

WRITING THE OPENING BRIEF IN A CRIMINAL APPEAL

Vicki Mandell-King
Chief Assistant, Appellate Division
Office of the Federal Public Defender

Introduction

Writing your opening brief involves getting the materials together that you will need to learn the facts, understanding what the case is about, identifying possible issues, doing legal research, and writing. The writing itself requires accuracy, clarity of thinking, good grammar, freshness, and appropriate tone.

Record on Appeal

At the trial level, the “case” facts are contained in discovery provided by the government, interviews with your client, witness interviews, and other documents. But on appeal, such pre-trial discovery and preparation are not a part of the appellate record unless, for some reason, the trial attorney has included a document in a filing or an exhibit. As counsel for appellant, you have to order the record on appeal, consisting of all the documents and transcripts you will need to raise arguments, and which the court will need to review in order to address those arguments.

The court will reject claims when relevant portions of transcripts are not included in the record. United States v. Davis, 60 F.3d 1479, 1481 (10th Cir. 1995).

If, as the case proceeds, you realize you need to supplement the record on appeal, do so by filing a motion to supplement, and designating additional documents or transcripts. Motions to supplement the record are ordinarily only granted as to documents which were before the district court. Castner v. Colorado Springs Cablevision, 979 F.2d 1417 (10th Cir. 1992); Allen v. Minnstar, Inc., 8 F.3d 1479, 1475 n.4 (10th Cir. 1993); Rule 10(a), F.R.A.P.

You may also ask the court to take judicial notice of certain records and proceedings. Rule 2, F.R.Ev.

Familiarize Yourself With the Case

If the case was yours at trial, you will be familiar with the issues you have already identified. Try to keep an open mind for possible issues you missed. (This raises the philosophical question of whether it is preferable to appoint new counsel on appeal.)

If you are appointed to do the appeal and are not familiar with the trial, talk with the trial attorney to get a general idea of what the case is about. Oftentimes, trial counsel may be uncooperative, too busy with the next trial, or afraid of an ineffectiveness claim.

Of course, discuss the case with your client. Initially, the client knows more about the case than you do. However, the client does not know what facts actually

are in the record, and what facts will be significant for the appeal. These discussions are helpful to build trust and rapport, so that the client will understand your decisions as to how to write the brief and the issues to raise.

As you read the record, keep an open mind. In the initial stages, you do not know what facts may become significant. If you are new counsel on appeal, order the opening and closing statements. These parts of the trial may contain errors, and also help to orient you.

I recommend that, in reading a large record, you should dictate a summary as you go. Quote important passages, and note the volume and page. That way, when you begin to write the facts for the brief, you can refer to this typed summary. Of course, you have to refer back to the record itself to ensure accuracy and proper context. Having a summary works better than rummaging through multiple volumes with hundreds of stickers.

While reading, you are trying to understand what happened in the case, to determine the important facts, as well as to identify possible issues to raise. If you can, talk about your case with some colleagues to brainstorm the facts. Try to think of how a fact you think is “bad” may be good. Often, thinking about the bad facts in order to diffuse them or deal with them leads to entirely new approaches.

Issue Spotting

Keep up with the law, reading slip opinions from your circuit, the Criminal Law Reporter, and of course the Supreme Court decisions. That way you have a framework in your mind into which certain facts may fit, or facts may trigger a memory of a case you have read. You may not recall the case, but you know there is an issue being discussed by the circuits.

The facts will naturally fall into potential issue categories in an experienced attorney's mind – defects in the institution of prosecution, defects in the indictment, motions and objections, guilty plea, and sentencing. Sometimes, we have a “gut feeling” about some facts, but do not have a handy legal “hook” for them. Research will help you find one.

Standards of Review

The standard of review determines whether the appellate court will review your issue broadly or only in a limited fashion, and therefore affects the strength of the issues you wish to raise. The standard of review also reflects the appellate court's role in the judicial system. An appellate court is not equipped to make findings of fact. It does not listen to testimony or observe the demeanor of witnesses. It makes sense that an appellate court will review fact findings in only a limited fashion. Issues that turn on the exercise of discretion also will receive

limited review. An appellate court is best-suited to address questions of law.

