

Article Excerpt

I. INTRODUCTION

Five years ago, the Office of the Attorney General of Maryland held its first Civil Appellate Brief Writing Program. This program was part of a concerted effort to improve the level of written appellate advocacy in the civil appeals handled by its attorneys. Since that time, approximately 350 Maryland Assistant Attorneys General have participated in this program, by listening to lectures about effective brief writing, speaking to appellate judges who sit on the courts before whom the Office most frequently litigates, and engaging in small group discussions in which they have dissected briefs written by them specifically for the program. (1) The centerpiece of the program is the Office's Civil Appeals Style Manual.

The Manual was created for the purpose of improving and standardizing the hundreds of civil appellate briefs that the Office files each year in state and federal courts. The Manual is premised on the beliefs that not only is a great brief better than a good brief, but that a great brief is more likely to result in good law and a positive outcome for our clients. An excellent brief also properly reflects the high professional standards expected of all attorneys when advancing the Office's role in the appellate process.

We share with others the substantive components set forth in our Civil Appeals Style Manual, slightly adapted to fit the law journal format. We are eager to share the Manual's principles because we have seen a marked improvement in our appellate briefs. We believe that others can also benefit from the writing principles that our attorneys consider when engaging in the brief-writing process.

II. GUIDELINES FOR THE STRUCTURE AND CONTENTS OF THE BRIEF

The Manual contains three parts: technical requirements, guidelines, and an appendix. The technical requirements, which are not reproduced in this article, are designed to assure that our civil appellate briefs look the same; they consist of stylistic rules that govern the format and appearance of all civil briefs that the Office files. The guidelines, set forth below, articulate principles that apply to the substantive components of the appellate brief, e.g., the statement of the case, questions presented, statement of facts, summary of argument, argument, and conclusion. The appendix, which also is not reproduced here, contains examples of each of these components.

While the technical requirements leave the brief writer no discretion with respect to the brief's physical appearance, such compliance is not expected with respect to the Manual's guidelines. While the principles are intended to provide guidance on writing an effective brief, they may not apply in all circumstances. The Office's attorneys are accordingly told that the principles should not be followed if they do not work. The only request we make is that if the individual attorney decides to deviate from the Manual, he or she simply needs to be sure that this decision is made purposefully and is supported by a good reason.

These guidelines track the structure and contents of briefs filed in the Maryland appellate courts. The rules governing those briefs, however, are similar in most respects to the rules regulating briefs in other appellate courts, and so they may be of assistance to brief writers elsewhere. Attorneys within the Maryland Attorney General's Office are told that these guidelines are not a substitute for the rules and that they are based on the assumption that the reader is familiar with all applicable rules.

A. Beginning the Brief

Principle 1: Develop your theme.

Regardless which part of the brief you choose to write first, you should identify the brief's "theme" and use the theme in writing virtually every part of the brief. Senior United States Circuit Judge Ruggero J. Aldisert defines the theme as "the unifying focus of your brief" that (1) "directs the court's attention ... to where the heart of the matter lies" and to "the equitable heart of the appeal," and (2) answers the question, "What in the heck is the message?!" (2) As Judge Aldisert states, the theme does more:

The theme not only sets the flavor of your argument but also sets the mood. It is both the focus and the thesis. It directs the judges' attention immediately to where the trial court's error took place and explains straightaway why the trial court was wrong or, when used by the appellee, why it was right. It tells the appellate court what relief you want. (3)

An appellate theme may be easy to identify, such as when you can articulate in one sentence what the case is about. In other cases, however, the theme may not emerge until you draft an outline of the brief or just

start to write the brief itself. If you develop the theme by resorting to the latter technique, you will need to revisit your work to make the brief fit the theme. Whatever method is used, you must have a theme that shapes your brief.

Principle 2: Know your audience.

Consider your reader in the overall approach, style, and tone that you use when you begin to write. As two commentators observe, "[W]e must understand our audience and purpose before we begin to write...." (4) As they point out, however, this observation, standing alone, borders on being a cliché. It is not "enough to know, for example, that your audience is an appellate court and your purpose is to persuade it that a trial court misconstrued a statute." (5) Rather, you need to determine consciously what your audience knows.

