



*Introduction xvii*

C H A P T E R 1

**THE DECISION TO APPEAL 1**

**A. Appeals and the Appellate Process 1**

1. Appeals Defined 1
2. Appellate Courts and Their Jurisdiction 2
3. Appellate Lawyers and Appellate Briefs 3

**B. Appealable Error 5**

1. Identifying Trial Court Errors and Appealable Decisions 5
2. The Time for Appeal 7
3. The Trial Court Record 8
4. Preservation of Issues for Appeal 9

**Summary 10**

C H A P T E R 2

**THE THREE OVERARCHING PRINCIPLES  
OF APPELLATE BRIEF WRITING 13**

**A. Thinking Like an Appellate Lawyer 13**

**B. The Perspective Principle: See the Appeal  
from the Appellate Court's Viewpoint 14**

1. Putting Yourself in the Shoes of the Appellate Judge 14
2. Blazing a Seamless Trail Through the Briefing Thicket 17

**C. The Structural Principle: Build the Brief Around  
Analyses of Issues and Standards of Review 18**

1. The Core Function of Appellate Judging 18
2. The Relationship Between the Issues and the Function  
of Appellate Review 19

**D. The Organizational Principle: Separate the Analytic Process from the Writing Process 20**

1. Think (Long and Hard) Before You Write 20
2. Reaping the Benefits of Organizing First 21

**Summary 22**

C H A P T E R 3

**THE STANDARD OF REVIEW 23**

**A. The Review Function of Appellate Courts 23**

**B. Locating the Standard of Review for an Issue 24**

**C. The Principal Standards of Review 25**

1. *De Novo* Review 25
2. Abuse of Discretion 26
3. Clearly Erroneous 26
4. Substantial Evidence 27
5. Mixed Questions of Law and Fact 28

**D. Waiver, Prejudice, and Harmless Error 29**

**E. Explaining the Standard of Review to the Court 30**

**F. The Relationship Between the Standard of Review and the Issues Raised 32**

**G. Using the Standard of Review 32**

**Summary 34**

C H A P T E R 4

**AN OVERVIEW OF THE APPELLATE BRIEF 37**

**A. Types of Appellate Briefs 37**

**B. Determining the Contents of an Appellate Brief 38**

**C. The Basic Parts of an Appellate Brief 40**

1. Jurisdictional Statement 40
2. Statement of Issues 40
3. Statement of Facts 40
4. Statement of the Case 40
5. Standard of Review 41

- 6. Summary of Argument/Introduction 41
- 7. Argument 42
- 8. Conclusion 42

**D. The Mechanics of Producing the Brief 43**

**Summary 44**

C H A P T E R 5

**THE STATEMENT OF ISSUES 45**

**A. The Purpose of Separately Stating the Issues 45**

**B. Drafting the Statement of Issues 46**

- 1. Selecting the Issues 46
- 2. Formulating the Issues 48
- 3. Questions, Law, and Facts 49
- 4. Choosing What to Emphasize 50
- 5. Ordering the Issues 51
- 6. Referring to Parties 52

**C. Recognizing a Good Statement of an Issue 53**

**Summary 53**

C H A P T E R 6

**THE PRELUDE: THE STATEMENT OF FACTS  
AND THE PROCEDURAL HISTORY 55**

**A. The Statement of Facts 55**

- 1. Supplying Dispositive Facts 55
- 2. Context Facts: Telling a Story 56
- 3. Identifying the Relevant and Dispositive Facts from the Record 57
- 4. Lining Up the Facts in Order 57
- 5. Accuracy and the “Favorable Light” 59
- 6. Setting Up the Subheadings as Guideposts 62
- 7. Applying the Principles 63

**B. The Procedural History 64**

- 1. The Function of the Procedural History 64
- 2. Only Essential History Wanted 65
- 3. Applying the Principles 66

**Summary 66**

CHAPTER 7

**THE ROAD MAP: POINT HEADINGS 69**

**A. Creating a “Road Map” Before Writing the Argument 69**

1. Extending Your Analytical Thinking 69
2. A Look at the Table of Contents 70
3. The Multiple Functions of Point Headings 71
4. Thinking About the Order of the Issues 75

**B. Writing a Point Heading 76**

1. Complete Sentences That Use Facts and Persuade 76
2. Subheadings That Break Down the Overall Argument 78
3. Conventions to Follow in Drafting Headings 79