Waiver or Plain Error

“Usually an appellate court will not set aside a judgment based upon errors which were not brought to the attention of the trial court.” United States v. Atkinson, 297 U.S. 157, 159 (1936). *See also* United States v. Olano, 507 U.S. 725 (1993); Rule 52, F.R.Cr.P. Plain error analysis requires the court of appeals to view the trial record as a whole to determine if 1) there is error, 2) that is plain, and 3) that affects substantial rights. If these criteria are satisfied, 4) the court may exercise its discretion to correct the error if it seriously affects the fairness, integrity, or public reputation of judicial proceedings. United States v. Scull, 321 F.3d 1270, 1277 (10th Cir. 2003)(*citation and quotation omitted*).

When an issue is primarily factual, the court may deem the issue waived, rather than determine whether the error is “plain.” *Compare* United States v. Orozco-Rodriguez, 60 F.3d 705, 707 (10th Cir. 1995) (reviewing for plain error defendant’s claim that the term of supervised release imposed by the district court exceeded the maximum permitted by law), *with* United States v. Olivio, 69 F.3d 1057, 1060 (10th Cir. 1995) (finding that, by failing to object, the defendant waived his argument that the district court erred by admitting a co-conspirator’s conversation that occurred after the conspiracy terminated).

Clearly Erroneous Standard

As to questions of fact, the scope of review is limited. Under this standard the question is whether the appellate court is left with a firm impression that a mistake has been made. See United States v. McCullah, 76 F.3d 1087 (10th Cir. 1996) (underlying facts as to voluntariness of confession); United States v. Cordoba, 71 F.3d 1543, 1547 (10th Cir. 1995) (managerial or supervisory role adjustment); United States v. Lewis, 71 F.3d 358, 360 (10th Cir. 1995) (findings of fact when reviewing a denial of a motion to suppress); United States v. Gomez, 67 F.3d 1515, 1519 (10th Cir. 1995) (compliance with the Speedy Trial Act); United States v. Sloan, 65 F.3d 149, 151 (10th Cir. 1995) (drug quantity determination); United States v. Guthrie, 64 F.3d 1510, 1514 (10th Cir. 1995) (facts underlying restitution order).

Abuse of Discretion

If the trial court did not make a clear error of judgment or exceed the bounds of permissible choice in the circumstances, the reviewing court will not disturb the district court's decision. United States v. Jaynes, 75 F.3d 1493 (10th Cir. 1996). See also United States v. Quintana, 70 F.3d 1167, 1170 (10th Cir. 1995) (admission of expert evidence); United States v. Olivio, 69 F.3d 1057, 1065 (10th Cir. 1995) (leading questions on direct exam).

Mixed Questions of Fact and Law

Most issues contain underlying facts, because it is the facts to which the court applies the law in any given matter. In reviewing a motion to suppress the appellate court will uphold factual findings unless they are clearly erroneous; however, the ultimate determination of reasonableness under the Fourth Amendment is a question of law reviewed *de novo*. United States v. Alarcon-Gonzalez, 73 F.3d 289, 291 (10th Cir. 1996). Whether the government is required to disclose certain evidence under Brady v. Maryland, 373 U.S. 83 (1963), is a mixed question of law and fact which the court reviews *de novo*. United States v. Molina, 75 F.3d 600 (10th Cir. 1996).

De Novo Review

Generally, questions of law are reviewed *de novo*. See United States v. Hill, 53 F.3d 1151, 1153 (10th Cir.1995) (*en banc*) (interpretation and application of the Armed Career Criminal Act). See also United States v. Gomez, 67 F.3d 1515, 1528 (10th Cir. 1995) (right to be present); United States v. Browning, 61 F.3d 752, 753 (10th Cir. 1995) (compliance with Rule 11).

Harmless Error

“[E]rror in the admission or exclusion of evidence is harmless if it does not affect the substantial rights of the parties, and the burden of demonstrating that

substantial rights were affected rests with the party asserting error.” Chapman v. California, 386 U.S. 18, 24 (1967); United States v. Mejia-Alarcon, 995 F.2d 982, 990 (10th Cir. 1993); Rule 52(a), F.R.Cr.P.