Judges are very familiar, for example, with the principles of statutory construction or the substantial evidence test, and they do not need a multi-paragraph recitation of these maxims. Instead of spending time and energy telling the audience what it knows, and thus advancing no useful purpose, an effective brief devotes greater space to discussing why those familiar principles warrant the result that you seek. In a case involving a statutory construction issue, for instance, focus on the language of the statute and pertinent legislative history; in an administrative appeal raising a substantial evidence question, focus on the factual findings that warrant the appellate court's deference. You will need, of course, to discuss the controlling legal principles in each of these cases, but these principles should be used to advance, rather than to monopolize, that discussion. In other words, "[t]he goal is to find an approach that is informative without being condescending or wasting time." (6)

Being cognizant of what your audience knows also is important to the overall approach of the brief. While you may assume that judges are familiar with basic legal principles, do not assume that the court is as knowledgeable as you are on the law surrounding the issues on appeal. All briefs (appellant and appellee) should be written so that regardless of the order in which the briefs are read, the judges will fully understand the issues raised and the context in which they are presented.

B. Statement of the Case

Principle 3: Advocate from the beginning, but do so without arguing.

The Maryland rules of court provide that a brief shall contain "[a] brief statement of the case, indicating the nature of the case, the course of the proceedings, and the disposition in the lower court." (7) This requirement contemplates a succinct recitation of material procedural facts that describe what the case is about and how it arrived at the appellate level. You need not, however, reproduce the docket sheet or set forth a sterile discussion of the case's procedural history. A brief's sole objective is to persuade the reader that the judicial decision below was either right or wrong. The brief writer should advance that purpose at the earliest opportunity, i.e., at the beginning of the statement of the case. Just make sure that this recitation is done with absolute accuracy and no argument. Consider the following examples introducing a statement of the case:

Example 1 Appellant Department of Public Safety and Correctional Services filed charges of removal against appellees Walter Howard and Brandon Taylor in June of 1992, seeking to discharge them from their positions as correctional officers at the Eastern Correctional Institution. Example 2 This case arises out of charges of removal that Appellant Department of Public Safety and Correctional Services filed in June of 1992 against Appellees Walter Howard and Brandon Taylor, seeking to discharge them from their positions as correctional officers at the Eastern Correctional Institution because: (1) one of the officers assaulted an inmate; and (2) both officers made false statements and reports in an attempt to cover up that assault.

Each example complies with Rule 8-504(a)(2), yet the second example is more effective, because it tells the reader so much more: It provides information that is very favorable toward one side (the Department) and very unfavorable toward the other (Howard and Taylor); and it delivers a much more complete context with respect to what the case is generally about. A brief that begins like the second example will be more interesting to a judge who reads hundreds of briefs each year.

Advocacy has its limits, however, and the writer must tailor the statement of the case accordingly. While all argument is advocacy, not all advocacy is argument. Effective advocacy in the early sections of a brief often consists of selecting information and packaging it advantageously. As the following examples illustrate, the statement of the case should advocate; it should not argue:

Example 1 This case presents a jurisdictional issue triggered by a jury trial request that Petitioner Autos, Inc. filed in a district court action in which its landlord, Respondent Department of General Services, sought to terminate its lease. The district court erroneously entered an order striking Autos, Inc.'s demand for a jury trial, even though the jury trial request by operation of law divested the district court of jurisdiction over the action. Autos, Inc. immediately appealed that decision to the Circuit Court for Frederick County, which improperly ignored Autos, Inc.'s assertion that the court had original jurisdiction over the case due to the jury trial request. The court compounded that error by incorrectly dismissing the appeal as an impermissible interlocutory appeal. Autos, Inc. subsequently filed a petition for a writ of certiorari that this Court granted.

Example 2 This case presents a jurisdictional issue triggered by a jury trial request that Petitioner Autos, Inc. filed in a district court action brought by its landlord, Respondent Department of General Services, to terminate its lease. The district court entered an order striking Autos, Inc.'s demand for a jury trial, rejecting its claim that the jury trial request divested the district court of jurisdiction by operation of law. Autos, Inc. immediately appealed that decision to the Circuit Court for Frederick County, which disregarded Autos, Inc.'s assertion that the court had original jurisdiction over the case due to the jury trial request. The court instead dismissed the appeal as an impermissible interlocutory appeal. Autos, Inc. subsequently filed a petition for a writ of certiorari that this Court granted.

These examples contrast the difference between advocacy that is argumentative and advocacy that is not. While each conveys the same procedural information, the first example crosses the line in a manner that is both unnecessary and likely to draw the ire of a judge who believes that the statement of the case should be "neutral." No useful purpose is served by including words such as "erroneously," "improperly," and "incorrectly." The first example also assumes the legal conclusion in stating that "the jury trial request by operation of law divested the district court of jurisdiction over the action." That is precisely what is at issue in this case; it should not be treated as an undisputed proposition. This is nevertheless meaningful information that the statement of the case, as an advocacy tool, should include. As the second example shows, this same information can be communicated just as effectively--and without the risk of alienating the judge--by packaging it in terms of what the petitioner argued to the district court.

