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Lecture

Effective Argumentation

Paula Rudman

ANATOMY OF AN ARGUMENT

-Paula Rudman, First District Appellate Project Staff Attorney

Getting a veteran appellate attorney to talk (or write) about the process of writing an argument can be difficult: it's something like asking an adult human being to describe the process of walking. By the time we are asked to describe the process, it is so ingrained that bringing the steps into our consciousness may be impossible. As project attorneys, however, we have the advantage not only of having written many briefs ourselves, but also of having assisted numerous other lawyers, both novice and experienced, in producing them. The assistance process helps to revive our awareness of the basic underpinnings of legal argumentation. (The writer also confesses to having at one time been that most unappreciated of all law school teachers, a legal writing instructor. However, while this gave her some additional vocabulary with which to discuss the subject matter, it is principally her experience as a practitioner and, briefly, as a judicial clerk, which has influenced the content of these materials.)

We hope that this discussion will be useful to you as you begin, or continue, to develop into one of those attorneys who can't begin to describe what they do to create clear, persuasive, and sometimes even winning, arguments. (Caveat: as will quickly become obvious, this is intended as an informal discussion rather than as a model of formal legal writing in and of itself!)

I. General Considerations

A. Getting Started

“[W]riting in search of structure can be a time-consuming process....” Squires and Rombauer, Legal Writing in a Nutshell 29 (1982). For that reason, it is useful to begin writing an argument by creating an outline which covers each element (standard of review, main issue,

subissue 1, ... prejudice). Include the major points you wish to make and the authority you will use in support of each point. Often, I find that I'll start writing an outline and then get involved in elaborating on one of the points I'm listing. Frequently, I'll end up writing whole portions of the argument as I outline. I still find it helpful, however, to begin with the intention of outlining; it helps me to keep the overall structure in mind. As an added benefit, an outline can make the task of writing a complex argument seem more manageable.

B. Remember Your Audience

Of course, your audience consists of the judges and their clerks (and to a lesser extent, your opposing counsel and your client). The conventions of legal rhetoric prescribe certain approaches to this audience. But it is also worth bearing in mind, to the extent possible, the personalities of the individual justices for whom you are writing. For example, a brief in a division of the Court of Appeal whose presiding justice prides herself on her erudition might profitably contain a few more footnotes than one in another division.

In considering your audience, the tone of your argument is also an important concern. Tone will be discussed in greater detail in connection with word choice. Each individual appellate attorney develops his or her own argument style, one more strongly worded, another more reserved. Keeping in mind the overall goal of persuading the reader, however, "quiet forcefulness" is a good benchmark.

Finally, a word or two about your secondary audience, opposing counsel and the client. As to opposing counsel, the principal question is whether to tip your hand by disclosing your response to their expected argument. Certainly, as will be discussed, you need to cite and deal with contrary authority on your main points. The difficulty comes when you can think of an

affirmative response to your argument: e.g., waiver. It then becomes a judgment call whether to anticipate the respondent's argument or to wait and deal with it in the reply brief. A good overall guideline is, "How obvious is the response?" If you are sure respondent (and/or the court) will think of it, it is probably better to deal with the argument in the AOB, thus taking some of the air out of respondent's sails.

As to the client, the usual question is whether you should include an argument which he feels is important, but which you believe is frivolous. In general, the answer is no, though most of us have bent the rules on occasion. As a practical matter, it is your decision whether an issue is arguable. How you communicate this decision to your client is another question, to be dealt with elsewhere in the Appellate College. In general, however, I am fond of the analogy to surgery: once you decide to have the operation, you should generally leave questions of surgical technique up to the doctors.

C. Federalize.

Always federalize your argument, whenever possible. Some experienced appellate practitioners view state appeals as no more than a prelude to federal habeas proceedings. We appellate project attorneys are not quite so pessimistic as to the chances of winning in state court. However, it is crucial to preserve the client's right to federal habeas review. A federal court will not consider a federal constitutional claim on habeas corpus unless it was properly raised and preserved in state court. Moreover, federal errors generally receive a more favorable standard of prejudice, even in state court.