In conducting harmless error analysis, the court reviews the record *de novo*. United States v. Garcia, 78 F.3d 1457 (10th Cir. 1996). There is non-constitutional harmless error and constitutional harmless error (“harmless beyond a reasonable doubt”). Id.

Choosing the Issues

It is *generally* better to be selective in choosing the issues to raise, rather than including weaker issues in your brief. In selecting issues, think in terms of likelihood of winning, that is, the strength of the law and facts. What issues have the more favorable standard of review – *de novo* rather than clear error? What about the remedy – a new trial or resentencing?

Too many issues clutter the brief, weaken it, and show insecurity and poor judgment on the part of the attorney. Balance the possible contribution the issue may make to the brief against the loss of persuasive impact and credibility.

Where the issues are related or connected in some way, or set the stage for another issue, it may be appropriate to include a weaker issue. Or you may include a less important issue, such as erroneous admission of evidence, in a case

in which you also challenge the constitutionality of a statute. This will give the court leeway in terms of the remedy.

While being selective, you must raise all meritorious issues. (Easier said than done.) Imagine how the attorney felt in United States v. Cook, 45 F.3d 388 (10th Cir. 1994), whom the court held had failed to assert a “deadbang winner.”

Consider the client’s input, but make the final decisions yourself. Do not raise frivolous issues. Some appellate attorneys will set out an issue separately as the client’s. The better approach may be to suggest that he/she seek permission to file a *pro se* supplemental brief. (But, the circuit rarely grants such requests.) This is really a matter of client control and satisfaction, which can be difficult when communication may only be by letter or telephone. But given the length of sentences and the difficulty of winning on appeal, at the very least we can give our clients the sense that they have been heard and that their cases matter to us.

Some experts would say you should raise every possible issue. There is merit to this position. This is because, in the federal context, if a claim is not raised on direct appeal, a petitioner is barred from raising it on collateral attack (motion to vacate sentence pursuant to 28 U.S.C. § 2255), unless he can show cause and prejudice or actual innocence. Bousley v. United States, 523 U.S. 614 (1998). Recall that, in Bailey v. United States, 516 U.S. 137 (1995), the Supreme

Court had held that “use or carry” was not synonymous with “possession.” But prior to Bailey, Bousley had pleaded guilty to a § 924(c) charge. After Bailey, he filed a §2255 action, claiming that his plea was not knowingly and intelligently entered. The Court held that its Bailey decision was not so “novel” as to constitute cause for overcoming the procedural default of not having raised the Bailey claim earlier. And thus, Bousley would have to show actual innocence in order to have his claim heard on the merits.

With Bousley in mind, as well as the landmark (if not “watershed”) decisions in Apprendi v. New Jersey, 520 U.S. 466 (2000), Blakely v. Washington, 124 S. Ct. 2531 (2004), and United States v. Booker, 125 S.Ct. 728 (1995), and absent a crystal ball, being selective about issues to raise is perilous indeed.

What if you overlook an issue or a new claim arises as a result of a recent decision, after you have filed the opening brief? The court will not consider an issue not raised in the opening brief. United States v. Abdenbi, 361 F.3d 1282 (10th Cir. 2004).

If this happens, I suggest you make a motion with the court seeking permission to file a supplemental opening brief. That way, the government is able to respond and the court has the benefit of full briefing. Allowing supplemental

briefing saves judicial resources, avoids delay, and serves the administration of justice.

Statement of the Case

Most writers treat the Statement of the Case as a short section of a brief, which describes the nature of the case, the course of the proceedings, and the disposition below. In contrast, the Statement of the Facts is much more detailed about the two sorts of facts (the offense facts and the procedural facts) that arise in an appeal. You can use the Statement of the Case as the place in the brief where you give the court an overview and context for what will be discussed in more detail.

If you have some flexibility in the format of the brief, the Statement of the Case may be a main heading with subheadings, such as “Introduction,” “Facts of the Offense,” and other appropriate subheadings such as “Early Expressions of Discontent with Counsel,” and “Inquiry Reveals Breakdown in Communication.”

