Twenty-Five Propositions on Writing and Persuasion

Jonathan Van Patten, University of South Dakota School of Law

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TWENTY-FIVE PROPOSITIONS ON WRITING AND PERSUASION

JONATHAN K. VAN PATTEN†

This article is an attempt to re-discover certain principles—some well-known, some perhaps less so—about writing and persuasion in the legal context. As to those which are well-known, the purpose is to remind you, dear Reader, of their wisdom and to show how these principles must be honored in any persuasive writing. It is fair to say that much of what follows is not new. It may be, however, that the familiarity of these principles has inhibited their full incorporation into one’s habits of writing. Let me attempt to persuade you about their continued vitality and indispensability. It is also my intention to add a few propositions to the list of essential principles of persuasive writing.

1. The paragraph is the unit of composition. This is the second “Elemental Principle[ ] of Composition” given in Strunk and White’s, The Elements of Style. I first encountered this in the Fall of 1970 when I took freshman composition at UCLA. Although I had a very fine teacher, I missed the significance of this proposition. I wasn’t alone. I think most everyone has missed the significance of this proposition. In my opinion, it is the single most important principle of legal writing. If you take nothing else from this Essay, make this proposition a habitual part of your writing and you will become a better writer.

What is so profound about the concept of the paragraph as the unit of composition? It looks rather simple. Let us start with what the proposition is not. It is not: “The word is the unit of composition.” Wouldn’t this make more sense? The word as the unit, however, is the study of words, not composition. Likewise, it is not: “The sentence is the unit of composition.” Again, this looks reasonable, but sentences are not the units of composition, they are the units of

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3. It is puzzling that this proposition is listed as the second elemental principle on Strunk & White’s list. The first—choose a suitable design and stick to it (STRUNK & WHITE, supra note 1, at 10)—is good advice, but pales in comparison with the second principle. Could it be that Strunk & White themselves underestimated its importance? Consider also that Bryan Garner, who consciously models his The Elements of Legal Style after Strunk & White, gives the paragraph as the unit of composition principle a surprisingly subdued place in his book. See BRYAN GARNER, THE ELEMENTS OF LEGAL STYLE 67-71 (Oxford University Press, 1991).
grammar. They are units for a different kind of study, but they are not the units of composition. If there is a problem with existing writing improvement courses or books, it may be because the focus is wrong. If the focus is on words or even sentences, it is too narrow. The sentences in a paragraph combine to form a unit. This is the essential focus. You must build your brief or memo on the paragraph. You must think in paragraphs. Anything less than a paragraph will not work. The paragraph is the right size of unit in which to think about composition.

What does it mean to be the unit of composition? It means that the unit is about one thing. If it is about more than one thing, then it should be split into separate paragraphs. If it is not about anything (that is, anything worth advancing), then it should be eliminated or worked with until the point of the paragraph becomes clear. You ought to be able to summarize what each paragraph is about in a single sentence.

The paragraph as the unit of composition is a principle with two separate functions. One is compositional or creative and the other is diagnostic or editorial. The paragraph principle is both the number one tool of composition and the number one tool of editing. You use it not only to create your own writing, but also to fix other people’s writing (or your own, for that matter, if you haven’t been consistent in using it on the creation side). I learned to use it first on the editorial side. If the paragraph is the unit of composition, then one should be able to see the structure of an article or brief by focusing on the paragraph. Summarize each paragraph in a single sentence and then line up the sentences to see what is there. Look at the sequence and determine if any of the parts are out of order or if there are gaps in the sequence. If you cannot figure out what the paragraph is about, then work on it for clarification. This was the basic principle of editing that I used for years with Law Review. I taught people how to edit on the strength on that single principle.

How do you figure out what the paragraph is about? For this type of legal writing, what the paragraph is about is almost always in the first sentence. Although the topic sentence could be anywhere in the paragraph, for this type of writing, it is almost always in the first position. Thus, you can begin to build your one sentence summary of the paragraphs by looking at the first sentence in each paragraph. If it is not there, then find it and make a note to move it up to first position later. By putting the one line summaries in sequence on a sheet of paper, you get the most objective view possible of someone’s (or your own) writing. There is not another diagnostic tool that comes close in effectiveness.