How, then, does one "federalize" a trial error? First of all, make sure the federal bases of the error were stated at trial. If not, you will have to include an argument that trial counsel was

ineffective for failing to do so. Assuming that trial counsel effectively preserved the issue, in order to preserve it for federal habeas review, you as an appellate lawyer must: 1) cite all the applicable federal constitutional provisions; 2) if possible, cite one or more applicable United States Supreme Court decisions. (As a fallback, you may cite a federal Court of Appeals decision. Be aware, however, that under current federal law, the viability of a federal habeas claim is in doubt unless there is a Supreme Court decision on point. While the Ninth Circuit has been creative in interpreting United States Supreme Court cases to cover a variety of non-obvious situations, it is still the better part of valor to cite a Supreme Court decision on point if at all possible. You can take a cue from the Ninth Circuit and be creative, if necessary, in citing an “applicable” Supreme Court case.)

Included as appendix A to these materials is the California Appellate Project’s “Federalization Table” prepared by veteran appellate attorney Gail Weinheimer, which provides federal citations on a number of common appellate issues.

D. “Let no one else’s work evade your eyes....” -T. Lehrer.

Really, plagiarism has an honorable tradition in the field of criminal appellate practice. Or, to put it more gently, don’t reinvent the wheel unnecessarily. Ask your buddies, at the appellate project and otherwise, if they have, or know someone who has, written an argument on the same or a similar point of law. Use briefbanks. Et cetera. Of course, it is polite to ask permission, with appropriate offers of praise and reciprocity. And, need it be said, you will improve, update, and adapt the argument to the facts of your case. This latter point applies as well when you recycle your own arguments (another honorable tradition).

II. Overall Argument Structure

How you organize your arguments depends on two overall factors: persuasion and logic. These principles apply both in ordering the arguments in your brief (e.g., should the evidentiary issue go before or after the instructional one?) and in deciding how to structure each individual argument. We will first step back and focus briefly on the order of your arguments.

A. As a general rule, put your best foot forward.

This means start with your strongest argument (as well as with your strongest subissue within the argument). As a corollary, if you have an argument which, if it succeeds, will compel reversal without regard to prejudice (e.g., Wheeler error, sufficiency of the evidence), it should ordinarily come first. (And, failure to put it first may telegraph to the reader that you don't really have much faith in the argument.) However, there are certain complementary (and sometimes countervailing) principles.

B. First things first.

Most appellate lawyers generally prefer to order their arguments chronologically, starting with those relating to jury selection and proceeding through evidentiary errors, instructional errors, errors with respect to the closing arguments and jury deliberations, and, finally, sentencing errors. The same caveat stated above regarding varying the order applies here: a weak trial issue should still precede a slam-dunk sentencing argument, because to vary the order will convey to the court your lack of faith in the trial issue.

C. Keep it together.

Two or more related arguments should be grouped together, often regardless of chronology. A typical example is a sufficiency argument paired with a fallback instructional

issue (i.e., if the evidence was sufficient, the court should still reverse because the trial court gave an erroneous instruction on the crucial point on which evidence was lacking). Here, you use one argument to “set up” a second.

D. You need no introduction.

Ordinarily, an overall introduction to your argument is not necessary. However, if you have dovetailing issues, numerous issues needing a “roadmap”, or a kangaroo-court or “travesty of justice” situation, you may want to write a page or so giving an overview.

III. Headings.

The reason an overall introduction to your argument is not generally necessary is that the argument headings, when set forth seriatim in the table of contents, provide a quick overview.

The headings should be complete sentences; they should be concise and forceful statements of your contentions; and each should have both a fact and a law component. The principles discussed below under “Writing Style” are critical here. Preparing headings is an art: the goal is to craft a sentence or two which provides a capsule description of the entire argument, while predisposing the reader to agree with it. Some examples:

APPELLANT’S SENTENCE OF LIFE WITHOUT POSSIBILITY
OF PAROLE IS CRUEL AND UNUSUAL PUNISHMENT FOR A
NINETEEN-YEAR-OLD, RELUCTANT FIRST-TIME ROBBER WHOSE
CODEFENDANT KILLED UNEXPECTEDLY