The Statement of Facts

However your brief is structured, writing the facts that form the basis of the issues is critically important. How do you start? Are you the sort who thinks the case through, and begins to write only with a clear sense of where he is going? Do you handwrite all the facts and arguments? Or do you think while you are typing

on the computer, so that your thought process occurs simultaneously?

The statement of facts is not a summary of the record. The record made in the district court is largely in the government's voice, given that it has the burden of proof. Your citations to the record should not ordinarily be in numerical order. That is a clue that you are just retelling the same story.

Do not write your facts by saying, "This witness said . . ." and "that witness said." Of course, sometimes, it is important to focus on the name and testimony of a particular witness. Know the difference. Ordinarily, you should write the facts as revealed in the testimony of witnesses, citing to portions of the record.

Include the facts necessary to tell the story you want to tell, and which form the basis of your issues. Omit unnecessary details. Does the court need to know all the dates of hearings? Only in a case where delay is a factor, would the court need to remember all those details.

As Stephen Armstrong, author of Thinking Like a Writer, teaches, "make your reader smart." Let the court know what you need it to remember, what is important, and don't require the court to sort through unnecessary detail. If a lot of detail is important, provide a context paragraph, letting the court know why all the detail matters.

The issues, of course, drive what facts are necessary. If a motion to sever

was filed, but you raise no issue about it, why refer to it? Some additional facts are important, though, to orient the court and provide context.

Do not mislead the court or omit important damaging facts. Write about those in a way that may diffuse them – in the passive voice or in a subsidiary clause. You will have to deal with bad facts head-on in the argument. If you omit the bad facts, you lose credibility with the court for this and your future cases. The government will stress the bad facts anyway.

It is appropriate to point out what has not been proved. Example: “The government presented no fingerprint evidence connecting Mr. Thorn to the mailing of the letter.”

Balance the judges’ need for a fair and adequate statement of all relevant facts – and no others – with the advocate’s desire to state the facts as persuasively as the case permits. You should not be argumentative in the facts. Save that for argument. But the way you write the facts can be persuasive when written in a clear, accurate and interesting way.

We all may want to be creative in our writing, use fresh language, tell the story in a new way, and use our skills as writers to persuade the court. At the same time, none of us would want the court to write, “[W]e are troubled by the government’s loose treatment of the record in support of this contention,” United

States v. Edeza, 359 F.3d 1246, 1250 n. 2 (10th Cir. 2004), or criticize us for a “sensationalized description.” United States v. Abdenbi, 361 F.3d 1282, 1292 (10th Cir. 2004).

Writing the Issue Statement

The rules ask for a “statement of the issue,” not a “question presented,” as in a Supreme Court petition for writ of certiorari. So I draft my statement as a statement rather than as a question. In addition, the issue statement that begins: “Whether the district court erred in denying the motion to suppress” is not even a complete question. If you prefer the question form, state, “Did probable cause exist to justify Mr. Jones’ arrest when . . . ?”

The final form of your issue statement should not be mere boilerplate language. An appellate court’s initial reaction to, “Did the district court err in denying Mr. Smith’s motion to suppress?” would likely be, “Probably not.” The issue statement should contain some facts in order to grab the court’s attention.

But adding some facts may tend to make your issue statement long. So watch for that. See what you can cut out. It might be worth cutting out the part that begins, “The district court erred . . . ”

Also, a longer issue statement that is in all-caps and in bold is difficult to read. For example:

BECAUSE THE CRITICAL QUESTION AT TRIAL WAS WHETHER TERRELL, THE GOVERNMENT’S STAR WITNESS , OBTAINED THE JANUARY 1997 COCAINE FROM MR. WEATHERSBY, THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING THE MOTION FOR NEW TRIAL BASED ON NEWLY DISCOVERED EVIDENCE THAT TERRELL LIED AND THAT HE HAD GOTTEN THE DRUGS , NOT FROM MR. WEATHERSBY, BUT FROM HIS MEXICAN SOURCE

You might consider writing the issue this way under the Statement of the Issue heading:

The critical question at a trial was whether Terrell, the government’s star witness, obtained the January 1997 load of cocaine from Mr. Weathersby. The district court erred in denying the motion for new trial based on newly discovered evidence that Terrell had lied and had gotten the drugs from his Mexican source.

