How to Write a Great Opening Brief

by Bill Robinson, SDAP Assistant Director

Preface

Who am I kidding, writing an article about great opening briefs? Okay, colleagues sometimes compliment me on my briefs, while telling me that (a) the briefs are too long, (b) my sentences are torturous and convoluted, (c) I get too caught up in academic or pedantic exercises, and that (d) humor and irony are wasted on the audience for the briefs.

And how is my track record as an advocate? I win a very small percentage of my cases, and have had grants of review a grand total of two times in nearly 40 years of being in this racket, with zero granted since I started working at SDAP in 1998. So how would I know how to write a great opening brief, let alone a persuasive and effective one?

When I volunteered to write this article, not long before the world, as we have known it, seemingly changed forever back in March of 2020, I had two ideas. The first was to do a kind of counterpoint article in response to my friend, former colleague and former boss, Dallas Sacher, whose article on brief writing stresses brevity, conciseness, and precision in briefing.[1] I figured that my maximalist style would contrast well with his minimalist style, and I could give folks two poles between which they could comfortably operate, while sharing a number of common themes.

My other idea was to use one of my old familiar tricks for article writing: to call upon a number of my esteemed colleagues and ask for their ideas how to write a great opening brief, and then put together a kind of smorgasbord of ideas, with my own styles and techniques included in the mix. I did this with good success in my "Zen and the Art of Issue Spotting" article and rewrites, and on my article about Oral Argument. I figured this would work well for the art of brief writing, because it would allow me to show that lots of styles and different techniques can be employed for effective brief writing while stressing some common themes. Also, this would allow me to juxtapose different styles of brief writing, since some of the superb lawyers I work with on our panel adopt a more minimalist, concise approach to briefing, while others effectively utilize more expansive and developed argumentation to good effect, with most striking a balance somewhere in

[1]See, e.g., Dallas Sacher, "Practical Advice on Briefs and Making a Prima Facie Case," from the 2014 SDAP Seminar. Found at http://sdap.org/downloads/research/criminal/eds14.pdf.

between.

In the end, though, I have decided to just pontificate about what I believe are the qualities of great brief writing. What qualifies me to write such an article, I believe, is not so much my own somewhat uneven history of writing briefs for my own cases, but rather the experience of 21 years (plus several lives in being) of reviewing drafts of opening briefs by panel attorneys – especially in the last dozen-plus years in Greening training cases, involving some of the best attorneys on the panel working in homicide and sex-crime cases. In the course of the challenging and (mostly) enjoyable task of reviewing drafts of briefs by panel attorneys, and helping to steer them towards more effective, persuasive, clear, and concise exposition and argumentation, I think I have learned a thing or three about what makes for a great brief.

I will divide this article up into three parts. First, I want to pass along some useful general themes about brief writing, a kind of Gestalt for writing a great brief. Second, I want to refer you to, and borrow from, available resources and articles that will help you be a better brief writer, including a short article I did years ago about how to write effective statements of the case and facts, Zen and the Art of Issue Spotting, Dallas's article, and a number of helpful essays concerning how to effectively argue prejudice, avoiding procedural default, and properly federalize appellate arguments. Finally, I want to discuss the importance of style and careful editing in brief writing; in that section, I will borrow some from Dallas's article, and explain some of my disagreements with it.

A. **Bill Robinson's 10 Postulates for Great Brief Writing.**

Just as I do when I am making up a new issue, hitherto unbriefed, or drafting a motion that no one has ever drafted before – both relatively common experiences – I am going to be improvising in this section, but will try to draw upon decades of experience as outlined above.

I have come up with ten general themes for writing a great opening brief. Alas, none of them will write the brief for you. As you all know, writing a brief requires an agony of effort, thought, discussion with colleagues, many starts and stops, disparagement of your own ideas, combined with those precious moments of brilliant realization that you are on to something, and those inexplicable writing binges that can sometimes produce the beginnings of a great argument.

What follows might appear to be somewhat formulaic in approach, as it's hard to capture to "magic" and artful parts of brief writing, though I try to do so to some extent. I

hope these are useful to you, and can assist you in improving your work in opening briefs. At a minimum, it will provide a useful foil against which to compare your own practices, for better or worse.

Here goes.

Postulate 1: The Obvious and the Issue Outline

It all starts with . . .

(1) Careful review of the entirety of record and very detailed note-taking;

(2) Issue spotting and preliminary research; and

(3) Writing up a detailed outline of the potential issues to be raised, which you should go over repeatedly and, where possible, get vetted by a colleague or appellate project buddy, especially where the issues are either iffy or novel of both.

I will mostly focus on the third category, since the first two are outside the purview of this article, and already addressed at length in my Issue Spotting article.

Put plainly, *the issue outline is the foundation of every opening brief I write*. My outlines tend to start out as a rough list of potential issues, with the net cast as wide as possible, at least in the beginning. I've learned to describe the potential issues with sufficient specificity and substance, so that, later on, I can figure out what I was all excited about, but with the research and details to be filled in later.

I hasten to add, going back to (1) and (2) above, that since I switched to primarily (and these days, exclusively) electronic legal research, the process of reading the record has become increasingly commingled with exploration and preliminary research on potential issues. While going through the trial transcript, or even the trial minutes or jury instructions in the clerk's transcript, I will flag an apparent error/issue – e.g., a dubious evidentiary ruling, or a particular instruction that was given which seems wrong or improper in some sense, or the absence of a key instruction that should have been given – and then dive into some preliminary research. I then include what I learn from my research excursion in my record notes, with quotes or cites of key cases, and thumbnail sketches as to how such an issue could be raised.

My notes will contain lots of asterisks (**) and explanation points or question marks (*?!) which reflect my level of excitement or uncertainty about the issue. This process makes it much simpler to do my issue outline, because I can just scroll through my notes looking for the asterisks, and then cut and paste (and edit into discernible prose) these portions of the record notes into my issue outline.

The above is suggestive of my general approach to writing the issue outline: Go through your record notes, including all the little issue-asides that are already in it, and compile a detailed and, at least to start with, overly inclusive list of potential issues and questions about possible issues or problems. Throw everything in that seems remotely arguable or plausible; you will sort it out later, as described below. Even if something just bothers you, find a way to make it sound like an arguable issue.

Once I have made this preliminary issue list, I spend a lot of time working it over, massaging it into some semblance of an outline for my opening brief. This will lead to some issues being developed as most promising, with others winnowed out or moved to the back of the line, and the rest stuck in the middle somewhere. (This process is part of the "issue spotting magic" covered by my Issue Spotting article, to which I refer those readers who have not reviewed it yet.)

When I'm compiling the list, or after I've thrown everything in, I like to sort out the issues in two different but related ways. First, by *category* – e.g., evidentiary, instructional, sentencing, etc. – and second by their seeming strength – strong/winnable, arguable/ middling, weak/hopeless.

Second, and especially in more complex jury-tried cases, I also try to sort issues out into different *thematic bundles* for related issues. As one example, if it's a homicide where self-defense, provocation, and the effects of a mental disorder were involved in the defense theory, I'm going to come up with a related list of all the potential issues concerning these different but related defenses, which while help me to develop a "theme," or related sets of themes, for the brief – more on "Themes" in opening briefs in a bit. There might be an issue about the failure to instruct on one of the aspects of the combined defenses, defective instructions, lack of meaningful instructional guidance on the interplay of these different but related defenses (e.g., the effect of a mental disorder on imperfect self-defense), evidentiary errors related to the defenses, prosecutorial misconduct in witness examination or argument affecting one or more of the defenses, or a judge's failure to properly respond to jury questions about the defense theories or how they relate to each other.

An issue outline, like the brief that will come out of it, needs to focus, and focus hard, on *winnable* issues. Zen and the Art of Issue Spotting talks a lot about how to figure out which issues are winnable, focusing on factors like the weaknesses of the prosecution case, strengths in the defense case, or critical questions of legal ambiguity which could have led to an unjust verdict. The winnable issues should always be in the front of your outline, even if they are not necessarily in the front of your brief (although

they usually should be – more on that in a bit).

When I'm finished with my Issue Outline, it reads like a thumbnail sketch of the opening brief. But, with rare exceptions, it's not written like an opening brief.[2] The prose is choppy; there are many questions raised but not answered; and there are lots of counterpoint arguments with references to unfavorable holdings that stand in the way, followed by ideas about how to work around these impediments. But when I am more-or-less done with the Issue Outline, I have a roadmap for the opening brief I am going to start writing.

Postulate 2: Issue Outline First, Then Statements

It has always been my practice, which I have hardly ever varied from, to write the Statements of the Case and Facts *after* I have my issue outline in the bag. I know that many fine appellate attorneys start writing their draft of the statements as they read the record, and edit it as they go along, doing a final set of revisions of the statements after the brief is written, if necessary. I strongly counsel against this. I will say more, in outline form, about writing statements below, borrowing from my previous article on this subject. But the main point here is this: *the issues you raise should inform and circumscribe what you say and how you say it, in the statements*.

Postulate 3: Introduction(s), a Flexible Approach

These days it seems like every opening brief begins with an Introduction which summarizes the case and the arguments to be raised, composed with varying levels of artfulness and rhetorical urgency. For me, this is not an invariable practice. But I do utilize three or four different types of Introductions, depending on the case, and sometimes mix and match them, with the Intro at the beginning of the brief just one variation.

a. **Introduction for Each Issue.** First and foremost, I nearly always do an introduction, or "summary of argument," for each substantive issue raised. The point of this is to give the reader a heads-up about what is coming beyond the descriptive heading – more on headings next. It's important to tell the reader where you are going,

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[2]Sometimes I get carried away and start spitting out the brief argument in my notes. I find myself doing this most often when outlining a reply brief. This makes it easier to just cut and paste into the brief, adding in the cites to the record and authority and, in the case of the reply brief, editing out or toning down the inevitable wise-cracks about the AG's arguments.

particularly if you have an issue which, like many of our claims, has lots of twists and turns in it.