IT WAS REVERSIBLE ERROR TO DENY APPELLANT’S
MOTION TO SUPPRESS HIS INVOLUNTARY CONFESSION, WHICH
FEDERAL AND STATE AUTHORITIES OBTAINED IN EXCHANGE
FOR A TIME-SERVED SENTENCE FOR HIS RELIGIOUS LEADER ON
AN UNRELATED FEDERAL CHARGE

Of course, often you won't go so deeply into the factual predicate of the argument, but it should still be apparent:

THERE WAS NO SUBSTANTIAL EVIDENCE OF KIDNAPING
FOR ROBBERY BECAUSE THE MOVEMENT OF THE ROBBERY
VICTIM DID NOT SUBSTANTIALLY INCREASE THE RISK OF
SIGNIFICANT PHYSICAL INJURY

A. Subheadings

Subheadings are reader-friendly: they allow you to telegraph the structure of an individual argument, and they provide natural pauses for the reader. They need not, but may be complete sentences, and you can “mix and match” the two types of subheading.

IV. Organization and Substance Within Arguments

A. The Bare Bones

1. State Your Contention.

An argument should begin with a brief statement of your contention. This can be anything from a sentence to a couple of paragraphs, but it should “tell the readers what you’re going to tell them”: what did the trial court do wrong, and what is your legal theory as to why it was wrong. Note that even the best argument heading is no substitute for this textual explication. In part, this is because, after having read the table of contents, many readers skim over the argument heading. Also, the textual introduction can provide more information than the heading.

A slight variation is acceptable: if the procedural facts underlying your argument can be briefly stated, you can sometimes get away with setting them forth first, and then stating your contention as to why these facts produced error. In any event, you should never force the court to read through a substantial portion of your argument before stating your contention.

2. The Procedural Facts

Generally, the next step in your argument is to set forth the procedural facts giving rise to the error. I personally like to do this before getting too deeply into the law, but some folks prefer to spend a page or two on the general legal principles first. This is an individual decision which may vary from argument to argument and from case to case. In setting forth the procedural facts, conciseness is a frequent concern. You want to give the reader a complete picture of what happened, but you don't want to spend page after page on the details. Again, it's a judgment call. Judicious use of quotations from the record are helpful, particularly when the prosecutor's argument or the judge's ruling is especially outrageous. Note that the concise statement of the court's ruling you included in your statement of the case does not substitute for this portion of the argument.

3. The Standard of Review

Not to be confused with the standard of prejudice (reversible error), the standard of review is the lens through which the appellate court looks to determine whether error occurred (de novo review, abuse of discretion, etc.). How much deference must the appellate court give to the findings of the trial court? Which party has the burden of demonstrating error, and how heavy is that burden? Depending on the issue, the standard of review may be stated in a sentence, or it may require a separate subsection of argument. In any event, make sure you have

stated the standard early in your argument.

4. The Law and Its Application to Your Case

If the one or two best precedents will not convince, a score of weaker ones will only reveal the weakness of your argument.

- Jackson, J., *Advocacy Before the United States Supreme Court*, 37 *Cornell L.Q.*

Generally, you need to discuss two types of legal authorities: background authorities marking the general area of law in which your issue lies (sometimes referred to as “boilerplate”) and controlling cases more closely related to the facts of your case. It is usually best to begin with the background authorities and set the stage for your argument before launching into a more detailed analysis of the specific facts of your case and the controlling case authorities. Because...

“[I]t is a mistake to assume that the court knows the law.” Weihofen, Legal Writing Style 283 (2d ed. 1980). From an organizational standpoint, the challenge is to avoid starting at too elementary a level (e.g., treating the court to a short essay on the exclusionary rule). Yet, you need to lay the groundwork for your argument. As a rule of thumb, a paragraph or two at most should suffice to state elementary principles of criminal or constitutional law, in order to set the stage for your argument. More or less explication may be necessary, depending on the familiarity of the court with the general issue. E.g., an “open fields” issue may require more discussion of legal background than a “stop and frisk” issue, a Massiah issue more than a Miranda issue. Weihofen suggests the use of such phrases as “of course,” “it is elementary law that,” or even, “it is unnecessary to point out,” to soften the implication that the court is being spoon-fed stuff it ought to know. (Ibid.)