This principle is also the primary tool for creation of writing. If you are thinking in paragraphs, you are thinking of propositions. You are thinking about the sequence of the argument in steps. You are also thinking at the proper level of focus. At the initial creation stage, you should not be focusing on word choices. That will be taken care of later. If you focus on word choices at the outset, you may divert attention from the larger problems that must be solved before the argument can go forward in a coherent manner. If you focus on sentences, you are getting closer, but you may lose the essential focus because some sentences are more important than others.
The paragraph as a unit means that the paragraph is about one thing and for which the sentences in the paragraph play various roles. Just like a movie has lead actors, supporting actors, and extras, so paragraphs have sentences with different functions. There is the topic sentence—what the paragraph is about. It is usually in first position. The next few sentences play a supporting role. They explain, elaborate, describe, give examples, and give authority and support for the topic sentence. If you understand that sentences within the unit of the paragraph have different roles (particularly the distinction between topic sentences and supporting sentences), your writing is on the right track. Start with a proposition and, before you go on to anything else, think about what can be said to support that proposition. What can you do to support it, to explain it? If possible, the last sentence in the paragraph should conclude the thought in such a way as to point to the next topic sentence. When you think through the formation of paragraphs in this manner, then the sentences will form a unit.

Although paragraphs come in many sizes, it is useful to think about a model paragraph in a brief as follows. In first position is the topic sentence, the proposition around which the paragraph is formed. The next two to six sentences are the supporting sentences. The last sentence will either conclude the thought or point to the next proposition. Ideally, it will do both. The well-ordered paragraph has this kind of shape to it. It isn’t flat or uniform. It has a point, supporting information, and direction to the next point. This also means that one sentence paragraphs are inherently suspect. A division of labor is needed between assertion and support. The shortest paragraph one can write and make it work is a single sentence proposition followed by citation of authority.

I have the feeling with a lot of briefs that the function of the paragraph is mostly visual. That is, a paragraph indentation functions more like a breath mark in music—in essence a mental pause before the reader goes on. These paragraphs don’t have any internal cohesion. They simply break every so often. They are not built as units. When you see a brief with the paragraph as a coherent unit, you know the writer is a good writer. Good briefs use this method, whether consciously or not. I first started to see it as a diagnostic tool in law review editing and only much later did I begin to implement it as a tool for creation. If you think of paragraphs in terms of units, you are on your way as a writer. This is the starting place.

2. There are two ways to win a race—either run faster than everyone else or make sure that no one runs faster than you. For many students, the law

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4. This is not to say that the visual is irrelevant. In briefs, especially, there is a need to keep the paragraphs short. Longer paragraphs are somewhat daunting and, in any event, you want the impact of a topic sentence to occur with some frequency. When the paragraph reaches its fifth or sixth sentence, it is time to think about another proposition or to go back and break up the existing paragraphs into two (or more) units.

5. I acquired this priceless piece of insight from Professor Ken Graham of the UCLA School of Law. Its acquisition was fortuitous. I almost missed it. Every year, Professor Graham would give a satirical lecture entitled “How to Pass the California Bar Exam.” In a situation where the fail rate sometimes exceeds 50%, a little humor was needed to offset the growing apprehension among the students. The point of the lecture was simply to get people to laugh and yet I took from it something that
school process involves a metamorphosis. You come out a different person with a fundamentally different way of thinking about things. Along the way, you accumulate an incredible amount of information. What are the most important pieces of information from law school? For me, the first two propositions are my top two. Professor Ken Graham brought this second proposition to my attention: there are two ways to win a race—run faster or make sure no one else does. He gave several humorous examples which were built around ways to demoralize fellow competitors. It was intended to poke fun at the competitiveness of law students and not intended to be taken seriously. But somehow the line stuck with me and only later did I recognize its wisdom in practice.

I began to see that a recurring problem for attorneys in argument was that their competitive nature sometimes worked against them. Some attorneys try to win everything and you can’t win everything. So, the idea is not to win everything, but to make sure that no one else can run faster on the hard questions. Win where you can win. When you can run faster than anyone else, do it. You are expected to win some issues and that is what you must do. When the issue is close and you can’t run faster, make sure the other side doesn’t run faster than you. In other words, don’t lose. When attorneys try to win everything, they often lose because they have lost credibility. Instead, what they should have been doing is not losing the close ones.