Then, when you get to the Argument and repeat the issue statement, the statement could be shortened for easier reading in all-caps.

Order of the Issues

There is no one right answer for all briefs on this. But generally, you should put your strongest issue first. But what does “strongest” mean? The one most likely to be granted? The one that wins a new trial and not simply a remand? What about novelty of an issue?

You may also consider the notion of consistency in the “map” of a brief, as Stephen Armstrong suggests. If in your facts, you first discuss the suppression motion and then a sentencing issue, based on the chronological unfolding of the

events, that may be a good reason to put the issues in the same order, particularly if the issues are of similar strength.

Writing the Arguments

Begin with a contextual sentence or two. Now, in a one-issue appeal, this may not really be necessary, because presumably your issue statement, as well as the Summary of Argument that precedes the issue statement, has given the context. But in a complicated brief with several issues, it is important to contextualize each issue for the court.

In setting forth the applicable law, do not just state the controlling authority. Apply it to your facts, and then discuss the underlying principles, why this is fair and just, why the court should rule in your favor.

For example:

In considering whether a defendant should have been permitted to withdraw his plea, the courts consider several factors, including assertion of innocence, time of request, assistance of counsel, prejudice to the prosecution and disruption of the court. [citation to cases]

Mr. Collins entered an Alford plea. Immediately after the hearing he called the court and asked to be allowed to withdraw his plea. Although he had counsel, he did not have the “close assistance” of counsel. His attorney only visited him three times, and did not inform him, until the morning of trial, that he should plead guilty. The prosecution would not have been prejudiced

by withdrawal of the plea. The charges against Mr. Collins were relatively simple, involving only a few witnesses. Trial of this matter was scheduled to last only two days, which would have caused only minimal disruption to the court's calendar.

Headings are *very* useful, both as guides for the court and for emphasis. Try to make every word you write in the brief count.

Should you anticipate appellee's arguments? Should you discuss harmless error in the opening brief? Harmless error analysis seems to be so much a part of the standard of review that you normally should address it. But, if your argument on harmless error is weak and would detract from your earlier points, you might decide to wait to address this in a reply brief. Note: In United States v. Samaniego, 187 F.3d 1222, 1225 (10th Cir. 1999), the defendant made the preemptive argument in his opening brief that the error was not harmless. Due to the length and complexity of the case, and the "government's complete and inexplicable failure to address the issue," the circuit declined to "exercise its discretion to review the harmlessness of the error." Id. at 1225-26.

What if the appellee is not likely to raise an argument? Don't count on the court overlooking this. If appellee does come up with an anticipated but not briefed argument, you can respond in a reply brief. However, would your position seem stronger were you to set it forth in your opening brief?

Summary of the Argument

I suggest that you write the summary after you've written the facts and argument. It should be more than your issue statement. Include a citation to the lead case. But at the same time, remember, this is a summary.

Your Conclusion

The conclusion section need not be long. It can simply state the relief you seek: reversal, new trial, remand for resentencing. Each of the separate arguments should have had its own conclusion, and not leave the reader hanging. If all the issues interrelate, the conclusion to your brief may be the place to tie the case together. There may be a particularly eloquent quote in one of the cases you have cited that might be an inventive way to end your brief.

Citations

Cite to Supreme Court law, law of your circuit, then other circuits, the district court, then rarely a state case. Cite and deal with cases which go against you. You can try to distinguish them, or ask for *en banc* consideration to overrule prior circuit law.