Once you get to the more specifically controlling case authority, it is important not to let

the individual cases “drive” the argument. Organize around your contentions, not your cases. A catalogue of case after case, with paragraphs beginning, “In People v. Case Name” should be avoided. A few helpful hints are in order here. When you outline your argument, your numbered and lettered topics should be contentions that advance your arguments, not case citations. Similarly, the topic sentence of each paragraph should advance your argument. If you need to discuss the facts of your precedent case in order to show how it is similar to, or distinguishable from, the present case, that’s fine. But your paragraph should begin, e.g.:

As illustrated in People v. Timmons [citation], the increase in risk must be considerable in order to transform a simple kidnaping during a robbery into a ‘kidnaping for robbery’ under Penal Code section 209.

rather than:

In People v. Timmons, defendant approached two employees of a market as they parked in the parking lot.

The latter is a perfectly acceptable sentence, but it is not a topic sentence and should not begin a paragraph of argument.

A quick aside on the use of parentheticals: Let’s say you want to summarize a large body of caselaw. Perhaps there are too many precedents to be discussed in detail; perhaps you have multiple examples of the application of a single rule of law to a variety of fact situations; perhaps your argument requires you to set forth the approach of all fifty states to a given issue. In any event, you have a situation to which the wisdom of Justice Jackson, quoted above, as to using only a few precedents, does not apply. In such a case, go ahead and break the rule your legal writing teacher drummed into you against using “string citations.” Include with each citation a

concise parenthetical or bracketed remark as to the case's relevance, as in the following example:

In a large number of these cases, the defendant's participation was so substantial, and his state of mind so culpable, that there was in fact considerable suggestion that he may have participated in the actual killing, or intended to kill. (E.g., Flamer v. Chaffinch (D.Del. 1993) 827 F.Supp. 1079, 1098-1099 (defendant participated in stabbing victim, not clear whether he delivered fatal blow); Scott v. Dugger (S.D.Fla. 1988) 686 F.Supp. 1488 (jury verdict unclear whether premeditated or felony murder); State v. Henry (Ariz. 1993) 863 P.2d 861 (defendant and codefendant kidnaped and robbed victim, defendant claimed codefendant stabbed victim, defendant helped drag victim up berm and left him there, defendant's clothing was spattered with blood); Van Poyck v. State (Fla. 1990) 564 So.2d 1066 (defendant participated in attempt to free prisoner, kicked one victim, was armed, and may have fired fatal shots); Diaz v. State (Fla. 1987) 513 So.2d 1045 (armed robbery, defendant one of three who fired shots, defendant had gun with silencer); State v. Kills on Top (Mont. 1990) 793 P.2d 1273 (defendant agreed victim should be killed, kicked victim causing potentially fatal injuries).)

We will discuss organizing the argument further in the "Writing Style" section of these materials. For the moment, here are a few more pointers on the substantive aspects of dealing with precedent.

a. Policy

The policies behind a rule of law are critical in determining whether and how the rule is applied. Thus, in discussing the application of a rule -- whether constitutional, statutory or common-law -- to the facts of your case, you should rarely neglect to mention the policy underlying it. This discussion may range from a simple phrase to a full-blown subsection discussing the legislative history or the evolution of a common-law doctrine.

Addressing policy, however, need not be a complex process. Often it is as simple as asking, "what is the reason behind the rule?" You should habitually ask this question, as it will

improve and simplify your analysis of most legal questions.

b. Contrary Authority

Elaborate analysis and rebuttal of every [contrary] case...may show over-concern about their importance. One should dispose of them as ably and as pungently as one can – and move on.

-Weihofen, Legal Writing Style, *supra*, at p. 297.

One must, indeed “dispose of” rather than ignore, contrary authority on point. The first line of attack is to distinguish the precedent case factually or legally from your own case. If you cannot honestly do so, then argue it should not be followed, citing policy reasons to support your position (provided, of course, it is not a decision of the California or United States Supreme Court, in which case you should reconsider the viability of your argument).