Principle 4: Paint a picture that persuades the reader to the writer's point of view.

The following examples contrast the ways a statement of the case can give the reader a good sense of the context of the case and the brief's theme:

Example 1 (from Comptroller's brief) This case involves an appeal from an administrative decision upholding the right of the Comptroller of the Treasury to freeze the reclassification applications of three of his employees. Example 2 (from Comptroller's brief) This case involves an appeal from an administrative decision upholding the right of the Comptroller of the Treasury to freeze the reclassification applications of three of his employees. The Comptroller imposed the freeze because of a lack of funding and in response to the Governor's September 4, 1990 directive to all state agencies to contain costs to make up a \$150 million shortfall in revenues.

Each example states what the case is about, but the second goes much further: It tells the reader the central reason underlying the action that the appellate court has been asked to review.

Principle 5: Continue to articulate the theme long after the introductory sentence.

As the following examples show, a statement of the case is more effective if it advances the theme or theory of the case throughout:

Example 1 (from the Appellee's brief) On January 25, 1995, Appellant moved to intervene as a matter of right in the proceeding below pursuant to Maryland Rule 2-214(a). (E.50.) All parties filed responses opposing the intervention motion. (E.61; 79.) On April 4, 1995, the Circuit Court for Baltimore City (Kaplan, J.) held a hearing at which it denied the motion. (E.193.) Nevertheless, the court stated that Appellant could participate as *amicus curiae* in order to present its views. (E.193-94.) This appeal arises out of the circuit court's order denying Appellant's motion to intervene in this case. Example 2 (from the Appellee's brief) This is an appeal by Montgomery County from an April 11, 1995 order of the Circuit Court for Baltimore City (Kaplan, J.) denying its motion to intervene in a case brought by parents and children of Baltimore City against the State alleging that the State has failed to provide the "at risk" children of Baltimore with a constitutionally adequate education. Montgomery County sought to intervene as a matter of right, arguing that the resolution of the case would cause it to "devote still more revenues from local tax sources for the support of its public schools." (E.52.) Montgomery County's position was based on the following contingencies: that "there would be a finding of a violation" in the Baltimore City case; that the remedy for

such a violation "would be a vast increase in the commitment of State financial resources to the Baltimore City Public Schools System"; and that there would be a corresponding "diversion of ... additional State resources to Baltimore City [that] would cause a diminution in the resources to other jurisdictions." (E.52-53.) The court denied the motion, concluding that the case presents "a basically straightforward issue and that is, are the children of Baltimore City getting an appropriate education or are they being denied an appropriate education." (E.186.) This appeal followed.

The second example is a better piece of advocacy--it contains significantly more meaningful information, and it communicates that information in a punchier and more interesting style.

A stylistic observation should also be made. Although both examples include record extract references in the statement of the case, the Maryland rules impose such a requirement only for the statement of facts. Nevertheless, the preferred practice is to include extract citations whenever possible, because they direct the reader to parts of the extract that you rely on.

Principle 6: The statement of the case should be short, but long enough so that the reader understands the issues that the case involves.

The typical statement of the case should be set forth in one or two paragraphs, such as in Principle 5, Example 2 above. In some situations, however, a short statement of the case may be ineffective due to the nature of the issues involved. Care should be exercised in determining whether it is necessary to provide a fuller and more detailed discussion of the case to communicate to the judge what the case is about.

Principle 7: The statement of the case should make clear that the appellate court has jurisdiction over the appeal.

In explaining how the case made its way to the appellate court, set forth the necessary facts establishing the court's jurisdiction over the appeal. In most cases, this can be done fairly easily by stating that the judgment was entered in the circuit court on a certain date and that the notice of appeal was filed within thirty days of that date. As the following example illustrates, however, this is not always so simple:

The sole issue that this appeal presents is whether the Circuit Court for Baltimore County (Kahl, J.) properly held that suit against Appellant Stuart O. Simms, formerly the State's Attorney for Baltimore City, and Appellant Haven Kodeck, an Assistant State's Attorney, is not barred by absolute prosecutorial immunity. The appellees are three Baltimore City police officers who filed suit seeking monetary relief against the prosecutors and other individuals.... The prosecutors filed a motion to dismiss, asserting that all claims against them are barred by absolute immunity. Without holding a hearing as the prosecutors requested, the circuit court denied their motion. The prosecutors then noted immediate appeals under the collateral order doctrine from the lower court's denial of their immunity claim. See e.g. *Mandel v. O'Hara*, 320 Md. 103, 134 (1990); *Rice v. Dunn*, 81 Md. App. 510, 511-13, cert. denied, 319 Md. 581 (1990).