Once you start looking for the overreaching, you begin to see it everywhere. Lawyers and law students can’t help themselves. They are often so competitive they want to win everything. One time, for example, I watched a student lose a round in the USD Sam Masten moot court competition because he tried to win a question he could not win. A former debater and aggressive by nature, he took the bait from the judge’s question and wandered right into trouble when he could have easily avoided it. I thought: “I can fix that.” At the writing retreat for the moot court board, I spent extra time on this proposition and it turned him around. For him, the idea that there are two ways to win a race probably became the most important piece of information he took from law school. He was then able to channel all of that will and energy in a productive manner.

Another way I put this to various students is: “Pick your fights wisely.” Not only which fight, but how to fight. That is the insight of this second proposition. You always fight in the case, but on some issues you fight offensively and on others you fight defensively. Be aware of which way you are fighting. When you learn how to fight defensively, how to counter punch, it will greatly increase the number of arguments you can make. Some do it instinctively. They learned it at the dinner table with their parents and siblings. Some come by it naturally because their personality lends itself easily to counter punching. Others have to be taught how to counter punch.

I will discuss later on what follows from this principle. I had to put this proved to be invaluable in practice.

6. I will have more to say about this in connection with proposition number 12.
one near the beginning of the twenty-five propositions because of its importance. When you understand there are two ways to win a race, you will be far ahead of those who don’t.

3. **The brief is a series of propositions.** A proposition is a statement that advances your position. It is not simply information. It is a statement with an attitude, an edge, that moves the argument forward. The topic sentence of the paragraph should be in first position and it should not be neutral. It should be a proposition.

The brief is a series of propositions. Let’s do a visualization here. Assume you have a case that is about to be submitted for decision. You are staying at a bed and breakfast in the Black Hills and, as luck would have it, you see the judge who will decide the case about to take a walk. The judge says to you: “Come walk with me down to the lake and tell me about your case. Tell me why you should win.” The lake is about ten minutes away. Wouldn’t that be nice, to have that opportunity to talk, *ex parte*, to the judge? Before you become too agitated about the ethics of this visualization, understand that the brief is your opportunity to talk directly to the judge without the other side being able to interrupt. Now, you have ten minutes, don’t start out with desperation. “Judge, this is really important to my clients. If you don’t rule for us, their lives will be ruined. It would be unjust to let the other side get away with this. My clients must win.” Is this an effective start? Of course not.

How do you start? The brief is a series of propositions, a series of units. I have discussed how the unit is supposed to be shaped. Now we need to talk about putting the units in some kind of sequence. Assume the judge says: “I am going to listen to you for ten minutes and ten minutes only. When the time is up, I will leave you and think about what you have said.” I have said that you don’t want to start out too fast, to start out with desperation. Neither do you want to start out too slow. You need to lay out your case with a sense of urgency. Start with the givens, that is, a basic orientation to how to think about the problem, which should draw the judge’s agreement, at least at the beginning. You use this orientation to set up the thinking about the tougher problems ahead. In order to see the brief as series of propositions, think of an argument as a section that is six paragraphs long. This might be the reaction of the judge to the six propositions, if you are successful: “Yes, of course. I agree. Okay . . . . I see where you are going . . . . Aha! Yes, you are right.” You see the progression of reactions to your series of propositions. You don’t go for what I call the Big C conclusion (“I win”) until you have first set it up.

A section of a brief is not a unit itself. Rarely will you have the kind of issue where you can just pound it and bury it. No, the section is a series of units in which you build from what everyone knows toward a resolution of what you are trying to figure out. What might be the reaction of the other side to your six propositions? “Yeah, everyone knows that. So what. Well, I don’t know about that. That can’t be right. No way. You’re simply wrong.” Very different reactions, of course. But note they start at nearly the same place. Think of your section as starting from a spot that even your opponent will have to agree: “This
is where we start; this is how we begin to think about this aspect of the problem.”

If the brief is a series of propositions, you don’t have to get the job done in one unit. These problems are not ordinarily of the sort that can be done in one. You usually need three to six or more propositions to get it done. Don’t start with your best one. Think of the section as a series and lead up to it so that its acceptance becomes compelling.