Beware, however, of spending too much space distinguishing or otherwise explaining away cases helpful to your opponent, in relation to the space you have spent on helpful precedent. Also, beware of starting your discussion of precedent by discussing contrary authority. Counter-arguments should be sandwiched in near, but not at the end, of your discussion of a given issue or subissue.

c. Out-of-State (“Persuasive”) Authority

On occasion, you may want to use authority from another state’s court or the federal courts in support of your argument. Such authority (called “persuasive” because the court doesn’t have to follow it) may be helpful in a variety of situations. Most obviously, if your issue has a strong federal component, you will probably want to discuss the federal Courts of Appeals’ approach to the issue. Or, if the issue is one of first impression in California, but New York has already dealt with the same situation, the court may be grateful for any guidance you can give it.

Frequently, however, the reason you want to use out-of-state authority is that the authority from within the jurisdiction is unfavorable, or there just isn't enough of it to establish a basis for your argument. Or, perhaps, the Illinois Supreme Court decided a case which appears factually indistinguishable to your own. In such a situation, keep firmly in mind the proposition that the court doesn't have to follow the cases you are citing. While it seems self-evident, this fact should affect your rhetorical approach to the caselaw. You will want to make sure it is clear why the court should pay attention to these holdings. (Were the out-of-state courts interpreting a decision of the United States Supreme Court? Or, perhaps the state statutes the courts were interpreting are nearly identical to the California law.) Similarly, you may want to use words such as "persuasive" or "useful" to implicitly acknowledge that the court is free either to follow or disregard the offered precedent.

See the discussion of parentheticals, above, for one example of the use of out-of-state authority.

d. The Lessons of History

In interpreting a rule of law, it is sometimes useful to delve into its history: what function has the rule served in the past, and how did it develop in order to serve that function? A requirement in a state statute may have had its genesis in the need to conform to federal constitutional requirements. A judicial gloss on a criminal statute may have originated because of the disparity between the penalties for the enumerated offense and another, similar one. A seemingly-clear phrase in a common-law test may have meant something very different when the test was first formulated. Such information may be vital in persuading the court to see the law in a way that favors your client.

The challenge here is often to keep a large body of information under control. How much history should one give; how far back should one start? As a rule of thumb, keep in mind the function history serves in your argument: examine every sentence and paragraph to make sure it furthers your goal of persuading the court to apply the law in a favorable manner. Of course, it doesn't hurt if you can give the history lesson a little entertainment value. (E.g., in a discussion of the history of the Daniels test for kidnaping for robbery, I was glad to be able to mention both Caryl Chessman and the Lindbergh baby.)

5. Prejudice

Every appellate argument should include a discussion of why the error requires reversal. If the error is clearly reversible per se, this section may be mercifully brief. More often, a full-blown discussion of prejudice is in order.

Of course, the first step is to determine what standard of reversible error applies: e.g., Watson, Strickland (IAC), or some version of the federal Chapman standard. Sometimes this is a substantial discussion in and of itself, as when you must struggle with the Yates version of Chapman, which applies to various instructional errors. Other times, it is as simple as stating the applicable test and citing the case on which it is based. Often, when the standard of reversal is unclear, it is necessary to make one or more “fallback” arguments based on lesser standard than the one you would prefer to see applied.

In general, however, the most challenging portion of a prejudice discussion is marshaling the reasons a given error resulted in prejudice. Of course, one generally starts with the favorable defense evidence and/or the shakiness of the prosecution's case. Close attention should be paid to the relationship of these to the error. (E.g., did the judge erroneously admit damaging

evidence about the defense's star witness, or exclude damaging evidence about the prosecution's?) Similarly, if there are multiple errors which reinforce each other, this should be pointed out, and a separate "cumulative prejudice" argument may be of value.

Other factors to be considered in assessing prejudice are the length of jury deliberations, jury questions about the issue giving rise to the error, requests for re-read of erroneously admitted evidence, or prosecutorial argument emphasizing the erroneously-admitted evidence or the erroneous legal standard.

Writing prejudice arguments is always a challenge. Frequently, by the time you get around to discussing prejudice, you have expended most of your time and energy addressing the error. It may be tempting to give this portion of the argument short shrift. Don't succumb to temptation: it is all too easy to win the battle of error, but lose the war for reversal.

6. Conclusion

Each argument should conclude with a request for reversal or whatever other relief is appropriate. In addition, the entire brief should contain a conclusion section. While some writers take a page or two to summarize the arguments, the Appellate College faculty prefers a simple "prayer for relief." For example:

For the foregoing reasons, appellant respectfully submits that his conviction must be reversed.