The bottom line: If a potential doubt exists with respect to the appellate court's jurisdiction, include enough information to remove that doubt.

Principle 8: As a general rule, all appellee's and respondent's briefs should include a statement of the case.

A Maryland rule of court provides that "the appellee's brief shall not contain a statement of the case unless the appellee disagrees with the statement in the appellant's brief." (8) This rule gives considerable discretion to the brief writer, particularly as sub-section (a)(4) of that rule provides that "the appellee's brief shall contain a statement of only those additional facts necessary to correct or to amplify the statement in the appellant's brief." (9) We have suggested to our attorneys that, as a general matter, they exercise their discretion to include a statement of the case in their appellee's or respondent's brief. In most cases, the opponent's brief will not characterize the nature of the case in a manner that favors our client. Nor, in most cases, will the opponent describe the course of the proceedings or the disposition of the case in the lower court to our agency's advantage, at least not as well as we can. In other words, unless the case is one in which no amount of advocacy can be used in the statement of the case, our attorneys are encouraged to write their own statement because our opponents are most likely not going to be advocates for our clients.

C. Question Presented

After setting out the statement of the case, the brief is required to state "the legal propositions involved and the questions of fact at issue expressed in the terms and circumstances of the case without unnecessary

detail." (10)

Principle 9: The question presented should be a brief argument summary, one that is (a) adversarial and designed to elicit a favorable response, and (b) developed with enough law and facts to give the reader a sufficient understanding of the case.

Writers should draft questions that slant most favorably, but fairly, to the position they are advancing, while also comprehensibly informing the court of the brief's central arguments. When you write a brief in support of a judicial or administrative decision, consider whether to incorporate language in the question such as "Did the circuit court/administrative agency correctly decide ...?" It may also be effective to include information that pertains to the applicable standard of review. Consider the following examples from an appellee's brief:

Example 1 Did the juvenile court correctly exercise its discretion in revoking a newspaper's access to a confidential juvenile court proceeding? Example 2 Did the juvenile court abuse its discretion in revoking a newspaper's limited access to a confidential juvenile court proceeding, which was otherwise closed to the public, after the newspaper (1) violated the court's prior order prohibiting the disclosure of the identity of the child who is the subject of this proceeding, and (2) refused to agree to conditions designed to ensure that the child's identity would not be divulged?

The first question is short and comprehensible; it is effective to the extent it focuses the reader on the circuit court's discretion, which appellate courts are reluctant to second-guess. Certainly, it is more effective than a question stating, "Did the juvenile court commit reversible error?" But it tells the reader virtually nothing about the case.

In contrast, the second question is much more effective for the appellee because it includes additional information more likely to persuade the reader to answer the question in a favorable manner. Adding the word "limited" before the word "access" and stating that the juvenile proceeding "was otherwise closed to the public" qualify the nature of the newspaper's right. The remaining information adds an entirely new dimension to the question that is designed to lead the reader to conclude that there is no abuse of discretion in this case. Consider also using commas and bracketed numbers to break the question into shorter subparts, thus relieving readers of the obligation of storing too much information as they digest the question.

Principle 10: Provide a complete explanation of the issue on appeal.

It is easy to fall into the trap of writing a question that avoids being abstract but at the same time fails to convey a full sense of the issue before the court. One trick that often works is to use the word "when" in writing the question. As the following examples from a respondent's brief show, this technique forces the writer to provide a fuller description of the issue on appeal.

Example 1 Did Petitioner's demand for a jury trial divest the district court of jurisdiction to strike that demand when Petitioner entered into a lease that expressly waived the right to a jury trial? Example 2 Was the district court's decision striking Petitioner's jury trial demand immediately appealable under the collateral order doctrine when the jury demand could be effectively reviewed on appeal and was inextricably intertwined with construction of the lease?

Had each of these questions ended before the word "when," it certainly would not have been abstract, and it might even have been adequate. But it would not have been a particularly informative question. Using "when," however, makes the writer give a more complete description of the issue that the court is to decide, and the question is markedly improved.

Principle 11: The question presented should emphasize the proper focus.

Ensure that the question presented asks the right question and has the proper focus. Consider the following question from a petitioner's brief:

Does a district court, which is automatically divested of jurisdiction when a party has made a proper jury demand, have authority to find a waiver of the jury trial right based on a lease?

This question would be effective if, as the question leads the reader to believe, the jury demand automatically divested the district court of jurisdiction. But if that is a central issue, as it was in the case in which this question was presented, the question is off the mark because it fails to properly direct the reader's focus. That focus is better stated as follows:

Is a district court automatically divested of jurisdiction when a party has made a proper jury demand, such that the court lacks authority to find a waiver of the jury trial right based on a lease?