**C. Using Point Headings as an Organizing Tool 79**

**Summary 80**

CHAPTER 8

**BUILDING THE ARGUMENT: CASES, STATUTES,  
AND TRANSITIONS 81**

**A. Using Cases and Statutes 82**

1. The Mental Process of Using a Case Precedent 82
2. When a Complete Analysis Is Needed 84
3. Applying Statutes and Constitutional Provisions 85
4. The Basic Building Blocks of Argument 87

**B. Constructing an Argument on an Issue 87**

1. A Review of What You Already Know 87
2. Setting Up the Argument: Supplying the Necessary Legal Background 87
3. Previewing the Upcoming Argument 91
4. Framing the Specific Issue 93
5. Making Factual Comparisons 94
6. Distinguishing Cases 97
7. Applying Statutes 98
8. Policy or Intent Arguments—Know Your Audience 99
9. Using Quotations in Making Arguments 101
10. To Footnote or Not? 101

**C. Transitions 102**

1. The Structure of Transitions 103
2. Caution and Precision 105

**Summary 105**

CHAPTER 9**THE INTRODUCTION OR SUMMARY OF ARGUMENT 107****A. Previewing the Case to the Court 108**

1. The Perspective Principle (Once Again) 108
2. Differentiating an Introduction from a Summary of Argument 108
3. Checking the Court's Rules 109
4. Purposes: Summarizing and Persuading 109

**B. Common Questions for the Brief Writer 110**

1. Location in the Brief and Its Consequences 110
2. Deciding the Length 110
3. Sources of Material 111
4. When to Write the Introduction or Summary: A Debate 111

**C. Techniques 112**

1. Capturing the Court's Attention 112
2. Telling the Story 113
3. Employing Themes 114
4. Requesting Relief 116
5. Framing the Opponent's Argument 117

**Summary 119**CHAPTER 10**BASIC WRITING AND OTHER MECHANICS 121****A. Good Writing Is Not a Matter of "Style" 121****B. Ten Writing Principles to Follow 123**

1. Sentence Length 123
2. Paragraph Length 127
3. Minimize Use of the Passive Voice 129
4. Keep Subjects Near Verbs and Verbs Near Objects 132
5. Omit Surplus Words 133
6. Do Not Turn Verbs Into Nouns 134
7. Avoid Noun Chains 134
8. Avoid Vague Referents 135
9. Do Not Assume Knowledge by the Reader 136
10. Use Topic Sentences and Stress Locations 137

**C. A Short List of Usages to Avoid 139****D. Citations: A Few Words of Warning 141****E. Writing Improvement in Perspective 142****Summary 143**

C H A P T E R 1 1

**EDITING AND FINALIZING THE BRIEF 145**

**A. The Process of Editing 145**

1. The Importance of the Editing Function 145
2. Creating an Approach to Editing 146
3. The Need to “Break Away” 148
4. Developing Editing Skills Through Practice 148

**B. Finalizing the Brief 149**

1. Cite Checking 149
2. Double Checking Compliance with Rules 149
3. Final Proofreading 150

**Summary 151**

C H A P T E R 1 2

**ORAL ARGUMENT 153**

**A. After the Briefing Is Complete 154**

1. The Waiting Period 154
2. The Court’s Internal Analysis 154

**B. Preparing for Oral Argument 155**

1. “Hot” and “Cold” Benches 155
2. Refamiliarizing Yourself with the Case 156
3. Outlining Your Argument 157
4. Taking Control of the Beginning and the Conclusion 157
5. Confronting the Hardest Questions 158
6. Practicing the Argument and Properly Using Notes 158
7. Knowing and Using the Record 159

**C. The Mechanics of Arguing 159**

1. The Formal Decorum of Oral Argument 159
2. Engaging in a Conversation 160
3. Using a Moderate Tone 160
4. Avoiding the Speed Trap 160

**D. Argument Procedure 161**

1. Introducing Yourself and Reserving Time for Rebuttal 161
2. Creating a Roadmap for the Argument Ahead 162
3. The Appellee’s Argument 162
4. The Concluding “Time Crunch” 163
5. Using Rebuttal Time Effectively 163

**E. Answering Questions    164**

- 1. The Initial Response: A Full Stop    164
- 2. Answer, Then Explain    164
- 3. Always Respect the Court    166

**Summary    166**

A P P E N D I X   A

**Sample Appellate Brief    167**

A P P E N D I X   B

**Chapter Exercises    193**

*Index    225*