argument follow a three-step process: First, give the court the tools – the statutes, cases, and other legal materials – it will need to support its ruling. Second, explain why those are the right tools for your case. Finally, show the court how to apply those tools to your facts.

It's a simple process and, like the simple process of presenting the facts chronologically, it works every time. Using this formula makes your life – and, more importantly, the court's life – easier. Within the formula's seemingly strict confines there is ample room for creativity.

A warning. As mentioned above, your argument must take into account *all* relevant facts. There is no such thing as a bad fact, there are only bad theories. If there are undisputed facts that are inconsistent with your legal theory, you need a new theory. Put another way, you cannot control the facts, but you can control what you do with them. Of course, there is another rule: virtually everything cuts both (or several) ways. Most facts or evidence can be looked at in several ways, among which you can almost always find one that fits your theory. If not, you need a new theory (or you need to settle).

The Governing Standard. Whether writing a dispositive motion or an appellate brief, you will probably start the argument with a statement of the governing standard, *e.g.*, the standard for summary judgment. Your statement can normally be very brief, since judges generally understand the standard. An exception is where the standard is in dispute or where you want to argue that summary judgment is favored or disfavored. Another exception is where you're opposing a motion for summary judgment made by the plaintiff. Then the defendant might want to cite a case showing that the standard imposed on

a plaintiff seeking summary judgment is greater than on a defendant because the plaintiff bears the burden of proof.

Most appellate courts require the appellant to describe the standard of review. Unlike summary judgment, the standard of review varies, from *de novo* at the one extreme, to abuse of discretion at the other. Even if there is no formal requirement, appellate judges welcome such a statement. The statement can be brief – one paragraph is usually enough – unless there is a compelling reason to make it longer.

PRESENTING YOUR ARGUMENT: THE THREE STEPS

Within each point you follow the simple three-step analysis described above: (1) present *all* of the applicable law; (2) explain why that law is what it is; and (3) explain why that law requires the court to rule for you. Sometimes the law won't be in your favor or you'll be unable to find legal support for the outcome you're proposing. When that's the case, don't be afraid to rely on common sense, logic, and fairness.

a. Presenting the Applicable Law.

The introduction is followed by your first point heading, usually designated by a I. or an A. This heading should contain a one sentence summary of the conclusion of your point, *e.g.*:

I. X CORP. IS ENTITLED TO SUMMARY JUDGMENT BECAUSE MR. JONES HAS NOT PRODUCED ANY EVIDENCE THAT HE SUFFERED ANTITRUST INJURY.

Or, if your point is larger:

I. X CORP. IS ENTITLED TO SUMMARY JUDGMENT BECAUSE MR. JONES HAS NOT PROVIDED EVIDENCE NECESSARY TO SUPPORT TWO OF THE ELEMENTS NEEDED TO ESTABLISH A CLAIM FOR MONOPOLIZATION: MARKET POWER AND PREDATORY CONDUCT.

If, as in the latter example, your point contains major subpoints, your first paragraph should contain a summary of those points. As with the introduction to the argument, this can be simply a recitation of the headings of your major subpoints.

Present All the Law for Each Point at the Beginning. The first item under your point should be a summary of *all* of the applicable law. If a statute or procedural rule applies, start with that. It generally

helps to quote the actual language of a controlling statute or rule. There's usually no need to quote the entire statute – the pertinent portions should be enough. But be careful not to leave out anything that your opponent can argue was left out to mislead the court.

If the statute alone clearly requires the desired outcome, then you probably need go no further. You may, however, want to briefly explain why the statute was passed, *i.e.,* to demonstrate that it was passed specifically to ensure the outcome you are seeking.

Next – or first if there is no governing statute – summarize the applicable case law. All you really need is a simple statement of the holdings of the minimum number of cases needed to establish your point, followed by a citation of the case or cases. Normally you'll start with a statement of the elements of the claim. For example:

> A plaintiff seeking to recover for monopolization must allege and prove that the defendant: (1) possessed monopoly power in a relevant market; and (2) willfully acquired and maintained that power through improper means. (cites)

Follow that with an explanation of the element(s) you're dealing with in the point:

> Monopoly power is the power to control market prices or exclude competition. (cites)

For uncontroversial proposals like these, there may be no need for more than one or two case citations. If possible, use only cases that come out the way you hope your case will come out. And, if possible, use cases with fact patterns similar to yours so that you can choose one to discuss in further detail later, if necessary. Sometimes, there is a leading case in your jurisdiction that is customarily cited for a given proposition. If that case comes out the wrong way and has distinguishable facts, it then becomes a matter of judgment whether to cite that case.