Here is another way to visualize it. Assume you are trying to ask your parents for some money or something important. Assume they will have a fair amount of scepticism and that it will be a tough sell. If you telephone them to ask, you will make your case much more quickly than if you write. If you write, you have more time to make the case. I know this from experience. My mother is a tough sell. If I talk to her, I can’t go slowly because if I start with proposition number one, she either puts wet blankets on that proposition or jumps ahead to where she thinks I am going and crushes it without having heard the entire argument. If I write a letter, she can’t interrupt me. She has to read the whole argument. It changes the whole dynamic of the plea. With a letter, I can let the argument take its proper time.

The reason I use this personal visualization is that a brief is like a letter. You can get through the entire argument without interruption. You don’t have to do the hard sell; you don’t have to close the deal right away. It is your time with the judge and you don’t have to be panicked. You write with a sense of urgency, not desperation.

The brief is a series of propositions that lead to the Big C conclusion (who wins). Think of them in sequence, one leading to the next. So, the brief is actually a series of “little c” conclusions (each paragraph is a unit) that lead to the Big C conclusion. When you do that, the reader has no trouble following the argument, which is a necessary condition for agreement.

4. Use strong propositions. You should drive the argument with strong propositions. This is difficult for the novice writer. Law students, for example, tend to be too nice and too fair. I tell them, in order to be effective, you have to lose some of that niceness and even fairness. Why? Because fairness means both sides. Wouldn’t it be strange if the judge asks you to talk about your case and you spend half of the allotted ten minutes talking about the other side? That’s fair, probably very nice, and the other side would thank you for it. But why do that?

Writing strong propositions is easier said than done. In order to get a sense of what I am after, start grading your propositions. Does the proposition favor your position, is it neutral, or does it actually favor the other side? In weaker briefs, more than half of the propositions are neutral or worse. They are neutral if the other side can say the same and worse if the other side wants to say that.

7. Probably the most common weak proposition is the one that describes a case holding. “In Wilder, the Supreme Court held...” It is neutral at best. Why not state the holding of Wilder as a proposition and then cite to Wilder? The proposition should advance your position, not just convey information. Give it attitude.
This is sometimes done out of a sense of fairness. “Well, before I can criticize it, I must at least describe it.” In so doing, however, it will advance the argument of the other side.

If you start grading your propositions, you will see that in your own initial drafts there will be a lot of neutral propositions. That’s okay, so long as it doesn’t stay that way. Start thinking in paragraphs, building the argument in each paragraph, getting the right sequence in the paragraphs, and then you can come back and kick it up a notch by strengthening the propositions. It is difficult to write propositions with an attitude on the first draft. In fact, attempting to write strong propositions on the first draft might be detrimental to the argument. It might divert attention from the basic argument. Like a fine oil painting, this may be a situation where the subject is done in layers. It may not be possible to get the right effect with the first stroke of the brush.

At the outset, writing strong propositions is probably better made a two-step process. Start with a basic proposition—a clear notion of the task of the paragraph—and then come back and fine tune it. Do it neutrally so that you get it right and then turn up the heat. This is the fun part. Thinking about functions or roles of sentences, you may be writing a supporting sentence and you suddenly see it as your actual point and so you elevate it to first position and make it the point of the paragraph. You were working toward that point and now you see it. Regroup and make everything else support that point or put it in first position in the next paragraph and lead right to it.

Almost always, the proposition with the right amount of edge is shorter rather than longer. The longer it takes to make the point, the less impact it will have. Sentences that play the supporting role can be longer. The impact of a strong proposition doesn’t come solely from the type of language used. Another thing that gives it bite is size. Size matters in argument. Shorter is better. This is part of the fun—looking for the right balance. When the propositions come out in short, crisp, sharp sentences, one after another, this is good writing.

5. Lay the legal foundation first. It is common to see briefs start a section with an assertion about the facts of the case. When I see that, I think of the words of Dr. Eric Hagen, of the USD Theatre Department, referring to improper placement of actors on the stage: “Amateur hour.” That is, they don’t know what they are doing. Amateur brief writers start out with facts because they love their facts. They think the facts are the strongest part of their case. That may be, but don’t lead with facts. Lead with foundation. Facts don’t have meaning by themselves. You must first establish the legal framework against which the facts will resonate. The law is the foundation. The brief is like a law school exam answer in which the reader (the judge) wants to know two things: what is the law

8. Here is a difference between moot court and law review. Law review writing will have a lot more neutral propositions because it is more of an “on the one hand, on the other hand” kind of enterprise. It is supposed to be “scholarly.” A brief, however, is an advocacy document. A law review article provides a reasoned account of a problem and will have a point of view that leads to a proposed solution. But it isn’t an advocacy document, unless it is expressly made so. It should be noted that one now sees more “advocacy scholarship,” if that phrase is not an oxymoron.
and how does it apply to this case?