Or, in a more complex case:

For the reasons described in Part I, appellant submits that his conviction in counts 1 through 3 must be reversed. Alternatively, because of the instructional error described in Part II, his conviction for robbery in count 2 must be reversed. Finally, for the reasons described in Part III, remand for resentencing is required.

If you find yourself moved to write a lengthy conclusion, you might consider whether a page-or-two introduction to the argument section of the brief would be useful, instead. (See “You Need No Introduction,” above.)

VI. Style Pointers

When friends told Cicero that he was the greatest of orators, he replied somewhat as follows: “Not so, for when I give an oration in the Forum people say, ‘How well he speaks!’ but when Demosthenes addressed the people they rose and shouted, ‘Come, let us up and fight the Macedonians!’”

If the judge reading your brief is impressed merely with how well you write, you have defeated yourself. You want to make him feel that your client has a good case, not merely that he has a good lawyer.

-Weihofen, Legal Writing Style, *supra*, at p.5.

While each good appellate lawyer has his or her own unique style, below are some overall principles which are useful in developing a style which will make the court feel “that your client has a good case.”

A. Organization

1. Start (and End) Strong

“Primacy” is an important principle in legal argument, as in life. As already discussed, all other things being equal, you should start your brief with your strongest argument. In addition, each argument should begin on its strongest point. But you don’t want to end on a weak note, either. Discussion of weaknesses in your case (such as contrary caselaw or bad facts) should be sandwiched in near, but not at the end of your argument.

You can emphasize not only arguments, but paragraphs, sentences, and even words, by putting them in first (or last) place. Compare: “The trial court found that the officers had engaged

in outrageous conduct,” with “‘Outrageous’ was the trial court’s characterization of the officers’ conduct.” The practice of varying word order for emphasis should be used sparingly, however, because, as you can see, it produces oddly structured sentences.

2. Lead the Reader By the Hand

We are all familiar with the hard work of reading and writing for a living. (Yes, I can hear my peasant ancestors guffawing as I write this....) Your job as a writer of appellate briefs is to make your reader’s life as easy as possible. In so doing, you serve your client’s interest, for an easily-understood argument is far more palatable than one the court has to struggle to understand. Much of the structure suggested in the “Bare Bones” section above is intended to make it easier for the reader to follow your argument. In addition, keep in mind the following techniques.

a. Tell Them What You’re Going to Tell Them....

We know, you learned this in junior-high-school English, and it has stuck in your craw ever since. Nevertheless, it’s true: the reader wants to be reminded where she is in the argument, what has been established so far, and what is about to be discussed. In addition to introductions and conclusions, topic sentences (already discussed in the “Bare Bones” section) serve this function.

1. Transitions

There is an additional, very important device, called a “transition,” which helps to move the reader’s attention from point to point in your argument. Transitions may range from single words, such as “however,” “therefore,” “similarly,” “again,” “specifically,” “nonetheless,” “yet,” and “next,” to complete sentences or paragraphs which tell the reader, “I’ve just been talking

about x, and I'm about to move on to y, and the relationship between x and y is z." A good transition moves the argument seamlessly from point to point, e.g.:

But, even assuming this Court finds the evidence sufficient to sustain the conviction, by no stretch of the imagination do the present facts compel a finding that appellant's conduct substantially increased the risk of significant physical injury to the victim. Thus, appellant was entitled to an instruction on the lesser included offense....

Sometimes a transition can be accomplished simply by using the same word or phrase in the last sentence of one paragraph and the first sentence of the following one:

...The trial court explained, "it's not a crime to possess alcohol, but yet, it can be a condition of probation not to possess or use alcohol."

Appellant does not challenge the condition of his probation that he not use alcohol. Rather, appellant contends....

Transitions are a great aid to readability, and it is difficult to overuse them. One or two per paragraph is not excessive.