For example, if the claim is prosecutorial misconduct as to an interesting and novel area of the law, but defense counsel didn't object, in your Introduction or Summary of Argument section, you will want to situate both the misconduct claim and counsel's ineffectiveness, as well as briefly explaining prejudice, i.e., why this misconduct/IAC mattered in this case based on the evidence, defenses presented, or weaknesses in the prosecution's case. With the same type of error, we will sometimes see a "sort-of" objection by counsel; when that happens, you are going to want to argue it as misconduct based on the half-assed objection, maybe back that up with a claim that the issue is cognizable because no admonition could have cured the harm, and then back that up with an IAC claim. An introduction, which can vary in scope and size depending on the issue and sub-issues involved, helps lay this out for the reader. Only with short and simple issues do I omit this introductory passage.

Sometimes I will combine this "Introduction" or "Summary of the Argument" with the "Procedural and Factual Background" portion of the argument – and, again, more on this in a bit when I talk about how I tend to organize issues by sub-arguments. I tend to go with whatever works best for a particular issue.

b. **The Global Introduction, Two Variations.** A second kind of introduction I will often employ is the global introduction summarizing all of the issues raised in the brief. This has two alternate types – hence my "three or four" above. The first version, which I see most commonly in others' briefs, comes at the beginning of the opening brief, before the Statements. The second variant, which I personally tend to use more often, comes *after* the statements, following the "Argument" heading in the brief but before Roman I argument.

Which one I choose is going to depend upon the relationship of the facts and procedural history of the case to the arguments presented. If I think the reader will have a better understanding of what's important in the procedural history and factual summary if they are already familiar with the arguments, I will put the Introduction first. But if my gut tells me that the arguments are better understood *after* the reader has reviewed my summary of the wacky facts and procedural background, I will put the statements first.[3]

[3]Never do both. I have seen it, and it does not look good.

c. **Introduction to the Fact Statement.** The final introduction I will sometimes use, commonly in cases with lengthy records with conflicting evidence, is an introduction to, or "summary" of, the Statement of the Facts. I started seeing this in briefs by some of my favorite appellate advocates, and then began employing it myself.

In cases with particularly long and confusing facts, conflicting evidence, lots of experts, and lots of government witnesses, this Introduction or "Summary of Facts" gives you a chance to highlight the key facts of the case that really matter to the arguments which are coming. Doing it as an Introduction allows you to employ a condensed format where there is normally no need to provide all those tedious and distracting citations to the record. While one should avoid being argumentative in such a summary, which is a no-no in a fact summary, you can be choosy and artful about how you put your summary together.

d. **Mixing and Matching**. There are no set rules for these things. Even where I write a global introduction, I also tend to do a summary or introduction for every argument which is lengthy or complex. Sometimes I will write an introduction to a grouping of related issues (e.g., for issues II-IV in a 8 issue brief – see "Themes" below).

I also find myself doing a global introduction which incorporates a summary or introduction of the factual background to the case. The Appendix to this article includes an example of this from my Chase Benoit case. (See Appendix 1.) Needless to say, if you do this, you won't also want to include a separate, redundant summary of the facts preceding the Statement of the Facts.

Postulate 4: Headings and Subheadings Should Help Advance Your Argument.

This small topic is an important one that is often overlooked and not emphasized enough. You can use headings and subheadings, which are required by the Rules of Court (see Rule 8.204(a)(1)(B)), to advance your arguments in an effective way, as I discuss below.

Headings – Artful, Informative, Sufficiently Federalizing, but not Unduly Verbose, with Tedious Run-On Sentences and Rote Recitations Which Cause Readers to Avert Their Eyes.

Too many headings (and sometimes subheadings) read like what I just wrote above, both in the form of my subheading above and the substance of what is described in the second part. Here are my ideas about headings which I have developed over the

years.

Postulate 4a: Global headings, and sometimes the key subheadings, should be written in the form of a *sentence*, and should describe the issue (or sub-issue), with sufficient specificity and clarity that the reader gets a good understanding of the nature of the claimed error. I have always taken the position that headings are critical because the first thing a reader of your brief sees when they pick up the brief is the Table of Contents, which compiles all the headings and sub-headings. I like to think that when I am done writing a brief, the Table of Contents, to some extent, tells the story of what's coming in the brief, and what was wrong with the case in the trial court, such that the reader has a good sense, after reading the Table of Contents, why reversal is required. Of course it doesn't work that way, but that is what I try to accomplish. This means that headings should be descriptive of the issue in a meaningful way. It should tell the reader what the issue is about.

I have too often seen headings in drafts of opening briefs, and in opening briefs where I didn't get to review a draft, which looked as follows:

> SENTENCING ERROR BY THE TRIAL COURT REQUIRES REVERSAL AND A REMAND FOR RESENTENCING.
>
> THE TRIAL COURT'S ERRONEOUS DENIAL OF THE PENAL CODE SECTION 1538.5 MOTION COMPELS REVERSAL.
>
> THE TRIAL COURT'S IMPROPER INSTRUCTION UNDER CALCRIM NO. 3428 VIOLATED APPELLANT'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS, REQUIRING REVERSAL.

Look familiar? (Just kidding.) What's wrong with these headings? *There's no way to know what issue is at stake in the case*!

You need to describe the sentencing error; you need to explain what type of Fourth Amendment issue is raised; and you should, at a minimum, tell the reader that CALCRIM 3428 involves evidence of a mental disorder as it relates to proof of a specific intent. Here's three counter-examples, where the nature of the type of error is specified and the argument is properly set up.

> The Trial Court Abused its Discretion When it Ordered Execution of the Previously Imposed Sentence Based Simply on the Fact That Appellant Had Violated Probation, and Did So with No Meaningful Consideration of the Available "Sentence Choice" Between Reinstatement of Probation and Execution of the Prison Term.

Appellant Was Detained Without Proper Justification When a Police Officer Shined a Vehicle Spotlight on Him While He Was Walking down the Street at 2:20 a.m. and Asked to Talk to Him. Thus the Trial Court Erred, in Violation of the Fourth Amendment, by Denying Appellant's Motion to Suppress Evidence, Requiring Reversal.

The Trial Court Erred, in Violation of California Law and the Sixth and Fourteenth Amendment Jury Trial and Due Process Protections, by Failing to Sua Sponte Modify CALCRIM 3428 to Include Language Telling the Jury That the Mental Disorder Evidence in the Present Case Was Admissible as to the "Manslaughter" Elements of Murder Which the Prosecution must Prove Beyond a Reasonable Doubt, Namely That the Killing Was Not Committed in Imperfect Self Defense and Not in the Heat of Passion from Provocation.

Okay, these are long. But they concisely describe the issue, and the two involving federal constitutional error adequately federalize the error in the heading. And hopefully, each of these – all from briefs I wrote – tell the reader what's a stake in the issue, or at least lay the groundwork for me to do so.[4]

Subheadings. Every argument longer than 6-8 pages should include subheadings. Likewise, every Statement of the Case which describes multiple sets of proceedings, and every Statement of the Facts longer than 8-10 pages should also include descriptive subheadings.

Postulate 4-b-i: Most subheadings can be concise and not necessarily in the form of a sentence. For example, in the sentencing argument summarized above, the first three subheadings in my brief are:

Procedural Background;

Applicable Legal Principles; and

The Trial Court's Abuse of Discretion.

Postulate 4-b-ii: When subheadings involve important matters of substance, and are complicated, they should be written in the form of a sentence, and be descriptive in the same way as a global heading (though, hopefully, shorter). Here's an example from the same brief:

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[4]You may have also noticed that these headings are not ALL-CAPS, but use Initial Caps formatting. Increasingly, this is how my headings look. ALL-CAPS headings are a relic of typewriter days. They are not required by the rules, and are hard on the eyes, especially with longer headings. I recommend using them sparingly or not at all.

D. The Issue is Cognizable on Appeal Because Counsel Argued for a Grant of Probation, There Was No Meaningful Opportunity to Object, and Any Further Objection Would Have Been Futile. Alternatively, Any Failure to Object to the Erroneous Factual Premise of the Court's Sentence or to the Refusal to Exercise Discretion Amounts to Ineffective Assistance of Counsel Under the Sixth Amendment.

That's all I will say about headings and subheadings for now. Try not to make them unduly verbose, but make them clear, specific, and descriptive of the error. You should also federalize the argument in the heading or subheading when raising a constitutional claim in order to satisfy the "exhaustion" requirement for such error to be presented in federal court.[5]

Always bear in mind the point I started this discussion with – that headings and subheadings, in the Table of Contents, are the first thing the reader sees in your brief, and thus by structuring their phrasing as a kind of outline to the brief and its various components, you can advance the presentation of your arguments on appeal.

Postulate 5: Writing it up: Organize Each Argument in an Easy-to-Follow, Predictable Way.

Once you have identified that potentially winning issue, and carefully developed its substance through research, consultation with colleagues or your buddy, it's time to begin drafting that issues. But what's the best way to organize the argument?

Of course, every issue is different, and some balance between routine and predictability, on the one side, and creativity and attention-grabbing variation is part of our stock-in trade. But typically, I find myself organizing all but the simplest legal arguments into a set of subheadings that follow a fairly stable outline:

A. Introduction/Quick Summary of Argument;

B. Factual and Procedural Background (As noted above, A & B can be combined);

C. [And sometimes] Cognizability of the Issue on Appeal

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[5] Here's how my colleague Jonathan Grossman put it a few years ago in his article on federalization: "To satisfy the exhaustion requirement make sure to expressly cite the applicable federal constitutional provision at stake and controlling United States Supreme Court precedent. Include the same express citations in your petition for review. A useful technique is to cite the applicable federal constitutional provision in your argument heading. By doing so you will never inadvertently fail to exhaust your claim in state court."