Principle 12: Minimize the number of questions presented.

When you are determining the number of questions that are to be presented, the general rule is "the fewer the better." As Judge Diana Motz of the United States Court of Appeals for the Fourth Circuit writes, "Generally, there should be no more than four questions; do not repeat the same question in different ways. Often, a case presents only one or two questions. Very occasionally a case presents many questions. It is, however, almost impossible to treat adequately more than four issues in a thirty-five to fifty page brief." (11) Or, as another federal judge observes, "When faced with a brief that raises no more than three points, I breathe a sigh of satisfaction and conclude that the brief writer really may have something to say." (12)

Circumstances may exist, of course, when deviation from this rule is appropriate. Just make sure that such a deviation is necessary. For example, an appeal may involve a number of evidentiary rulings. Instead of a separate question for each ruling, consider setting forth separate questions for the two most serious issues, followed by a general question that subsumes the remaining issues, such as "Did the circuit court properly allow testimony on subsequent remedial measures that the defendants implemented, or did it commit any error in deciding the other evidentiary issues raised below?"

Principle 13: Consider whether to condense your opponent's questions.

The same principles also apply when you are determining the nature and quantity of questions to include in an appellee's or respondent's brief. Resist the temptation to parrot the number of questions set forth in the other side's brief. It is not uncommon for an appellate court to rephrase the questions in a party's brief (and in the process reduce their number) before embarking on a legal analysis. If the courts can do it, so can we.

D. Statement of Facts

Maryland rules of court mandate that a brief contain "[a] clear concise statement of the facts material to a determination of the questions presented, except that the appellee's brief shall contain a statement of only those additional facts necessary to correct or amplify the statement in the appellant's brief." (13) Consider the following guidelines when drafting this portion of the brief.

Principle 14: Tell a story.

As one judge notes, "[E]xperienced appellate judges may form their first, and probably their most lasting, impression of your side of the case from your statement of facts." (14) Because the statement of facts immediately precedes the argument, it should attempt to "set up" the reader to begin the argument section favorably disposed to the brief's ultimate position. Accordingly, the statement of facts "should be an accurate, interesting narrative of the facts relevant to the underlying legal dispute." (15)

According to two experts, facts may be organized "according to chronology, actor, issue, witness, or geography." (16) Although Messrs. Armstrong and Terrell caution against mixing these approaches (claiming it can be "fatal"), they offer the following example as a way to do so "in complicated situations" without creating "chaos."

By chronology: J. entered first grade.... In 1981, she was placed in.... Two years later, she was moved to.... Then by issue: Starting in 1980, J. began to exhibit behavior that.... As a result of this behavior, school authorities concluded that.... Then by witness: On the question of whether her present nonresidential program has resulted in significant educational progress, Dr. Jones stated that.... Ms. Smith, on the other hand, said that.... (17)

Even with a chronological approach to organizing facts, however, it may sometimes be necessary to begin elsewhere than at the historical beginning. For example, many of our cases involve complex statutes and regulations. These cases lend themselves well to a compartmentalized discussion of the statutory and regulatory scheme, followed by the facts giving rise to the appeal. Engaging in this type of approach, after an introductory statement about the case, accomplishes several objectives. It tells the reader what to expect, and it avoids the temptation to jam too much information into the brief at one time. It also provides a more appropriate "home" for this type of information than a generic "Introduction" section used by many writers to describe applicable statutes and regulations at issue in the appeal.

Use the witness approach to organizing facts with care. As Judge Motz comments, "[A]void simply recounting 'he testified, she testified'...." (18) A witness-by-witness summary of testimony rarely accomplishes the goal of setting out an engaging account of facts that the reader will want to follow. Instead, it is more likely to be repetitive and unfocused. Further, by forcing the reader to figure out the relevance of the summarized testimony, you may lose rather than capture the judge's interest. Your goal should be, as Judge Motz suggests, to "tell a story." (19)

Principle 15: Establish and maintain your credibility with accuracy and fairness.

The story you tell in the statement of facts is a road map to the record. Every statement must be accurate and supported by material in the record. A good way to ensure this level of accuracy is to follow every sentence with a citation to the record. An occasional sentence of summary or orientation may not need a record citation, but be sure the facts contributing to such a sentence are stated nearby with citations. Judges check the record. If you stretch facts or distort the record, you will lose credibility; one error often casts into doubt your entire effort.