Citation Form. A word on citation form. Strict adherence to the "Blue (or White) Book" is usually unnecessary – *so long as the citations are clear and accurate.* Consistency is also desirable. But accuracy and clarity are crucial. You can't win if the clerk cannot find your dispositive case because you have mis-cited it or because he can't understand your citation. Provide jump cites *(i.e.,* an indication of the exact page you are referring to) wherever appropriate. These must be right and clear too.

One area where you should depart from the Bluebook is when re-citing a case cited on an earlier page. Rather than rely on *Id.* or *supra* or some variation, repeat the name (or a recognizable part of the name) and the volume number (see example above). That way the clerk does not have to search through the brief trying to figure out what case *Id.* or *supra* refers to. (You do not need to provide the full cite, with date, subsequent history, *etc.)*

Minimize Case Citations. Be a minimalist when it comes to citing cases. Remember: "need to know." Make it your goal to cite the fewest cases needed for a complete and convincing presentation. There are several reasons. First, the fewer cases you cite, the shorter your brief. Second, the less work you have to do to check your cites and to prepare for oral argument. You are also less likely to make the embarrassing, or worse, mistake of citing a case that your opponent can use effectively against you. At the same time, you minimize the work of the judge and the clerk, who will be grateful. By citing cases that themselves cite other relevant cases, you can save yourself some work and your client some money, while at the same time pointing the court in the direction of useful additional precedent.

Avoid String Cites. For the same reasons, avoid long string cites. String cites are usually unnecessary and often counter-productive. They can annoy the judge or the clerk who must either read or ignore the cited cases. They cause additional work for you. Finally, indiscriminate string cites can provide your opponent with lots of potential ammunition to attack your position. You must assume that your opponent will carefully read every case you rely on and pull from them anything that can be used to undermine your argument.

An exception to the rule against string cites can arise when you are asking the court to change the law, to take the law in a new direction, or to do something that may appear unusual or controversial. Then it can be useful to cite a series of cases in which other courts, either within or without your jurisdiction, have done what you are asking your court to do. Even here you should make do with the minimum number of citations necessary.

The string cite can be made more effective if you include a short parenthetical statement at the end of a citation to illustrate why the case is included. Don't overdo parentheticals. And don't use a

parenthetical that simply repeats the point for which you are citing the case.

Legal History. Avoid long-winded and pointless recitations about the history or development of the law. Just as a brief is not the place to show off your vocabulary, it is not a place to show off your legal erudition. Does the court really need to know the legislative history of the statute that controls your case? Does it really need to know the history of the common-law development of the tort of interference with prospective advantage? If it doesn't, don't include it. The court won't miss it.

Sometimes, history is essential to your presentation. This becomes more likely the farther up the appellate ladder you go. It also becomes more likely if you are asking the court to change, expand, or take the law in a new direction. In such cases, the evolution of the law may indeed be relevant.

If so, the history of the law becomes part of the factual background of your case. Treat the law as if it were part of your statement of facts. Present it in chronological order and use short, present tense headings. You may find it easier to include this history in a section entitled "Background" placed between the introduction to your argument and your first argument point heading.

Minimize (or Eliminate) Footnotes. Keep footnotes to a minimum. If read, they distract the reader from the flow of your argument. If not – which is more likely – they are useless. If material is important enough to include in the brief, you should be able to find a place for it in the text. If you must use a footnote, the ideal placement is at the end of a section, or at least the end of a paragraph. Never place a footnote in the middle of a sentence.

Inexperienced lawyers often try to hide problematic material in a footnote. This can backfire. Hiding harmful material in a footnote merely draws attention to your sensitivity. A crafty opponent will seize upon this and use it against you. It's usually better to "hide in plain sight" in the text. Doing so forces you to figure out a way to present the material as helpful to your cause.

b. Tell the Court Why the Law Is What It Is

Once you have laid out the applicable legal principles, it is often helpful to briefly explain the reason for those rules. The idea is to show the court that the law is what it is precisely because people situated like your client need its protection.

A quote from a useful opinion can be effective here. One caution: avoid the indiscriminate use of long passages of quoted material, *i.e.*, block quotes. Like everything else, quotes should be kept to a minimum. One or two short, pithy quotes tellingly placed are far more effective than page after page of long dense quotes.