D Applicable Legal Principles, Including the Standard of Review;
E. The Trial Court's Error (or the DA's or Jury's Misconduct, Counsel's IAC, etc.)
F. Prejudice/Requirement of Reversal
G. [And sometimes] Remedy

This preset of sub-arguments generally informs how I structure most issues in a brief. Starting with a summary of the issues, followed or combined with the necessary factual and procedural background, sets the table for the argument. By separating out the "Applicable Legal Principles" from the Court's Error/Misconduct/IAC, I am able to divvy up my "objective" summary of pertinent law from my "diligent advocate" summary of what was wrong in the case. The Prejudice section, which is absolutely critical – more on this in a bit – lets me tell the reader why the court's error or the malfeasance of the prosecutor, jury or defense counsel made a difference in the outcome.

The two "Sometimes" sub-arguments, Cognizability and Remedy, are often not necessary, but are many times very critical. You can normally cover the cognizability of an issue – i.e., whether a sufficient objection was made in the trial court, or whether this type of error involves a sua sponte duty or involves a species of legal error where objection is not required (e.g., IAC on direct appeal) – in either the Procedural Background section (e.g., there was a sufficient objection), or the Applicable Legal Principles section (e.g., sua sponte instructional duty). But when it's complicated, as it often is – i.e., was the objection specific enough? or did the objection properly federalize the claim? – a separate cognizability section – like the one outlined in the sub-heading above – can be necessary.

The oft-omitted "Remedy" section gives me a chance to tell the Court precisely what I want them to do if they agree with my argument, or some aspect of it. This comes into play in issues like Fourth Amendment claims in plea cases, where the remedy is fairly odd, or in cases of sentencing error, where you want to specify whether you are requesting that the Court of Appeal simply direct a modification of the judgment, or remand for new sentencing hearings. And I *always* make a point to include, in any sufficiency argument, that the remedy of reversal presumes the double jeopardy protection which preclude retrial when an appellate court finds insufficient evidence to prove a crime or enhancements. (See *Hudson v. Louisiana* (1981) 450 U.S 40, 44.)

Postulate 5a: Standard of Review. But "Wait!" you are saying. "Bill Robinson, you've left off the Standard of Review!" I know, these days, every brief has to have a section called "Standard of Review." To that I say "Phooey!" That's just one piece of the

"Applicable Legal Principles" and should not be privileged into its own section. Yes, it is something that should be covered in some form for any argument, but dividing it up from the summary of applicable law just seems like an unnecessary fetish which I try to avoid.

Postulate 5b: The Complicated Omnibus Issue. Obviously, every argument is different and creativity is often called for when structuring any particular argument. With some issues, we find ourselves raising a series of *alternative* arguments each focused on winning reversal based on an evidentiary error, or an instruction given, or not given/ refused. Then you have to be tactical and creative.

First, you need to decide if these alternative arguments hold together, such that they belong under one Roman numeral argument as a set, or whether they should be separated into multiple Roman numbered arguments. If you're going to keep them together in one omnibus issue, which I like to do with related issues, what's the best way of organizing this compound issue?

An introduction to, or summary of, such an issue is going to be critical so that the reader can follow what's coming. Normally, a single summary of the procedural/factual background will suffice. Typically, though, the "Applicable Legal Principles" and "Trial Court's Error (etc.)" portions have to be set apart into the sub-issues as you get to them.

With the Prejudice section, you have to be tactical and careful. Is the alternative argument focused on a single error/omission, such that a combined prejudice argument will suffice? Or do the sub-arguments standard apart such that you need to discuss prejudice as to each separately? And, if you do it the latter way, should there be a mini-cumulative prejudice argument at the end?

Here's a couple of quick examples of situations where different structuring is required.

(1) **Series of Acts of Misconduct by DA, or related evidentiary error.** It's usually a good idea, when you have multiple acts of misconduct by a DA, or related instances of evidentiary error, to separate them out into sub-arguments, with separate prejudice arguments as to each. Why? Because the Court of Appeal is rarely going to find that all your misconduct allegations or evidentiary error claims are valid. You can then end with a mini-cumulative error argument as to the combined impact. Also, there may have been objections to some but not others, so you will have different cognizability issues and IAC backups that apply to some, not others.

(2) **Challenge to Evidence Code Sections 1101(b)/1108/1109 Prior Bad Acts**. Typically, we will argue that (a) these don't comply with the 1101(b) (etc.) requirements, (b) should have been excluded under section 352, and (c) their admission violated due process, and sometimes also, (d) that counsel was ineffective for not objecting or federalizing the objection, and maybe sometimes also that (e) the instructions on the other crime evidence was erroneous. But since it all involves the same evidence, a single prejudice argument can be made, with attention to the fact that two or three different prejudice standards may apply.

As should be obvious, my suggestion as to how to structure arguments won't carry over into every issue in every case. In my oral presentation and power point, I will try to give some examples that apply to particular types of cases that don't fit the mold, e.g., Fourth Amendment challenges, and sufficiency claims. But hopefully, it is a useful formula to be applied when it does fit, and can be tinkered with as needed.

Postulate 6: Developing the "Theme" or "Themes" of a case in your briefing.

Here's a subject that never really occurred to me at a conscious level until I started doing the Greening training. Every case with arguable issues that have some chance of success necessarily has a unifying "theme" – or sometimes, a set of related themes – that hold the case together and give you a "hook" from which to argue for reversal or a meaningful remedy for the client.. These come in various sizes, shapes, and forms.

Sometimes the theme of a case jumps right out at you – e.g., this is a provocation manslaughter case, and nearly all the arguments presented – instructional error, exclusion of evidence, failure to respond to jury questions – tipped the balance in terms of making it easier for the prosecution to get a murder conviction and harder for the defense to show that the prosecution had failed in its burden to show the absence of heat of passion from provocation.

Sometimes the theme of a case is less obvious, but you discover it as you are putting the brief together. I recall one particularly strange Greening case I had with Michael Sampson which involved a charge involving a sex crime committed 10 years before the charges were brought, involving a violent sexual assault against the 4-year old friend of the defendant's daughter, where defendant had previously molested a number of his children and done time for many of these prior molests. In that case, the "theme" turned out to be a common thread in the prejudice arguments which went something like this: "Yes, the 1108 evidence involving molestation of defendant's daughters demonstrates beyond question that appellant is a child molester; but it also shows he's a

certain *kind* of molester – one who grooms his victims and never uses physical force in his acts; thus the allegations in this case, of a violent, horrible, forcible act against a young child, disclosed a decade later, with an ulterior motive behind the accusation [to keep him locked up], were not credible." I mean, that theme didn't get Mr. Sampson anywhere in terms of winning the case; but it actually made sense in the case, and tied together the different issues in the case which went to the credibility of the most recent accusation.

In a somewhat similar vein, the theme could be, as it was in my *Cortez* case a few years ago, "Yeah, he stabbed the guy, but it wasn't an attempted murder," with several unrelated issues – concerning 1101(b) evidence, and the trial court's failure to meaningfully respond to the deliberating jury's questions about the lesser offense of assault with a deadly weapon, and the meaning of "intent to kill" – tied together by the ways that the various errors tipped the balance in favor of the attempted murder verdict and away from the lesser charge.

Or the theme can be punishment, i.e., the virtual LWOP punishment imposed on this young gang offender, or child molester, or third striker who never really physically hurt anyone, is shocking and unfair; and here are five different types of legal error or ineffectiveness by counsel which show this. A"punishment theme" in a more simple probation case could be that the probation condition(s) imposed in this case just don't fit the nature of the crime and the offender.

Thus, the "theme" of your appeal can involve errors and the defense theory, as in the first example; or it can be a unifying principle that ties together diverse issues with a common prejudice argument about a major weakness in the prosecution case, as in the second example. Alternatively, the theme can involve one of the alternative theories advanced by the defense, as it was in the third example (there was also a "he didn't stab him" defense weakly put together in *Cortez*). And in the final examples, the theme can be the injustice of the punishment. But in every case, there is some unifying principle that ties together a set of different issues.

Of course, cases can have multiple, and alternative themes, sometimes running counter to each other. In Mr. Cortez's case, if I had some way to argue error showing that Cortez was not the stabber, I darn well would have presented it, even though it divulged from the "he stabbed him but it wasn't attempted murder" theme.

Why do I think that a unifying theme is important in an appeal? Because the Court of Appeal, who will decide your case, sees criminal appeals with both novel and recurring legal issues all the time, and largely views their job as getting around these and

affirming judgments rendered by juries, and sentences imposed by hard-working trial judges. To get their attention, to let them think this case is different, it is very useful to have something about your case that stands out as wrong, as unjust, as out-of-the ordinary, such that an appellate remedy is called for. In my view, some kind of unifying principle, or set of related principles, behind your argument which carry through in your case, will help you to persuade the court that this is one of those rare cases requiring a meaningful remedy. In pop culture terms, think of it as a kind of "hook" which makes your case stand out and cry out for a remedy.

I also have come to believe that we are better advocates for our client when there is some unifying theme which ties the case together for *us*. At some point in putting together the issue outline, writing up the statements, or drafting the issues, when the theme becomes apparent to me, I become a better advocate for the client, and I start to believe that our theme is valid and should lead to victory. This makes you a better advocate.

When and where in your brief you can reference the theme or themes is a challenging question. The obvious places are Introductions, the obligatory "Cumulative Error" argument at the end of the brief, and, sometimes, in a Conclusion. But the theme can run through the arguments themselves. If it's a related set of unique facts giving rise to a common claim of prejudice, you can emphasize this common thread when making your (sometimes redundant) prejudice claims. If it's a series of arguments of instructional, evidentiary error, and misconduct related to the same defense theory in the case, you can tie these together into a coherent theme by referencing preceding claims as bolstering subsequent arguments. Much creativity can go into the process of making a theme of your opening brief apparent to the reader, and getting the most out of it.