A first cousin of accuracy is fairness, but do not confuse fairness with neutrality. If a witness at trial testified clearly to facts establishing your case, it is perfectly fair to state those facts in your brief forcefully and as an advocate. Neutralizing that favorable fact into a sterile statement to which your opponent would not object surrenders an opportunity to lay the foundation for your position. Effective advocacy occurs when you marshal favorable facts and state them accurately and fairly, with detailed citations to the record. Fair advocacy often gives way to inappropriate (and weak) argument, however, when buzzwords like "obviously" and "clearly" creep into a statement of facts. These adverbs are telltale signals of weak or non-existent record support.

Effective advocacy of facts also includes dealing directly with facts unfavorable to your position. Doing this eliminates the risk of unpleasant accusations from your opponent (or worse, from the court) that you are attempting to mislead the court, and it enables you to cast lousy facts in the best light possible from your perspective. Giving the complete picture bolsters your credibility by enhancing the sense that you are handling facts fairly.

Principle 16: Use the statement of facts to advance the theme of the brief

Because facts are not neutral, the writer should view this portion of the brief as yet another opportunity to be an advocate. The relevance and significance of facts are largely determined by the manner and order in which they are organized and presented. The presentation of facts will likely have a greater impact if the facts are structured in a way that sets up and furthers the theme of the brief. Consider the following example:

On December 2, 1993, the Board of Physician Quality Assurance charged respondent Lester H. Banks, M.D., with "immoral or unprofessional conduct in the practice of medicine" under [section] 14-404(a)(3) of the Health Occupations Article. Those charges were based on his sexual harassment of female staff while working at Carroll County General Hospital as a house physician. As the Court of Special Appeals noted, "Dr. Banks does not dispute that any of the incidents of harassment took place," (App. 2 n. 1), nor does he dispute "that his conduct was immoral and unprofessional." (App. 10.) "Witness #1," a unit secretary on the hospital's East Wing, testified that Dr. Banks often stopped by the nurses' station, ran his hands through her hair, caressed her head and neck, and made sexual comments. (App. 2-3.) She testified that, on one occasion, she was in the kitchen with him when he got up and closed the door, causing her to become very frightened and to leave the room. (App. 3.) On another occasion, Dr. Banks approached her from behind and put his arms around her waist. (Id.) She testified that this conduct was unwelcome, that it embarrassed her and made her uncomfortable, and that she asked Dr. Banks to stay away from her. (Id.) She also testified that he was "dressed in green scrubs at the time of the offensive touching...." (E. 6 & 16.) In a report that this witness subsequently filed describing Dr. Banks's repeated touching and rude sexual comments, she stated that his "offensive conduct often occurred in areas where patients, visitors, and other staff could observe the advances." (App. 3.)

The first paragraph in this example states the brief's theme--that Dr. Banks engaged in immoral or unprofessional conduct in the practice of medicine. The sentences that follow then advance that theme by highlighting those facts that build on and develop that assertion.

Principle 17: It is usually necessary to include a complete statement of facts in an appellee's or respondent's

brief.

Maryland's appellate court rules limit an appellee's brief to setting out "only those additional facts necessary to correct or amplify the statement in the appellant's brief." (20) With few exceptions, "additional facts" will almost always be "necessary to correct or amplify" the statement of facts in the appellant's brief. Because the appellant's counsel is an advocate, the appellant's selection and arrangement of facts will rarely be sufficient, without correction or amplification, to tell the story of the case from your client's perspective. The difficulty, however, arises in presenting only the additional facts needed to augment or correct the appellant's statement. Because facts exist in context, a disjointed presentation that isolates corrections and amplifications is almost certain to be awkward, ineffective, and maybe even unfair. For example, the isolated correction of the appellant's inaccurate statement of a relatively minor fact will give that fact undue emphasis. Similarly, the need to amplify a handful of points may direct unwarranted attention to those points, to the detriment of facts that both parties acknowledge to be more important. Indeed, the cumbersome process of orienting the reader to a particular correction or amplification--"Appellant states A, B, and C, but the evidence actually establishes A+X and B-Y and Z, not C"--often takes as much space as simply restating the facts, and runs the risk of introducing blatant argument into the statement of facts.

In most cases where there is a need to correct or amplify facts, the most efficient, fair, and effective way to accomplish that goal is to provide a complete statement of facts incorporating the necessary corrections and amplifications. It is the most efficient means because it permits the judge reading your brief to read it continuously and coherently, without turning repeatedly to the appellant's brief to understand the points on which the facts are disputed. (This is particularly true because some appellate judges have told us that they read briefs from our Office first, even if we represent the appellee.) It is the most fair approach because it gives all facts in appropriate context, without the distortion that is inevitable in a piecemeal supplementation of facts, and because it avoids the argumentativeness inherent in pointing out deficiencies in the appellant's brief. It is by far the most effective technique because it tells your client's story and advances the theme of your brief.