Avoid string citations. You should not discuss every case in the manner of “[I]n United States v. Jones, the court said, . . .” Rather, on a particularly important or lead case, you might set it out that way, and include the facts of that

case pertinent for the court to consider, as well as the holding. Then you might do a “*See also*” paragraph in which you list some cases and in parentheses set forth their holdings. For example:

See also United States v. Smith, 930 F.2d 1450, 1452 n.3 (10th Cir. 1991), (“because amendments effective November 1, 1989 increase the offense level applicable to the charged offense, we apply the guideline version in effect on the date of the offense conduct. . .”); United States v. Suarez, 911 F.2d 1016, 1021 (5th Cir. 1990)(the *ex post facto* clause prevents application of amended §1B1.3 to a defendant whose offense occurred prior to the effective date of the amendment which exposed defendant to increased punishment).

Begin a paragraph with a statement in your own words about what the law is.

When Mr. Porter sought to withdraw his plea based on ineffective assistance of counsel, a conflict arose between counsel and himself. Under these circumstances, this court has found that substitution of counsel is necessary. *See* [citing cases]

Or begin with a quote from a case, followed by the citation. For example:

“A trial court’s failure to appoint new counsel when faced with a total breakdown in communication may constitute a denial of counsel in violation of the Sixth Amendment.” United States v. Lott, 310 F.3d 1231, 1250 (10th Cir. 2002).

Quotations

Don’t quote extensively. When you quote, vary the format – indent for

quotes, and quote sentences within your paragraphs. The reader's eye tends to skim over a long blocked quote.

General Writing Tips

Good writing is accurate, and has clarity and readability. Do not use lawyer-like phrases which do not impress but obfuscate. (How's that for a "big word?") Good writing flows, is easy to understand.

Don't be unnecessarily repetitive. But repetition for *emphasis* is important.

Vary sentence length. Too many short sentences give your brief a staccato or monotonous tone. A sentence can be long, if you "chunk" it, as Stephen Armstrong says, with punctuation: "The motion to substitute counsel should be granted, the district court reasoned, because of the conflict inherent in counsel having to claim his own ineffectiveness for Mr. Porter to prevail in a motion to withdraw guilty plea."

When you use "this," be sure it is clear to what "this" refers. Plural nouns should have matching plural verbs: "The whole team, including guards and tackles, was in the car;" "Everyone is present." Spell correctly. "Judgment" is often misspelled. Use parallel expressions – not "simplicity, being accurate and how to spell," but "simplicity, accuracy and spelling." Keep tenses consistent, past or present tense.

Use mostly the active rather than the passive voice. The active voice is more direct, more energetic. Use the passive voice when you want to minimize or de-emphasize. You would not want to write, “The defendant stabbed the victim four times in the chest.” Instead you may write, “The autopsy revealed the victim had been stabbed four times in the chest.” Also, shifting voice varies the rhythm of your writing, which makes the experience of reading more pleasant.

Put negative facts in a subsidiary phrase in your sentence: “Although there was some evidence to the contrary, the money for the Vado properties came from Duarte.”

Change adjectives created from verbs back into verbs. For example, “is aware,” “has knowledge” should be “knows.” “Is taking” should be “takes,” and “are indications of” should be “indicate.”

Watch out for nominalizations – verbs that have been made into nouns by adding “tion,” “sion” or “ment.” For example, “It is apparent that a reexamination of the rule needs to be made,” should be written, “This Court should reexamine the rule.”

Use expletive constructions sparingly – “it is,” “there is,” “there are.” Instead of, “It is her last argument that persuaded me,” you should write, “Her last argument persuaded me.” Instead of, “There are likely to be many police asking

questions,” write: “Police are likely to ask questions about the good faith exception.”

Use the client’s name rather than “the appellant.”

Avoid unnecessarily inflated words. “Ascertain” means to find out, “attempt” means to try, “impact on” means to affect, and “utilize” means to use.

Reduce wordy phrases:

the reason for – because
despite the fact – although
in the event that – if
on the occasion of – when
it is important that – must, should
is able to – can
has the opportunity to – can
is in the position to – can
subsequent to – after

The question of footnotes is *very* controversial. Some experts unequivocally avoid footnotes no matter what. However, footnotes are useful in order to include more detail on a collateral matter that is cumbersome to include in the paragraph itself. But this may indicate the information is not really necessary at all.