Postulate 7: Prejudice is Everything.

I won't say much about this point, because I think most of you know this very well already, and because there are many great articles written which can help you to write strong and effective prejudice arguments, some of which I reference in Part B below. My point here is that effective appellate advocacy is pretty much meaningless if you can't find a way to get over on prejudice, to show that the claimed error had a qualitative impact on the result.

In the hundreds of briefs I have reviewed since coming to SDAP in 1998, one of the most troubling things I see, both in drafts in assisted and training cases, and in finished, filed briefs in independent cases, are deficient, underdeveloped prejudice

discussions. Too often, prejudice is almost assumed from the nature of the error, with little substantive discussion. This can kill the argument and your chances of success, and gives the Attorney General and the Court of Appeal an easy way to argue for affirmance, no matter how great your legal claims might be.

Since this subject is covered in many useful articles, which I will reference in Part B below, let me just make a primary point:

> **Every prejudice argument should focus on *both* (a) the nature of the error and its effect on the part of the verdict or sentence we are seeking to challenge; and (b) the overall weaknesses in the prosecution's case or strengths in the defense case which made this a close case irrespective of the claimed error, and thus tip the balance in favor of reversal.**

I can't tell you how many times I have made one or both of these two points in comments about drafts of opening briefs, urging the writer to fully explore *both* these avenues when one is missing or underdeveloped in a prejudice claim.

There is more, of course. Controlling *standards* of prejudice must be effectively discussed and emphasized; comparable cases finding similar error prejudicial should be analogized; and all those awful cases out there finding similar error harmless need to be distinguished or criticized as wrongly decided.

My point is simply the one in the heading: prejudice is everything! And the more meaningful attention you can pay to this critical component of your brief, the better are your chances of prevailing on appeal.

> **Postulate 8: Authority and Argumentation: Creativity, Persuasiveness and Selective Repetition.**

I have said very little so far about the actual writing of the brief. Maybe that's because this is the hardest thing to write about. Every advocate has their own writing style, their own techniques for being persuasive, and their unique ways of emphasizing the key aspects of an argument, or working their way over or around the obstacles to a winning claim. I think I know what works for me; and I think that, as a reader, editor, and helper with briefs by others, I can get a good sense of what will work better for them. But it's not so easy to convey this. Here's a few suggestions, which will hopefully tie together.

Postulate 8a: Careful and Creative Use of Authority – an Ex Post Facto Story. Every legal argument we advance has to be based on authority from cases, constitutions or statutes, and wherever else we can find it. Which means, in the first instance, when

you are doing your issue spotting and outlining, you are diving into your Lexis/Westlaw (and maybe books?) with zeal and spirit, looking for both helpful and unhelpful case law. I like to have an outline that goes deep enough into the existing authority to give me a running start with my briefing. I also like to run circles around the case law, as it were, looking for parallel authority that may be helpful. This is where the "creative" part comes in.

Very often when you are thinking up something novel to raise, you find no case law directly addressing the point. What do you do? You find something analogous and do your best with it. Let me just cite one example, from my excellent (thus far) losing argument about the Ex Post Factor Clause and Prop. 36, the Three Strikes Reform Act of 2012 ("Reform Act").

As you will recall, the Reform Act gave inmates a way to petition for resentencing where their "current offense" conviction – the one that, umpteen years ago, sent them to prison for life when combined with the strike priors which proceeded it – is not a serious or violent felony. One of the obscure but important legal questions which arose from ambiguities in the statutory language in the Reform Act was whether this limitation meant that the current offense was a serious felony *at the time of the commission of the current offense*, or whether it meant that it was a serious felony *at the time the Reform Act was adopted*. This mattered to a lot of inmates, including several of my clients, because they had current offense convictions for crimes which were not serious felonies when they committed them in the late 1990s – e.g., criminal threats (§ 422), witness dissuasion (§ 136.1), and any-felony-with-a-gang-enhancement – but which became serious felonies after the passage of Prop. 21 in March of 2000.

Our brilliant statutory construction arguments as to why the status of the crime *at the time it was committed* was the controlling fact were shot down by the Supreme Court in *People v. Johnson* (2015) 61 Cal.4th 674. Focusing on the use of the present tense in the controlling statutory language, *Johnson* held that the status of the crime on the effective date of the Reform Act was controlling. I *hated Johnson* and still believe it was erroneous. But they're the Supreme Court.

However, all along, I had a constitutional argument in my back pocket which had not been raised in *Johnson* (despite my urging otherwise with counsel for Johnson); can you guess what it was? Yes, the Olde and Improved Ex Post Facto Clause![6] Changing

[6]See my article of the same name, which I wrote early in my days with SDAP

the status of the "current offense" crime after its commission, making it more aggravated, and causing greater punishment based on changes of the law after the offense was committed, were plainly violations of this bedrock constitutional principle.

The problem was, there was no case law applying the Ex Post Facto Clause to a resentencing law. And there was a lot of bad case law holding that the *Apprendi* doctrine did not apply to resentencing laws. So what was my ex post facto authority going to be? I got creative, and combined analysis from two lines of ex post facto cases. First, I looked at the exact language from the seminal Supreme Court case on the Ex Post Facto Clause, Justice Chase's separate opinion in *Calder v. Bull* (1798) 3 U.S. 386, concerning the rarely-applied second category of ex post fact laws, i.e., a law which "aggravates a crime, or makes it greater than it was, when committed." (*Id*., at p. 390.) Surely this is precisely what happened when Prop. 21 was passed and turned my clients' non-serious felony crimes into serious felonies, a more aggravated type of felony under California law. This was clear enough. But this "aggravation" of the nature of the current offense had no discernible impact upon my client until the Reform Act was passed, and then not until *Johnson* was decided adversely. What was my authority, under ex post facto jurisprudence, for there being a violation of the Clause based on something which would have *reduced* punishment, rather than something which *increased* punishment?

To answer this, I turned to a provision of the Clause with which I was more familiar, the third category, which concerned, as Justice Chase put it, "Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed." (*Calder*, *supra*.) In a pair of fairly recent cases, *Weaver v. Graham* (1981) 450 U.S. 24 and *Lynce v. Mathis* (1997) 519 U.S. 433, the Supreme Court had applied the third category to laws which reduced an inmate's ability to earn conduct credits based on changes of law enacted after the inmate's crime, but before the inmate's good (or bad) conduct in prison led to a calculation of his good time credits, concluding that such laws violated the Clause. There was some great language in those decisions which arguably applied to my Three Strikers, which referred to the new law in *Weaver* as changing the "effective sentence" of the defendant by "*constrict[ng] the inmate's opportunity to earn early release*, and thereby mak[ing] more onerous the punishment for crimes committed before its enactment." (*Weaver*, *supra*, at pp. 35-36, emphasis added.) Now that was a very helpful phrasing because it was exactly what happened in my client's case: the client's "effective sentence" – i.e., the time he actually had to serve – ended up being longer than it would have been but for the retroactive change in the law making his crime a serious felony; and like the "gain time" earning restrictions at issue in *Weaver* and

Lynce, the consequences of the change did not become evident until after the change in law took place.

Of course, this brilliant argument got me nowhere in the Sixth District, with unpublished decisions holding that Ex Post Facto had no application to sentence reducing laws, denial of review and, ultimately, after a seemingly hopeful request for briefing by the Attorney General, denial of certiorari.[7]

That was a long diversion, but hopefully it gives you an example of (1) how to be *creative* in your use of authority, and (2) why it makes you a better advocate when you believe in your crazy issue ideas.

Postulate 8b: Being Persuasive by Remembering Who Your Audience Is.

We all strive in our briefs to persuade the appellate court that our arguments are compelling and correct. At the same time, we are doing our best to be effective advocates for our clients and for the cause of justice and fairness that we serve as part of our work. But it's not always easy to know how to draw the line, or to chart the shoals between our zeal as advocates and our obligation to present fair and balanced arguments to Courts of Appeal that don't necessarily share our advocate's passion for justice and fairness for our clients.

It's hard for me to describe how I try to do this. It's almost an instinct. When the law is clear and in your favor, and the trial court clearly erred, this is not difficult. In cases like this, all you need to do is cite the correct law, then go back to Postulate 7, and argue prejudice as best you can. But when you are pushing the frontiers of the law, and even arguing that some seemingly settled point set against you is wrong, it is sometimes hard not to get carried away by your own zeal and make arguments which will not be appealing or persuasive to appellate justices or to the members of their staffs who do the leg work in most appellate cases.

I try to temper my ardor with practical wisdom about what rhetorical strategies are likely to work, and which ones are likely to fall flat. If there are cases against you, find ways to distinguish them, and find analogous authority that is more favorable. If the

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[7]I never gave up. I have a Cert. petition pending now in a case raising the same issue. I also included an equal protection challenge, comparing my client to a similarly situated hypothetical defendant who was never sentenced for his Third Strike crime committed on the same day as my client, who plainly could not get a life sentence for his nonserious felony crimes under the Reform Act without violating ex post facto. This briefing is attached in the appendix if you are interested in seeing how I did this.

authority against you comes from the Court of Appeal, make your best argument that this case was wrongly decided, even if the authority is from the district of the Court you are addressing.