Readers tend to skip over block quotes. So in addition to keeping such quotes to a minimum, make them as short as possible. Most importantly, summarize what you want the reader to take from the quote in an introductory sentence. This way the reader who skips the quote will at least know why it's there.

You must take care when quoting that the material really supports the proposition you are using it for. You must also take care that you cannot be accused of taking the quote out of context. Nothing is worse than having your opponent quote material from the same opinion that contradicts your quote or demonstrates that it provided a misleading impression of the court's holding.

Make Your Citations Accurate and Continue to Update Your Research. It can't be repeated often enough that accuracy in your legal citations is crucial. You must check each cite carefully. Make sure that the name, date, court, volume, and first page information is correct. Also, be sure that, where appropriate, you have included reference to the specific pages (a/k/a "jump cites") within the opinion that contain the quote or holding for which you are citing the case. This is all part of your job of making life easy for the judge and the clerk.

Update your research as late in the writing process as possible. You do not want to overlook a new decision that may alter your argument (for better or worse). You also must read each case you cite carefully to make sure that it doesn't contain anything that may come back to haunt you. If it does, and you still go ahead and use it, at least you will be prepared. If the problem is obvious, it is better to deal with it in your brief. That way you appear open and confident rather than defensive.

This is not a research instruction manual. But good legal research is critical to persuasive legal writing. So, while I urge a minimalist approach to writing and to case and other citations, I do not suggest that you take such an approach to research. Also, just because you've served your brief doesn't mean

you're done with your research. Be on constant lookout for new and useful material. And update your research before you serve your reply brief and again before oral argument.

Occasionally, you may feel that you had to file your brief before your research was complete. So don't stop; keep looking. While no one likes to write letters to the court after the briefing is complete, it's sometimes necessary. Certainly, if you find a dispositive case or realize that you have made a critical error, the sooner and more directly you bring it to the court's attention the better.

c. Applying The Law To The Facts

You have laid out the facts in a way that should make the court sympathetic to your client. You have told the court what the applicable law is. And you have explained why the applicable law is what it is. Now you're ready to apply the law to your facts, *i.e.,* to show the court why your facts fall within that law and why that law requires the outcome you seek.

Because you have already laid the groundwork this can be short and powerful. There's no need to repeat all of the facts from your fact statement. A brief synopsis to remind the court of the crucial facts will do. Follow that with an explanation of how the applicable law applies to those facts to require the outcome you seek.

Finally, if appropriate, you can include a discussion of the one case you have already cited that is most on point. The most effective use of such a case is first to present a fact-by-fact comparison demonstrating the similarities of the cited case to yours. A series of sentences beginning with the phrase "There, as here," is a simple way to accomplish this. One or two paragraphs is usually enough. Follow this with a brief recitation of the court's reasoning and holding. Then explain why the court's decision compels the same outcome in your case. A short and telling quotation from the decision can be used to good advantage here.

d. Attack Your Opponent's Or The Lower Court's Position

Once you have set forth your affirmative argument, you can go on the attack. If you know what your opponents have argued or are going to argue you can point out the weaknesses in their legal position. Describe the absurdity of the result they seek. Distinguish the cases they have relied on. If you're

briefing an appeal you can do the same for the lower court's legal reasoning.

e. Don't Summarize Each Point At The End

You do not need a summary sentence or paragraph at the end of each point. As with the brief as a whole, your conclusion should have been stated in your point heading and at the beginning of the point. Just finish your argument and move on to the next point.

D. THE CONCLUSION

The conclusion is usually only a sentence or two. There are only two rules for the conclusion: (1) don't sum up and (2) tell the court what you want:

Don't sum up. The conclusion of a brief is not a place for a summing up. You have already done that several times – in the preliminary statement, in the introduction to your argument, and in the introduction to each point. To do so again is unnecessary. The conclusion merely begins: "For each of the foregoing reasons, defendant XYZ, Inc. respectfully urges this Court to enter an Order . . ." This leads to the second rule:

Tell the Court What You Want. Be specific in describing the relief you want. Too often attorneys find themselves dismayed because the opinion reads like they've won but the relief is not what they wanted. They may simply have failed to clearly tell the court exactly what they wanted. For the same reason, in the conclusion, as in the preliminary statement, identify your client and your opponent by role as well as by name (*e.g.*, "Plaintiff/appellant John Doe respectfully urges this court overturn the ruling of the court below granting summary judgment to defendant XYZ Corp. and remand with instructions that the case promptly proceed to trial.").