Because your statement of facts will be a complete statement, avoid using introductory sentences such as, "The appellee agrees generally with the appellant's statement of facts, subject to the following additions," or "The appellee submits this statement of facts because of material omissions from the appellant's statement of facts."

Principle 18: State only those facts that are necessary to understanding the legal issues that the case involves.

Include in the statement of facts all material facts, i.e., those facts that the reader needs to know to appreciate the context surrounding the legal controversy at the heart of the appeal. Unless the issue on appeal warrants it, you should not need to provide an exhaustive list of every procedural event that occurred and the date of its occurrence. In the ordinary case, these kinds of facts add nothing to your brief. Refrain from inundating the court with similarly unnecessary detail or facts that relate to issues that were significant at the trial court level but that are no longer important at the appellate stage.

Principle 19: Provide record extract citations for each of the facts that you discuss.

The statement of facts should contain citations to the record extract for each factual contention made, not just to ensure the accuracy of the statement, but also because judges often will want to know the source of the facts that you have asserted. That source should be the original source, i.e., a witness's testimony or a document, not an administrative law judge's or circuit court's description of the evidence.

If all of the facts in a paragraph are set forth in the same page of the extract, a citation at the end of the paragraph is sufficient. If multiple pages are involved, however, provide a citation at the end of each sentence, even if these facts come from the same source such as a witness or document. Citations to a pleading, affidavit, or other document with numbered paragraphs should include a reference to the appropriate paragraph (e.g., E. 247 [paragraph] 8).

Principle 20: Discuss the decision being reviewed.

Whenever possible, the statement of facts should include a succinct and meaningful discussion of the decision that the appellate court is reviewing. Remember, judges read the statement of facts just before proceeding to your argument. A discussion of the decision below reorients their focus; it can be used to highlight either the central error that you are asking them to correct or the major flaw in your opponent's

argument. Consider the following example from the State's brief:

Following a two-day hearing, the circuit court enjoined the implementation of the Commissioner's regulations restricting smoking in indoor places of employment. (E. 308; 311.) The circuit court found that plaintiffs satisfied the likelihood of success factor set forth in *Dept. of Transp. v. Armacost*, 299 Md. 392 (1984), because they raised "significant questions" as to two of their claims and "additional evidence" was required as to a third claim. (E. 307.) The court further held that the balance of convenience favored the plaintiffs because the Commissioner's regulations "would work a severe hardship upon a significant number of citizens of this State." (Id.) The court also found that plaintiffs would suffer irreparable monetary losses absent an interlocutory injunction and that it was in the public interest to enjoin the implementation of the regulations. (E. 307-308.)

Great care should be taken, therefore, to squeeze out whatever juice the lower court's decision contains. Sometimes, of course, there may be very little to discuss, such as when a circuit court simply enters a pro forma order granting a motion to dismiss or a motion for summary judgment. In those cases, state the basis of the motion and summarize what the court did.

Principle 21: Decide where to put the heart of the best facts.

In some cases, particularly those that involve substantial evidence issues, you may want to put the best facts up front so that the judge is practically convinced of the correctness of your position from the statement of facts alone. In other cases, however, it may be more effective to save the best facts for the argument section of the brief, and so it might make sense to discuss them in a summary fashion in the statement of facts. Do this, without making your brief sound redundant, by restating, rather than repeating, good facts. For example, the circuit court decision that you are defending on appeal may contain very powerful and helpful language. You can get extra--not the same or repetitive--mileage out of that language by paraphrasing in the statement of facts what the circuit court did, and then quoting in your argument relevant portions of the circuit court decision. The same approach would work with an exhibit or a witness's testimony: If this is "smoking gun" evidence, you might want to give an abridged version of this evidence in the statement of facts and then quote the exhibit or the witness in the argument.

Principle 22: Consider when to repeat "great" facts.

Although facts should not be repeated as a general rule, some facts are so good that you'd almost be crazy not to repeat them. If, for example, the plaintiff in an age discrimination case inadvertently states at his deposition that he is thirty-eight years old--and thus not old enough to enjoy the protections of the Age Discrimination in Employment Act--you may want to quote this admission both in the statement of facts and the argument.