2. Conclusions

Yet another aid to readability is the concluding sentence. For rhetorical purposes, it rarely hurts to remind the reader of the point you have just made. For example, don't neglect to spell out your conclusion after applying a precedent case to the facts of the case at bench:

Unlike the defendant in Jackson, appellant was not even present during the killing. If the defendant in that case could not have prevented an unanticipated killing, so much less could appellant.

b. One Thing at a Time

In setting forth the analysis of an issue, it's important not to try to discuss too many things at once. Here is where a good outline, organized around contentions rather than cases (see

“The Law and Its Application to Your Case,” above) comes in handy. An outline helps you to put your thoughts in order (literally), so that you can discuss one thing at a time, using transitions to show the relationships between them. (One frequent organizational problem is the tendency to veer into a discussion of prejudice, then back to error, then back to prejudice. Make sure you complete your discussion of error before moving on to prejudice.)

On a related point, many writers (present company included) tend to write overlong sentences, containing multiple subordinate clauses, separated by comma after comma, in order to express what they believe to be unavoidably complex thoughts. Most such sentences can profitably be edited into two, or three, or four. Such editing requires a willingness to sit down and separate out several different strands of thought. Each of these strands then becomes a separate sentence.

c. Quotable Quotes

If an opinion or other source contains an elegant, pithy quotation that states precisely what you want to say in your legal argument, use it. If the source of the quotation is a particularly well-respected judge or opinion, so much the better: in that case, make sure to emphasize the source. On the other hand, overuse of quotations is a big mistake. Generally, use your own words except when the quoted language is particularly important or persuasive.

In using quotations, make sure not to quote a whole paragraph when a sentence or two will do. Short quotations are preferable, as the eye of the reader tends to skip over long, single-spaced “block” quotations. Where a “block” quote is necessary, make sure to introduce it with a phrase such as, “As the California Supreme Court recently stated: ...” Avoid simply plunking a quotation into the middle of the text without introduction.

B. Word Choice

Conscious choice of words becomes second nature to the appellate practitioner. We are all aware of the need to use terms of art precisely. For example, you would not use the phrase, “the prosecutor alleged” to describe the closing argument, because “alleged” has a technical legal meaning which relates to the charges filed. In general, even when technical legal meanings are not at issue, you should take care to be precise in your use of language. Avoid “elegant variation,” that is, using different words to mean the same thing. The reader may be confused into believing you are making a distinction you do not intend. (Although not in a legal context, I am fond of the following, rather outdated, example of elegant variation: “Two of the Democratic delegates are women, whereas all of the Republican delegates are ladies.”) Similarly, avoid “fuzzy” or “abstract” words in favor of simple, concrete ones, unless (as sometimes occurs) your goal is to obscure their meaning. (Back to the subject of “alleged”: consider the effect of saying “appellant was charged with rape” as opposed to “the information alleged a violation of Penal Code section 261.”)

The latter example points up the importance of considering the connotation of the words you use. Consider Bertrand Russell’s description of a game he called “conjugating irregular comparatives.” A sample round goes, “I am firm, you are stubborn, she is pigheaded.” In addition to considering connotation whenever we are faced with a choice of words, some briefwriters habitually use certain words or phrases in order to control connotation. For example, I routinely say, “complaining witness” rather than “victim” (though I haven’t yet settled on just

the right word to describe the victim in a homicide case)¹. Other practitioners prefer to use appellant's name ("Mr. Jones") rather than "appellant". Good use of connotation is subtle; ideally, the reader should be unaware he is being persuaded.

It is easier to be subtly persuasive if you get in the habit of using one strong word ("vital") rather than two or more weaker ones ("extremely important"). Positive words ("ignored") are more forceful than negatives ("didn't pay attention to"). Paradoxically, as you can see, strong nouns and verbs are generally both more forceful and more subtle than weak nouns paired with modifying adjectives and adverbs. In particular, try to avoid using legalistic modifiers such as "said", "heretofore", and "aforementioned". Likewise, try to avoid qualifying your argument with too many introductory phrases such as, "appellant contends" or "it is important to note." Just say it!

Whole chapters of legal writing texts are devoted to word choice; these few paragraphs will have to suffice here. Ultimately, it's simply a matter of being aware of language and of striving for a certain overall tone. Ideally (at least until you are good enough to break the rules), try for a sense of quiet forcefulness or restrained passion which gives the reader the dignity of formulating his or her own emotional response to the argument.