When the authority is from the state or U.S. Supreme Court, there are times when you need to state, flat out, that the lower appellate court to whom you are addressing an argument is likely bound by a prior bad appellate decision, even while criticizing it, and make it plain to the court that your real target is a change in law form the higher court. In those situations, I like to emphasize the principle of stare decisis which requires a lower court to follow an established precedent while permitting it to voice its principled disagreement with the holding, and urge its reconsideration. (See, e.g., *People v. Raby* (1986) 179 Cal. App.3d 577, 583-591[criticizing firearm enhancement limitation rule of *In re Culbreth* (1976) 17 Cal.3d 330 and urging reassessment, while following *Culbreth* in holding] and *People v. King* (1993) 5 Cal.4th 59, passim [overruling *Culbreth* based on reasoning of *Raby* and dissent in *Culbreth*].)

Postulate 8c: Dig Into Your Authorities! What makes the best kind of persuasion in an opening brief argument? Clear and precise references to authority, and candid acknowledgment of adverse authority must always be your starting point.

But here's a further suggestion for this section about avoiding a "shortcut" trap in brief writing: where you cite a case for a particular proposition, but don't discuss the case. I learned why this is a bad idea by writing reply briefs. Very often, the Attorney General will cite a series of cases for a proposition, or for a series of related propositions, without discussing them. When I sit down to draft my reply brief, I carefully go through these cases; and sometimes – relatively often, actually – I find that the case does not stand for the proposition, but for something else; or that it is plainly distinguishable on its facts, or it involves a related issue and doesn't fit the one being addressed in the briefing. And every once in a while, a case the AG has inartfully cited turns out to be the one that leads me to victory.[8]

When I am reviewing a draft of a brief which engages in a discourse of "Case A stands for Proposition 1" type of reasoning, I commonly urge the writer to dig into the facts and background of the most helpful cases in order to illustrate how the holding of that case applies to the case at bar; or do the same to distinguish a particularly

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[8]Apparently, "inartful" is not a word. I have been using it for decades though, and will continue to do so.

troublesome unfavorable holding. This does make your briefs longer, and you obviously can't do this with every case you cite. But the power of reasoning by analogy to related cases is greatly strengthened when you go beyond the holding in a case and look to its facts, procedural history, and the analysis of the court in that case.

This is a point where Dallas and I appear to part company. (See "Persuasive Brief Writing," pp. 16-17) But not really. I don't recommend that every case be analyzed in detail, and Dallas's treatise suggest you can go into the details of the most important cases. My point here, is "stretch out" about a particular case when it strengthens you argument, but, as always, do it in a way that doesn't result in a boring, overdone analysis.

Postulate 8d: The Power of Selective Repetition of Key Points. In Dallas's excellent article on brief writing, he quotes one of our favorite bands, the Talking Heads. "Say something once? Why say it again." As part of his "brevity is the soul of wit" thesis, Dallas urges brief writers to avoid repetition in briefs.[9] Generally, of course, I agree. Dallas's subsequent point, which focuses on prejudice arguments, notes the tedium of reading through verbatim recitations of a prior argument as to the weakness of the case and strengths of the defense, and wisely urges you to artfully refer to a prior prejudice argument in shorthand. There is little more annoying to me as a reader of a brief to see the same points, and even the same sentences and paragraphs about the same point, repeated *ad nauseam* in a brief. The eyes gloss over, and you lose your reader.

But I am a believer in *selective* repetition of key points. I mean, think of any great old blues song: it usually begins with a repetition of the first line.

> I went down to the crossroads, fell down on my knees,
> Went down to the crossroads fell down on my knees,
> Asked the lord above for mercy, "take me, if you please"

Thank you Robert Johnson! Obviously, we are not writing blues songs, even if we end up crying the blues with our clients far too often when the appeal is finished. My point is the simple one that repetition can serve the purpose of *emphasizing what's important*.

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[9]Here's the passage from Dallas's 2010 article, "Some Thoughts on Persuasive Brief Writing:

> The easiest way to shorten a brief is to avoid redundancy. In many briefs, counsel will repeat the same point several times. This is unnecessary. The justices and staff attorneys are all intelligent people. The ceaseless repetition of your argument will likely cause you to lose your audience. In the immortal words of Psycho Killer, "say something once, why say it again?" (Talking Heads: 77.)

There's that old saw about how you're supposed to make a lecture. Tell the audience what you are going to say, then say it in detail, and finish by telling them what you said (while throwing in a few jokes here and there). There's something to that which relates to effective brief writing, at least if you are, like me, not the super-concise type. If you are saying something new and different, you are going to have to wave it around a couple times to get the court's attention. You can tell them it's coming in the global introduction, and in your introduction to the issues. You can then carefully lay it out in the sub-section of the brief to which it belongs, and then throw it in again in the conclusion.

I have employed this stratagem when an argument I am advancing is particularly novel, a departure from prior case law. For example, when writing my earliest briefs on *Descamps v. United States* (2013) 570 U.S. 254, the precursor to our Supreme Court's holding in *People v. Gallardo* 4 Cal.5th 120, that proof of prior convictions are significantly subscribed by *Apprendi* and due process principles, I probably discussed in three or four different ways how the jury trial right at issue related to the *prior conviction itself*, and not the *current* conviction, which was the revolutionary part of the holding in *Descamps*.[10]

My point here is that you can and should use creative repetition to your advantage when making a particularly important point in a brief. or when referencing an especially important factual or procedural history milestone in your case. Do this delicately and skillfully; and try to change your words up a bit so that the reader doesn't notice the same phrase or passage being repeated.

Postulate 9: Order in the Court! How to Decide the Order of Issues in a Brief.

Here's a topic that I have not seen discussed much. We all tend, to one extent or another, to follow a kind of unwritten set of guidelines about the order of the issues we present. But I have rarely thought about how I do this, except when I am reviewing a draft of a brief which clearly seems to violate one of these unwritten rules, and, for example, puts the issue about the probation violation first in the brief, followed by a claim that there was insufficient evidence. If ever there was a flag telling the Court that you think the sufficiency issue is worthless, it would be putting it after a probation condition challenge.

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[10]Don't get me started on what I mean by that, because it would be a side-discourse several pages in length, and I've already covered it in ridiculous detail in recent articles.

I am going to put forward three useful models which should help you organize the order of the issues in your brief, and suggest that you follow one or both depending on yours case. I will call them the "Order of the Case" model, and the "Organize by Themes" model, with a third model, "Organize by Strength of the Issue," that kind-of works it way in and between these other two.

Postulate 9a: the "Order of the Case" Model. I think what we typically do is organize our issues in the brief based on the order that they occur in the trial court process. Typically, it goes something like this.

A. Pretrial Proceedings/Errors (e.g., speedy trial, venue, discovery, suppression motions, Marsden motions, etc.)

B. Jury Selection Issues (if any)

C. Sufficiency of Evidence

D. Evidentiary Errors

E. Instructional Errors

F. DA Misconduct

G. Jury Misconduct

H. New Trial Issues

I. Sentencing Errors that Matter, Including Constitutional Challenges

J. Wimpy Sentencing Issues (Credits, Fines, Fees, Meaningless 654 errors, etc.)

This is not intended to be comprehensive, but you get the idea.

Looking at the outline above, you will see that there is one exception: we tend to privilege *sufficiency* arguments, putting them ahead of most trial error. This makes sense because these issues do have priority; if you prevail, the other arguments, at least as to the counts we are challenging, become moot. Thus, in this sense, they are the stronger, more dominant issue that takes precedence over those which follow.

Generally speaking, arranging your issues in the order of the trial proceedings is not a bad idea. Follow the order of the case, and you have a logical, easy to follow progression of issues. I think courts are used to this type of issue ordering, and that's always an important consideration. And in most cases, this order will serve your client and your case well, and is all you will need to know about how to put your ducks in line.

However, I want to suggest a re-ordering in certain circumstances which, I think, can strengthen the overall presentation of your issues and the persuasiveness of your arguments.

Postulate 9b: the "Organize by Themes" Model. My primary suggestion for thinking a bit differently about the order of the issues in your brief is one that many good appellate practitioners already follow, either through habit or instinctively, or both. And yet I notice it mostly when it is not followed. Here's what I mean.

Let's go back to what I was discussing in Postulate 6 above: Themes in your brief. Sometimes, I suggest, you should break from the "Order of the Trial" model outlined above and organize your issues by the theme-sets in the brief. This can make your arguments hold together better, and make for an easier to follow set of coherent arguments.

Let's use, as an example, a child molest case with three significant sub-themes. The first theme involved a set of strong evidence available in the case suggesting that the molestation accusations were fabricated by the victim or parent with a grudge against the client. A second theme involves the prosecution's use and abuse of a CSAAS expert to bolster its case. As to each of these themes, there are, let's say, three or four separate issues, some involving evidentiary error, some involving instructions, and others involving misconduct by the prosecutor or ineffectiveness by defense counsel. And let's also assume there is a third theme, lurking in the background, which presumes guilt but involves the sufficiency of the evidence of force/duress as to some or all of multiple counts charged in the case, and instructional and evidentiary issues which tie into the proof of these additional elements.

My suggestion would be to group your arguments by the common thread of the three separate themes, almost as if you had a Part A – issues around the whole thing being fabricated; Part B – issues around the CSAAS expert; and C – issues around the proof of force/duress. You can even artfully employ some kind of sub-grouping outline to your issues which shows up in the Table of Contents, though that is not essential. You will end up with issues in an order which is contrary to the typical "order of the trial" path we use, but which will hold together better in terms of the common themes between the issues and the inter-relatedness of the prejudice discussions and remedies for these related errors.

And here's a situation where, at least in my view, the argument(s) concerning sufficiency of force/duress elements could properly be placed *after* the trial error arguments concerning the error undermining the "it was all fabricated" defense, and *after* the various challenges to the CSAAS evidence. Why? Because a success in these first two sets of issues could lead to a reversal of all the charges, whereas a reduction of some, or even all, of the crimes to nonforcible 288(a) convictions will can often leave your client

with a lengthy, virtual-LWOP sentence, and not much of a meaningful remedy.