E. Summary of Argument

In the federal courts of appeals, attorneys are told to draft a summary of argument setting forth "a succinct, clear, and accurate statement of the arguments made in the body of the brief." (21) While no counterpart to this rule exists in the Maryland Rules, the latter do not prohibit the inclusion of a summary of argument in briefs filed in the Maryland appellate courts. We encourage attorneys in our Office to write a summary of argument in briefs that contain either more than fifteen pages of argument or multiple, complicated issues. The summary of argument section immediately precedes the argument section of the brief.

Principle 23: State the theme of the brief in the summary of argument.

A properly written summary of argument fulfills the important goal of providing a concise overview of the arguments set forth in the brief, thus informing the reader of the theme and scope of the brief. As illustrated in the following introductory paragraph from a summary of argument, the objective is to provide the court with the "big picture":

This case involves fundamental issues of federalism that affect one of the most basic rights of the amici states: the right not to be sued in their own courts without their consent. That right was a core attribute of state sovereignty when the Constitution was ratified; it was made an explicit part of our national framework when the Eleventh Amendment was adopted; and it is as much an essential component of state sovereignty today as it was when this nation was formed over two hundred years ago. In holding that Congress lacks the authority under its Article I Commerce Clause powers to usurp what is and always has been an inviolable element of state independence and integrity, the Supreme Judicial Court of Maine properly recognized these

postulates and reached a decision that carefully preserves the historic balance of power that underlies and welds the relationship between the federal government and the states.

Principle 24: Include all significant issues and sub-issues in the summary of argument.

The federal rule cautions that the summary of argument "must not merely repeat the arguments headings." (22) Nevertheless, argument headings should serve as a guide to constructing the summary of argument because argument headings, like the summary of argument, are designed to apprise the judges of the core arguments set forth in the brief. The summary should advance a theme that will be "all-inclusive and [will] subsume the various points to be discussed in the brief." (23) In contrast to argument headings, however, the summary needs to include a more extensive (albeit condensed) discussion of the different issues discussed in the brief.

Having said this, do not feel compelled to include in the summary of argument a reference to every issue addressed in the brief. Some issues are truly inconsequential and merit terse treatment in the argument section of the brief. It is not necessary to waste ink in the summary on such issues.

Principle 25: Use the summary of argument as an organizational tool.

The summary of argument, whether you write it before or after you draft the argument portion, also ensures that the brief is correctly organized. Briefs often address multiple issues and sub-issues, and frequently contain alternative theories. Writing the summary first helps map out an outline of the argument for you to follow. Alternatively, if you write the summary after you have written the argument, use the summary to revisit the structure of the brief, such as when the summary logically suggests a better order to the argument.

F. The Argument

Principle 26: Give context before discussing details.

The way in which an argument is organized marks the principal difference between a brief that is mediocre and one that is good or superior. As the late Maryland Court of Appeals' Chief Judge Robert C. Murphy suggested, focusing your effort on "more sensible and effective organization" will lead to a "fundamental improvement" in any brief. (24) A critical part of an argument's organization is an introduction that gives readers the context for your argument so that they understand the basic elements of your position. An effective way to do this is to structure the beginning of your argument so that it "goes for the jugular vein." (25)

Translation: If you are writing an appellant's or petitioner's brief, the way to convince the appellate court that the decision below is wrong is, first, to identify the mistake that the lower court committed, and then to set forth the reasons mandating reversal. Similarly, if you represent the appellee or respondent, your objective is to persuade the court that the decision below should be affirmed; therefore, first show what the lower court did with respect to the specific issue raised on appeal, and then explain why and how the court correctly resolved that issue. Consider the following introductory portion of the petitioner's argument from a case used in several of Maryland's brief-writing programs:

The district court improperly granted the Department's motion to strike Autos, Inc.'s jury trial request because, under Md. Cts. & Jud. Proc. Code [section] 4-402(e), Autos, Inc. has a right to a jury trial that, once demanded, immediately vested sole jurisdiction in the circuit court over Autos, Inc.'s dispute with the Department. Section 4-402(e)(1) provides that a party may demand a jury trial "[i]n a civil action in which the amount in controversy exceeds \$5,000...." Autos, Inc.'s counterclaim asserted that its possessory interest exceeded \$5,000. The Department offered no evidence below that contradicted this assertion. Nor did the district court cite any such evidence in striking Autos, Inc.'s jury trial request. Under the express terms of [section] 4-402(e)(2), therefore, the district court was obligated to transfer the case "forthwith" to the circuit court. Accord *Carroll v. Housing Opportunities Commn.*, 306 Md. 515, 518 (1986). The circuit court thus erred in believing it had no jurisdiction over this case, as did the district court in thinking that it did and ruling on the Department's motion to strike, because "it is the demand for a jury trial, in and of itself, which acts to divest the district court of jurisdiction and simultaneously to..."