C. Sentence Structure

We have time for a quick survey of the most important principles of sentence structure. First and foremost, the briefwriter should prefer the active voice (and use the passive voice

¹ Fellow appellate college faculty member Bill Robinson suggests, "the decedent" or "the unfortunate Mr. So and So."

consciously). Simply put, this means you should ordinarily use simple subject-verb-object sentence construction, as in, “Officer Smith drew his gun and brandished it at appellant,” unless you want to downplay the actor, in which case, “the complaining witness was shot three times.”

A corollary is that you should avoid nominalization (using the noun form of a verb or adjective), except, again, when obscurity is your goal. (Consider CALJIC 2.21.1 which includes the wonderful sentence, “Innocent misrecollection is not uncommon.” In addition to nominalizing the simple fact that people often remember things wrong, it also includes a double negative.)

In general, simplicity is the key to sentence construction in legal argument. However, there are some concepts that are just too cumbersome to express using short, active-voice sentences. Moreover, an argument composed of short sentence after short sentence may be almost as boring and unreadable as one composed of fifty-words. Here are a couple of concepts to keep in mind when writing a longer sentence.

Parallel construction means that, when you write a complex sentence, the two or more parts should reflect each other grammatically. This gives a pleasing rhythm and symmetry to the sentence and makes it easier to understand, e.g.:

Under state privacy law, the threshold elements of an interest deserving of constitutional protection are threefold: a legally protected privacy interest, a reasonable expectation of privacy in the circumstances, and conduct by the government constituting a serious invasion of privacy.

rather than:

The threshold elements of an interest deserving of constitutional protection are the existence of a legally protected privacy interest, that the defendant have a reasonable expectation of privacy in the circumstances, and conduct by the government constituting a serious invasion of privacy.

Now we come to my pet peeve: misplaced modifiers. These frequently appear in police reports, but also, all too often, in appellate briefs. (“Upon arriving at the scene, the defendant fled.”) Make sure you know which word your subordinate clause is modifying. As an editor, I am fond of scribbling cartoons to illustrate the image the misplaced modifier brings to mind.

Finally, another simple trick to increase readability: avoid starting sentences with citations. Instead of, “People v. Case Name (1999) xx Cal.App.4th xxx held that,” try an alternative such as “The Sixth District recently held in People v. Case Name, that....” Then give the citation at the conclusion of the sentence.

VII. In Which The Writer Throws Down the Citation-Form Gauntlet

While we’re on the subject, while good citation form is important, you should not adhere slavishly to the rules of citation form at the expense of readability. The importance of one-hundred-percent perfect citation form may be overemphasized. Good citation form has two important functions in appellate briefwriting: first, it gives the court the necessary information it needs to find the cited authority; second, it gives the impression that you are a pro who knows what you’re doing. So, make sure your citations contain all the necessary information (e.g., the exact date of a pre-advance-sheet case, so that the reader who has a different opinion service can find it). And, make sure the citation form is close enough to Hoyle (here, the recently-updated California Style Manual) to let the court know that you know the ropes. Beyond that, whether the case names are italicized or underlined, whether you say “section 288, subdivision (a)” or just “288(a),” frankly, my dear.....²

² Here, again, my learned colleague Mr. Robinson has a couple of useful additions. First,

VIII. Revision

By the time we finish an argument, we're usually out of steam and out of time. However, each of us has habits of revision that we find necessary for quality control. I do not consider myself finished with a brief until I have done two things. First, I print it out and let it sit, ideally for at least twenty-four hours, before reviewing and polishing it. Second, I hold my breath and give a copy to a trusted colleague to comment upon. On occasion, an approach, or simply a phrase, suggested by this third person has immeasurably improved the final product.

he suggests that “when you do ‘throw down the citation form gauntlet’ it is generally (but not always) a good idea to say so. I.e., if your whole brief is about some interpretation of Penal Code section 288, subdivision (a)(1), spell it out in correct form the first time [NB: the correct citation form, as opposed to textual form, would be: Pen. Code, § 288, subd. (a)(1)], then put: (hereinafter ‘section 288(a)(1)’) or something like that.”

Second, he recommends that when you cite two or more cases with the same name, such as People v. Williams or People v. Harris, in the same brief, you make sure to use enough of a citation that the reader can tell which case you mean.

IX. Appendices

A. Federalization Table

B. Sample Arguments