My suggestion in this type of situation is to prioritize the order of your Theme/Issue groupings based on some kind of calculus of (a) the strength of the issues/sets of issues in terms of likeliness to prevail and (b) the impact of success upon your client. How you would do that in the hypothetical example provided above would depend on a lot of variables I am too lazy to make up at this point. But this is an example of third, "Strength of the Issue" theme I noted above as a complementary factor.

The same goes for deciding the order of the issues *within* your related issue themes. Lead with the strongest, followed by the weaker ones, or the ones that depend on an alternative, "even if" premise – e.g., even if CSAAS evidence was properly admitted here, the expert engaged in improper profiling; and then "the instruction on CSAAS improperly told the jury to use the CSAAS evidence to assess the believability of the victim." In other words, group your issues within a theme by their likelihood of getting a reversal and the impact on the client.

The one exception I suggest to the rule of "strongest issue first" involves sufficiency claims. If you have a sufficiency claim, even a weak one, which is paired within a particular theme with a related instructional error or evidentiary claim, always (or almost always) put the sufficiency claim first. Using the example above, if client was convicted of 8 counts of forcible lewd conduct under section 288(b), with no instruction given as to nonforcible lewd conduct under section 288(a) as a lesser included offense, raise the sufficiency argument first, and then the instructional error. Why? Because the sufficiency argument sets up the instructional error. First advance your best argument why the evidence failed to show force-duress as to some or all counts, citing the few helpful case. Then, when you come to the instructional error back-up, you can make the simple rhetorical shift to this issue, with language akin to, "even if this court concludes that there was sufficient evidence to support a verdict on force/duress, it was, there was plainly sufficient evidence from which the jury could have found the acts to have been non-forcible," or words to that effect, which sets up the argument that the court failed in its sua sponte duty to instruct on the lesser included charge of non-forcible lewd acts.

In sum, I recommend that you largely follow the good-old basic order of issues set forth in the top of this section. However, when it works in your case, think about grouping issues by the "themes" and alternative themes in the case.

Postulate 9c: Don't Forget Cumulative Error! Finally, there is the subject of "cumulative error," which I must, of necessity, touch on here. When you have multiple

trial errors in a case, related or unrelated, a separate "cumulative error" argument is not just recommended – it is a *necessity*.

Any time you have multiple trial errors which, when considered together, can lead to a basis for reversal, cumulative error must be raised. The Ninth Circuit has held that the failure to separate raise this point, and the constitutional bases for it, in your state court briefing defaults this issue on federal habeas review. (See *Wooten v. Kirkland* (9th Cir. 2008) 540 F.3d 1019, 1026.) Moreover, like all claims that concern federal constitutional error, a cumulative error claim can and should be federalized, with reference to U.S. Supreme Court authority. (See *Chambers v. Mississippi* (1973) 410 U.S. 284, 298 [combined effect of individual errors "denied [Chambers] a trial in accordance with traditional and fundamental standards of due process" and thus "deprived Chambers of a fair trial"].)

In most briefs, where it is included, as required, the cumulative error argument tends to be a something of rote exercise, a quick trip through the issues combined with references to cases like *Chambers* holding that the combined effect of multiple errors can add up to prejudice and require reversal.

I suggest you should try to do more with this, and use the cumulative error argument as a way of emphasizing both the theme or themes of the brief, and the overall injustice of the trial proceedings. Far too often we see strong legal arguments which sink in the shoals of prejudice. It's fair to assume that some of your best arguments will lose on harmless error grounds. Thus, an artfully composed, succinct claim of cumulative error at the end of the trial error portion of your brief can give you a chance to explain the synergistic impact of a series of related errors, and provides you with a meaningful Conclusion to the arguments of trial error in the brief.

Postulate 10: Eyes on the Prize: Getting a *Meaningful* Remedy for the Client.

Okay, I've made this point before in my issue spotting article, but it bears repeating. Focus on issues with some chance of a *meaningful* remedy for the client. Getting a client's 150 to life sentence reduced to 100 to life will likely mean nothing; but knocking it down to a 35 year determinate term could give him a shot at freedom somewhere down the line; and eliminating the "life" component of a sentence can sometimes be the difference between hope and no hope for the client. Other times, a meaningful remedy won't reduce prison time or a conviction, but could have some helpful collateral effect, e.g., reducing a penal fine or restitution which can badly effect the quality of life for the client in prison, knocking out a probation condition which

impacts the client's freedoms and associations, etc. Likewise, eliminating the collateral consequence of a serious felony or strike conviction could make a big difference somewhere down the road.

That's not to say that we shouldn't raise issues where the potential victory will appear to by Pyrrhic at best. I really did once get a child molester's sentence knocked down 100 years, from 290 years to 190 years. (I just checked CDCR's Locator, and he's still in the joint.) Maybe this doesn't matter now; but it could matter later, when laws change and recognize that sexual offenders are human beings who aren't necessarily lifelong recidivists, and who don't deserve virtual LWOP terms for crimes that caused no physical harm to the victims. This is my way of saying, look for meaningful remedies, but also take what you can get for the client.

B. **Available Resources for Great Brief Writing.**

Here's the part of the article where I get lazy and refer you to other available useful articles, mostly from SDAP's collection. All of the articles I mention are available for your review at http://www.sdap.org/r-criminal.html, unless I state otherwise.

1. **"Some Thoughts on Persuasive Brief Writing," by Dallas Sacher, 2010.** This article is an essential companion to this one. Dallas and I are kindred spirits in terms of our love of music, sports, and various activities of our generation, and for our shared zeal and dedication to our work and clients. But we have very different approaches to the topic at hand, not to mention very different styles of writing and persuasion. Rather than saying that this reflects an alternative view, I would say that my article is intended to complement Dallas's, and can be read in conversation with it.

2. **"Zen and the Art of Issue Spotting," by Yours Truly.** SDAP's website only has my first version of this, from 2004. I have a much more updated one which I did for CADC in 2016, and a further revised one from 2019 that I did for the State Public Defender's Office, which are available from me on request (if I can't get one of our webmasters to put the newer ones on SDAP's website in the interim). In this article, I draw upon the wisdom of many appellate masters from our panel and elsewhere to discuss how and where good issues can be discovered and developed, with a number of useful themes for how to develop meaningful issues in a case. In the more recent versions, I added a new section about "Issue Articulation" where I explore some ideas about how good issues are put together in a brief, giving examples from some challenging cases.

Much of what I would like to say in the present article about effective brief writing is already said in the Issue Spotting article (with some overlap), so I highly recommend that article as a prerequisite or supplement to this one.

3. **"The Nuts and Bolts of the Opening Brief: Statement of Appealability, Statement of Case and Facts and Argument"**, by Paul Couenhoven, from the combined SDAP-FDAP Appellate Workshop of 2013. Actually, there's not much in this article about "Argument"; it is mostly Paul's artful edit and rewrite of an article I prepared 13 years earlier for the Appellate College of 2000 about writing the requisite Statements and proper forms for brief writing. My article acknowledged borrowing shamelessly from an article written four years earlier by Colleen Rohan and Michael Ginther, then both of FDAP. So, you can say that this article was a team effort.

I strongly recommend it for the discussion of the Do's and Don't's of Writing Statements of the Case and Facts; and it even covers Statements of Appealability.[11] If you are relatively new at this racket of appellate brief writing, I would describe this as an indispensable guide to this important aspect of brief writing.

As to drafting Statements of the Case, it will help you figure out (a) what you need to include and (b) what you should leave out, (c) what key procedural details pertaining to an issue should be included in the Statement of the Case, and what more particular and developed facts belong in your "Procedural Background" portion of the substantive argument (an editing pet peeve of mine).

As to Statements of the Facts, I am devote some effort to recite the sub-headings, with a few comments, which will give you a good idea of the main points.

A. **Get Organized** [How to use a fact outline, and when to write it, i.e., before or after developing your issues]

B. **Matters Usually Excluded From the Statement of Facts** [i.e., you should be writing about the facts of the *crime*, not the facts of the *trial*! This is a frequent error I see in rookie AOB drafts.

C. **Be Clear, Concise and Engaging** [speaks for itself, with the following sup-topics]

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[11]I am often surprised how drafts of briefs I review will cite the wrong provisions for appealability – e.g., citing section 1237(a) when the case involves an order after judgment (§ 1237(b)), or failing to cite section 1538.5(m) as the basis for an appeal from denial of a suppression motion after a guilty plea.

1. **Avoid Witness-By-Witness Summaries** [you'd be surprised how many brief writers do this, making their statements hard to follow and unhelpful to their arguments; there are exceptions, when witness-by-witness summaries are useful, described therein]

2. **Use Subsections When Helpful** [as I suggest above]

3. **Identify the Players** [critical in cases with lots of witnesses, especially where they use different names or monikers]

4. **Be Complete** [including those unhelpful facts which you will get fleeced for leaving out; but at the same time . . .]

5. **Omit Unnecessary Details** [e.g., the details of a ballistics report showing your client's gun was used, when this is undisputed]

6. **Do Not Present Your Client in a Bad Light** [navigating between the obligation to tell the full story and our duty to zealously represent the client]

7. **Never Use Police Jargon** [speaks for itself]; and

8. **Identify the Source of the Evidence, Defense or Prosecution** [which can be done either by the typical expedient of dividing your fact statement into "Prosecution Evidence" and "Defense Evidence" or, if this doesn't fit your best storytelling, simply identifying which witnesses were called by whom somewhere in the summary of the facts]

D. **Always Be Accurate** [duh, but you'd be surprised how often sloppiness or laziness leads to mistakes as to key points in the statements, and Woe unto thee when this is discovered by the AG or the Court! With the following two sub-headings . . .]