In addition, most judges say that they do not like to read briefs full of footnotes. Since an important part of persuasion is to know your audience, and since judges (as well as other attorneys, your clients, law clerks) are your

audience, you should use footnotes, if at all, sparingly. The challenge then is this: if a matter is somewhat collateral, yet you think it must be included, can you write it in the body of your brief in a skillful way?

Revise and Edit

Revising is part of writing. Allow time to edit and revise. Put your brief away for a day or so, and come back to it with a fresh eye. That way you will catch flaws in arranging the material, and can transpose paragraphs, delete verbiage, and correct typographical errors.

Have someone read your brief who is unfamiliar with the case, to help you include background information or details, the absence of which could confuse the court.

Remember that editing is not merely taking a red pen to a document and crossing out words. As Stephen Armstrong stresses, often the way to make a brief more clear and persuasive is to add – add context paragraphs, linking words, and subheadings. You should change the sentence structure around so that the sentence begins with the familiar and then introduces new information. This principle applies to paragraphs and sections of the brief as well.

I find that, in editing my writing for clarity, I become aware of all the places where my analysis is still fuzzy. The editing process clarifies my thinking.

Be aware of your default approaches. Do you spell out your thought process too much, when much of that may not be necessary in the final product? Do you always write chronologically? You may find that the end paragraph should really be at the beginning as a way to contextualize the depth and detail that follow to support your premise.

Also be sure that the sections of your brief match. If you have decided not to raise a particular issue, be certain you have deleted from the Statement of Facts those facts that are only pertinent to the omitted issue. As your argument evolves, be sure that you edit the Issue Statement so that it is consistent with the final version of the argument.

Look at the Table of Contents. See that your subheadings tell the story of the case in an outline form.

Check Compliance with Court Requirements

Before filing, remember to check the federal and circuit rules. Your brief must include a Summary of the Argument section. Did you include an oral argument statement? Does the request for argument appear on the cover? Did you attach all the orders and portions of transcripts that the rules require?

Anders Brief

Some people think an Anders brief (Anders v. California, 386 U.S. 738

(1967)) is appropriate in order to preserve credibility. But such brief requires exhaustive research, and you have to distinguish any case which could possibly support a claim. Most cases have at least one “writable,” if not winning, issue.

Would the court prefer an Anders brief to a one-issue writable brief? An issue that is raised to preserve it for further review? Keep Bousley in mind. The circuit should want the appellant to have an advocate, rather than to be abandoned at this level. In cases where Anders briefs are filed, the court may feel compelled to scour the record for an issue because of the lack of advocacy.

Consider this: In United States v. Mihaly, 67 F.3d 894 (10th Cir. 1995), the defendant plead guilty to committing mail fraud while serving another federal sentence. However, because the court ordered his sentence to run consecutively to his prior federal sentence, Mihaly appealed. The district court had ruled it did not have discretion, under §5G1.3(a), U.S.S.G., to order concurrent sentences.

Mihaly’s counsel filed an Anders brief and moved to withdraw as required. *See* Tenth Circuit Rule 46.4.2. However, on appeal the government conceded that the district court had erred, recognizing that the court had authority to depart downward to a concurrent sentence. Based on the government’s concession, the Tenth Circuit denied counsel’s motion to withdraw and remanded the case for resentencing.

You might persuade your client to voluntarily dismiss an appeal rather than file an Anders brief. *See* Rule 42, F.R.A.P. Sometimes there may be issues which can be raised in a motion to vacate sentence, rather than on direct appeal, and you should advise your client of these. Sometimes the risk of raising a winning issue outweighs the benefits. For example, the record reflects that the defendant should have been permitted to withdraw his guilty plea. However, there is also a strong indication in the presentence report that the prosecutor might charge him with more serious crimes than that to which he had pleaded guilty. In this situation, success on the merits entails risks. The client may decide to voluntarily dismiss his appeal.

Conclusion

Every case is different. The balance you strike in one case, in terms of tone, may not work in another. Ask the right questions, and you are more apt to come up with one of the possible right answers.

There are some cases that, even with bad lawyering, would be won. And there are many cases that, even with the best lawyering, will be lost. The aim in the developing your appellate advocacy skills is to make a difference in the vast number of cases that fall in the midst of those two extremes.