1. **Never Distort or Exaggerate the Facts** [again, obvious]

2. **Stay Within the Record: Never Present Matters in Your Factual Summary Which Are Not Part of the Record on Appeal** [another common rookie error]

E. **Be Persuasive, Not Argumentative** [key to a proper fact statement, with the following sup-topics...]

1. **Organize the Facts To Emphasize Good Points and Downplay Bad Ones**.

2. **Avoid Editorial Comments and Personalities**

3. **Use the Facts to Set Up Your Legal Arguments**

I hope this gives you a good idea about this useful little article, and that you will use it to your advantage. Now, back to my short summaries of useful articles . . .

4. "**Standards of Review and Standard of Prejudice (And How to Satisfy Them)**", by Dallas Sacher and Jonathan Grossman (2015 SDAP Seminar); and . . .

"**A Primer on Prejudicial Error: the Applicable Tests and How to Satisfy Them**," also by Dallas, as "slightly edited and presented" by Paul at the 2013 SDAP/FDAP Training. These articles are invaluable resources on essential topics for effective brief-writing. You can't beat Dallas or Jonathan for being both thorough and concise!

5. "**Elusive Exceptions to Waiver & Forfeiture Bars**", 2013, by Brad O'Connell, a revision of a prior article by Brad and Paula Rudman, also from the combined SDAP-FDAP Appellate Workshop of 2013. An exceptionally valuable resource from the Voltaire of Northern California appellate advocacy. Since waiver and forfeiture are a favorite tool of many appellate courts to avoid dealing with complex and meritorious issues, this is a must-read for anyone writing an opening brief.

One key tip, vis-a-vis the opening brief: Generally speaking, don't wait for the AG to raise these points in their brief; anticipate them and crush them (or slip by them) in your AOB.

6. "**Preparing Appellant's Reply Brief**," by Jeremy Price of FDAP, again from the 2013 FDAP-SDAP training. Reply briefs are a different critter than an AOB, and this very helpful essay will help you to write them. Jeremy and I exchanged emails recently about SDAP using this article with his permission. In our email exchange, I jokingly threw in the following wisecrack about writing reply briefs:

> My advice about reply briefs is usually (a) you have to write them and (b) don't repeat what you said in the AOB; but (c) do summarize it a bit before going after the AG; and then (d) always read the cases the AG cites cuz they got it out of somebody else's brief and it may turn out to be the best case for your argument! And of course (e) no new issues in the ARB!!

Jeremy responded with amusement, granting FDAP's permission, and telling me "I should have had you write the introduction! You have very concisely summarized its core recommendations." So there you have it!

7. **Many, many articles about substantive areas of law.** I won't get into the details here. But there are countless good articles about key areas of law which will help you write an opening brief on those topics. SDAP has many articles about sentencing

issues, probation conditions, and other small matters. The combined SDAP-FDAP seminar featured articles on homicide law, instructional error, and evidentiary error which are useful. My point is, there are great resources out there, find them, and use them to inform your practice and brief-writing on these important and recurring areas of appellate law.

D. Some Parting Thoughts on Style and Form, and the Editing and Proof-Reading of the Brief.

I will not say a lot here about style and form of brief writing. Dallas's "Thoughts on Persuasive Brief Writing" article contains a number of helpful points on writing style which I endorse – at least in theory, though perhaps not always in practice. He emphasizes that brief writing should always strive for *clarity* in arguments, and *precision* with respect to the record and authority. He suggests that the best way to get to this is with fairly simple references to controlling and adverse authority, and by using short, clear sentences in your prose.

I agree that both of these techniques are invaluable when they work. And they do work most of the time, when the issues and errors below are relatively clear. Dallas does make the fine point that his "brevity is the soul of wit" thesis requires an exception for *prejudice* arguments, where he gives a clinic on what can and should be included in order to try to win over the court as to this critical component, which is well worth your careful review. (See "Persuasive Brief Writing, pp. 18-21)

But where issues are novel, or complicated, and you are essentially innovating based on case law from parallel areas – a space we find ourselves in fairly often as zealous advocates – I think there is a need for detailed explanation and development of complex arguments. Some advocates are able to make these kinds of arguments in a relatively concise manner. Others of us, myself included, feel the need to stretch out and explain things in detail, taking on perceived contrary authority in the opening brief. This does lead to longer arguments and, at least for me, a lot of longer, more convoluted sentences. As explained below, I try to work on these when I am editing a brief, figuring out ways to more clearly state what I was trying to express in my long, twisted, grammatically swirling sentences and sub-arguments.

My point here is that we all need to strike a balance between keeping an argument clear, simple, and precise, on the one hand, and adequately addressing the legal and factual complexities in a given case and issue. In the next couple sections, I provide some of my own thoughts about some of Dallas's key suggestions about form and style in

his article, followed by a closing discussion about the process of editing and proof-reading the opening brief.

1. **Use of Proper Citation Form.**

I fully agree with Dallas about the imperative to use proper citation form in briefs. When filing briefs in California appellate courts, this means adhering to the somewhat arcane and cumbersome citation requirements of the California Style Manual. ("Persuasive Brief Writing, pp. 33-34.) The current Rules of Court do not strictly require this; but they do literally "encourage" it. (See Advisory Committee Comment to Rule 8.204(b): "Brief writers are encouraged to follow the citation form of the California Style Manual (4th ed., 2000)."

We know, anecdotally, that judicial research attorneys in the Courts of Appeal prefer briefs following the Style Manual form because appellate opinions are required under Rule 8.887(c)(1) to use it, and it is much easier for them if it is used in the briefs they are reviewing. If you stubbornly insist on using the more streamlined Harvard Bluebook citation form, which is employed by most other courts, including federal courts in California, you are permitted to do so *against* the recommendations of SDAP and this writer. But if you do this, be *consistent* in your use of this form; don't, as many do, mix and match between the two citation formats.

Speaking for all of my colleagues at SDAP, we view part of our job as mentors to newer appellate attorneys in Assisted cases as training you to consistently and accurately use the Style Manual form for citations to authority. For those members of the panel coming out of trial court or federal court work, this requires some significant adjustment. But we believe it's worth it in terms of increasing the effectiveness of your briefs and pleasing the consumers of the briefs, at the Court of Appeal, with your adherence to proper form.

2. **Footnotes: Use Them, But Do It Judiciously!**

I am less in agreement with Dallas's thoughts on the use of footnotes, which he strongly discourages, citing comments by Justice Mihara of the Sixth District that he disfavors them and often doesn't read them. ("Persuasive Brief Writing, 34-35) I suggest that you read some opinions by Justice Mihara, where he utilizes footnotes pretty regularly. (See, e.g., *People v. Garcia* (2020) 46 Cal.App.5th 123, 183-212, dis. opn. of Mihara, J., with 16 footnotes. The majority opinion by Justice Danner contains 46 footnotes.)

In my view, footnotes can serve a useful purpose. They allow you to briefly cover significant but tangential points. They give you a chance to explain, for example, why a certain case may be distinguishable, or why a certain factual or procedural predicate may be more, or less, important than may appear on the surface. In sum, they allow you to make short, meaningful *diversions* from the train of your argument. I think of footnotes as somewhat like the "Asides" voiced to the audience in a Shakespeare play – a chance to inject something telling into your brief without disrupting the flow of the argument or narrative in the brief.

Of course, that's the key: footnotes should not disrupt, or hijack your argument, or distract the reader, or lead to you losing the reader's attention. Thus, my advice is to use them judiciously (which, to be fair, Justice Mihara does as a general practice), and to keep them short as possible.

As a reader and editor of briefs written by panel attorneys, I frequently will flag matters in footnotes as to critical points which I suggest be moved to text. I will also see tangential asides in the text, which I suggest be relegated to a footnote (or deleted). Finally, I agree with Dallas that too many footnotes in a brief can become distracting, especially where they end up taking up big parts of many pages, and carry over from one page to the next.

3. **Use of Beyond-California Authority**

Dallas and I are also in agreement that your primary authority should be California case law, and that cases from federal courts and, especially, courts of other states, should be used more sparingly. (See "Persuasive Brief Writing" pp. 32-33.) However, as Dallas recognizes, there are situations where case law from other jurisdictions is critical to your argument. For example, when other courts are leading the way in new developments of constitutional principles, or are addressing areas of interpretation not-yet addressed in California, outside court authority can be critical and decisive to your argument, and can lead to reversal.

I also like to employ outside authority when I am trying to persuade an appellate court that a California case which stands in the way of my argument was wrongly decided. The goal is persuasion of the reader, and a well-reasoned opinion from a federal or other-state court is often the best avenue for this.

As a final point, sometimes use of one type of outside authority – decisions of the U.S. Supreme Court – is absolutely critical. To preserve your client's right to federal habeas review if his convictions are affirmed in state court, it is essential that you cite

pertinent constitutional and case law authority for all of your claims of federal constitutional error. And given that the AEDPA threshold for federal habeas relief requires a decision by the state court which is "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States . . ." (28 U.S.C. § 2254(d)(1) and (2)), it is imperative that you cite and discuss controlling Supreme Court authority.

A good example of this comes when you are arguing that a particular instructional omission violated the criminal defendant's right to instructions on the "defense theory of the case." There is lots of Ninth Circuit authority holding that this is a basis for finding federal constitutional error on collateral review (see, e.g., *Conde v. Henry* (9th Cir. 2000) 198 F.3d 734, 739–740 [federal habeas relief granted based on failure to give defense-requested instruction on simple kidnapping as lesser included offense of kidnapping for robbery]; but there is not any real *clear* authority on this from the U.S. Supreme Court, at least on federal habeas review. So, I always make a point, when raising this basis for federal constitutional error, to cite a Supreme Court direct review case, *Mathews v. United States* (1988) 485 U.S. 58, 63-64, which recognizes the due process right to instruction on inconsistent defenses shown by the evidence. This will at least get your foot in the door in federal court, even if it only rarely is acknowledged in state courts. (But see *People v. Rogers* (2006) 39 Cal.4th 826, 871-872, and *People v. Millbrook* (2014) 222 Cal.App.4th 1122, 1146 [expressing tacit approval of "failure to instruct on the defense theory of the case" as federal constitutional instructional error].)

4. **Citing to the Record on Appeal**

You must of course, carefully and correctly cite to the record on appeal. Dallas's article suggest that every sentence in the Statement of the Case and Facts should include a record citation. I generally agree, except I will occasionally drop the record citation after several sentences or a paragraph where I see redundant citations to the same pages, or if I am covering general matters not particularly important in the case.

A small aside: everybody seems to cite the record differently. For example, a reference to page 46 of volume 3 of the reporter's transcript can appear in a brief as 3-RT 46, 3RT 46, 3 RT 46, III RT 46, etc. And some folks put periods after all their record cites, whereas others (like me) don't use periods. I suggest keeping it simple, e.g., "(3RT 46)". This is shortest, and has the additional function of creating fewer words for your word count if you, like me, flirt with that limit in some documents (e.g., petitions for review).

I have a further, more substantive point about citing to the record, which concerns references to facts and procedural history from the case in the body of your substantive arguments. A lot of drafts of opening briefs which I read – and a fair number of filed briefs I read in Independent cases – seem to make the unwarranted assumption that once you've cited the record in your statement of the case and facts, and in the "factual and procedural background" portions of your substantive arguments, you don't need to do it again when you refer to key facts or procedural milestones in your arguments of error or prejudice. This is incorrect, and a very poor idea in terms of brief writing. When the reader is going over your prejudice argument, they need to see from where in the record you are getting your facts, and can't be expected to go thumbing back to your fact statement, or your procedural background discussion, to find the basis for your claim about the record. So: include references to the portions of the record on which you are basing your key points in the error, cognizability, and prejudice arguments of your brief, even where you think this may be redundant.

And check those parts of the record – or, at least, your record notes – to make sure you are being accurate. This is not a trivial point. We sometimes get carried away with out own ideas and hyperbole. We may not remember it right when we are writing up the prejudice argument, and need to make sure it's accurate. *Never* give the attorney general and the court the opportunity to fleece you for misstating or overstating matters from the record.

5. **Editing and Proof Reading**.

Somehow, you've done it – you've completed that draft of the opening brief, of course, carefully following all of my suggestions made in the rambling 30-plus pages above. Now comes one of the hardest parts: going over your own work with the fine-tooth comb of an editor and proofreader.

I think of the editing and final preparation of a brief as something that takes place in two stages. In the first, you are dealing with the raw material of your "rough draft" of the brief, trying to put it into the form of a thoughtful and effective opening brief. In the second and final stage, which I will call "finishing touches," you are going over the brief slowly and carefully to find all the editing errors, unnecessary redundancies, and awkward prose that remains, creating a perfect, pristine product. I will try to cover both, and include suggestions about how to approach these different, essential tasks.

a. **Reviewing the Rough Draft.** I have to start this discussion with a personal writing confession. Years ago, I used to do a draft of the entire brief, which created, at

the end, a full rough draft of the AOB. I would then go over this rough draft with a fine-tooth comb.

I rarely do it like that anymore. Nowadays, once I've done my issue outline, settled on my arguable issues, and started in writing the brief, I find myself doing lots of editing of what I've written as I go along. I think this came about as a result of writing briefs in bursts, with lots of stops and starts. When I return to, for example, a fully drafted set of statements, and a partially drafted Argument I, I will frequently not turn to the daunting task of finishing Part I, or starting in on Part II, but will go back and do a very careful reread and edit of the Statements. They are often quite a mess, and this is helpful. I will often find myself reorganizing what I've written, changing the order, emphasizing some parts and eliminating and de-emphasizing others, and getting rid of those embarrassing redundancies.

I do a similar thing as I am writing up the issues. Typically the Big Issues in my brief are up in the front. Once I have laboriously finished that first draft of Big Issue I, after taking a break to do something mindless (play solitaire, send some emails, do a couple of staff compensation claims), I will go right back to that draft and dig in on it. It helps that the writing process is fresh in my mind. At this point, I will spend a lot of time winnowing down the redundant parts, filling in the key points I had left out or had not adequately addressed, and, sometimes, reorganizing the monstrosity to make it more effective.

Whether you review your drafts the way I do now, or the way I used to do it – doing the whole thing in one big blow, which I still do with smaller briefs – your careful and stringent review of the rough draft is critical. Writing is a cathartic process. Both extremes of the process – writing up an argument in bits and pieces, and the converse, a frenetic stream of writing – are likely to produce a messy draft, exposing all of your weaknesses as a writer (and typist), and an advocate. This leads to a need for careful review. My rough drafts are also full of editing mistakes of all shapes and sizes that need to be put in line.

Is the review of a rough draft something you can have somebody else do for you? In my opinion, this is normally not a good idea. It's your baby. You have to put it in order before you can have somebody else look at it. The exception would be where you are trying to work out whether a particular issue is arguable, either based on problems of weak factual support or based on shaky or stretched legal analysis. Assuming that you've gotten far enough to do a rough draft of this "iffy" issue, having a trusted colleague (or your appellate project buddy) review the rough draft can be a good idea.

The goal of the review and editing of a rough draft is to create a finished product that you are ready to file. There may still be a few things to fill in when you are done (e.g., those "*ante*" page number references to something said earlier in the brief, which you can't fill in until you are all the way done with the brief) – but you should work the statements over as best as you can, making your sentences and arguments as concise and clear as possible, making sure the issues work between themselves in a coherent way, getting to the point where it looks like a good opening brief, and not last week's laundry of your mind.

Sometimes during this rough draft review I will move issues around, reorganize the order of sub-issues, take one Giant Issue and break it up into three smaller ones, and even come up with a new issue that I hadn't thought about, or remove one that now seems pointless or frivolous. I will often "re-tool" the statements after I have finished writing up all the arguments, deleting or shortening some redundant points that are covered by the arguments, and removing detailed summaries of matters I had included for a potential issue which, as often happens, I have ended up deciding was not arguable and removed. You are your own best critic. The only key to reviewing the rough draft well is to give yourself some time between composition and review, which I find extremely helpful. This could be a couple hours, but, ideally, should be a day or two.

Do you review the rough draft on paper, or on a computer screen? Of course, being Old, I started out reviewing every draft on paper. Now I do nearly all of my early editing on a screen. It's faster and more convenient. And you can go back to things more easily; plus, when your writing is as illegible as mine, you don't have the problem of deciphering your scribbled comments on the draft a day later.

How many times do I go over a rough draft of a brief or a tricky issue? It all depends. I do it until I'm satisfied that I've done my best job with it. And then I will sometimes do it again when I decide, after completing my "final" edit, that I've missed something important, or included something unnecessary or unhelpful.

b. **The Finishing Touch: the Final Proof-Read**

There is, of course, a last and final review of the draft of any brief which is indispensable. I like to tell myself that I don't do this final proof-read of the brief until, in my mind, it is a finished, final draft. Often that means, as suggested above, several do-overs of the rough draft, addition and subtraction of issues or sub-issues, etc.

But when it's *really* a final draft, I try to let it sit for some time before doing a final proof-read – couple hours, minimum, preferably a day. This is to clear your mind so that

you can read it with fresh eyes and a fresh brain, and pretend to yourself that you're reading it for the first time. Invariably, I will find lots of typos, foolish use of "it's" when it should be "its", and even "hear" when it should be "here." (What part of the brain it is that does that, I don't know, but as I get older it seems to have gotten worse.)

This careful, final edit is, I think, even better when done by somebody else, if that's possible – a colleague, significant other with some legal background, or, really, any literate person. Their eyes are going to be fresher than yours and will see more things. They might have questions about some part of the brief that seemed clear enough to you but left them confused or lost, which means you need to take another look. They are also more likely to catch those mistakes and typos that you have already missed catching in your previous reviews.

But most of the time, we do this final proofread ourselves. I have learned the hard way that I'm much better at reading somebody else's final draft than I am reading my own. And I have learned that I do a far better job with the final proof read when I PRINT THE DAMN THING OUT ON PAPER and review it that way, rather than on screen. For me, this makes it much easier to read it like it's something new, rather than something you've been drooling over for the past several weeks.

I think we've all had the experience I am about to describe: You sit down to carefully reread the opening brief because you are about to write the reply brief, prepare oral argument, or knock out a petition for review, and find appalling mistakes in it – things like the name of a different client, where you adopted the brief from another case, marooned sentences that you forgot to edit out, or just downright sloppy prose. This is why you need to do the final proof read as if you were reading it for the first time.

A final thought. There are times when you need to do the whole proof-reading process *twice*. This is especially the case when your edits and changes from the first go-through are sufficiently wide in scope that you need a final look. Plus, as we all know, it's hard to say good bye to our baby and send it off to the Court. But when you've done your job right, and it's *really* done, it's also one of the best feelings in the world.

CONCLUSION

Well, I've managed to do it again. Fill 36 pages with semi-organized rambling, which probably prove that the whole process of writing a good brief is subjective and largely inexplicable. I've tried to pass along what works for me, and impart some of the lessons I've learned as a reader of other people's briefs. I've tried to provide a "maximalist" counterpoint to Dallas Sacher's "less is more" philosophy of brief writing.

In the end, we all come to this with our own unique style and our own ability to write and convey simple and complex arguments. And the bottom line is to do all that we can to zealously represent our clients within the bounds of ethics, to argue for the best remedies within the realm of what's possible, even when the possibilities seem unlikely at best.

Now, of course, I will need to read this thing over a final time to see if it makes sense – the hunter gets captured by the game, as it were. And, hopefully, when you see the end product, it will help you some.