If you have good facts, great. Save them for that place in the sequence where they will have the most power. You can actually take away from their power by playing them out of sequence. It is like taking a fine guitar string, tying it to two points, pulling it tight, and then plucking it. The result is like plucking a rubber band—a dull thud. However, if you place the same taut guitar string next to a piece of wood, the plucking produces a beautiful tone. A vibrating string in the air produces almost nothing. Next to a sounding board, it produces music. It resonates. Facts without law, without foundation, is like a vibrating string in the air, a meaningless thud. The facts resonate off of the legal foundation. So, facts first—nothing. Facts after foundation—everything.

This also works because you want to start with orientation. The judge wants to know how to think about the problem. You must start at the beginning with what is known and work toward a solution of what is unknown. In light of what we know, how do we solve what we don’t know or what is in dispute? The movement of the argument is from general to specific. If the steps of the sequence of paragraphs are done correctly, the movement toward the solution is like a funnel.

6. Don’t hurry to the Big C conclusion. Another common sign of “amateur hour” is the temptation to declare victory too soon. Keep your powder dry. You must exercise patience. Build toward the Big C conclusion at the end of a section with a sequence of little c conclusions. Don’t be like the used car salesman on late-night television: “Come on down, we’ve got great deals, we’ve got this, we’ve that . . . . Don’t let bad credit stop you. We will make you a deal you can’t refuse . . . .” This is the hard sell.

The temptation to declare victory comes from the successful completion of a unit of the argument. It is like shouting “Bingo” when less than all of the numbers are in place. If you try to wrap up the point of a paragraph with a conclusion that points to the next proposition, resist the temptation to make more of the point than it actually is. Otherwise, it’s amateur hour.

Think about the brief as closing the deal. But the brief is soft sell. It cannot be hard sell. Hard sell generates sales resistance. It doesn’t work well in sales generally and it works even less so with briefs. Why? Because there is another side. Soft sell is generally the format for brief writing, no matter how much urgency you eventually put in it. Ultimately, it is about persuasion. You can’t beat the judge into submission. The attempt to persuade through the hard sell

9. Related to this is the question of what, if anything, should come before the section. You should determine whether a section needs an introduction. This is particularly important in moot court briefs, but it is also relevant to real briefs. An introduction allows the writer to give an overview, an orientation, to the area before the argument begins in earnest. The advantage of an introduction is that it allows an orientation without proof. That is, the reader is more likely to suspend disbelief during an introduction when it is clear that its purpose is general orientation. If the introduction goes on past three or four paragraphs, however, the suspension of disbelief may end and the reader may demand proof of what now appears to be assertions rather than orientation. Writing introductions to sections is difficult. I find the best advice is to ask: “What does the reader need to know before we get started on the argument in earnest?”
will generate sales resistance by the judge. You get the judge to agree through appeal to precedent, reason, common sense, and a sense of justice.

7. Be open to the argument—begin writing before you know too much. The second part of this proposition is counter-intuitive, so let me begin with another visualization. Think of a professor you had in college or law school you consider to be a poor teacher. What made that person a poor teacher? Was it lack of knowledge? Often, the answer is no. The professor may have known a lot, in fact, maybe too much, and the interest in teaching wasn’t there any more. Professors that fail as teachers usually fail because they are unable to go back to the beginning and bring the novice along. They may care about research or conferences, but whatever the reason, they don’t care to go back to the beginning. It may have involved a chalkboard filled with writings or numbers that you could not begin to understand. You didn’t know enough to even ask a question so as to get started. Now, think about a professor that you really liked. Did that professor take you through the subject like a guide? The ability to remember how it was to begin and to go back and show others the way marks an effective teacher. Perhaps, the professor may not have been with you all the way at your starting point, but was close enough to be pulling you along. “Wow, I don’t fully understand what was just said, but it sounded like it was something I should know more about.” It triggered your interest and you were drawn along.

What does this have to do with brief writing? If you begin to write before you know too much, you will have a better chance to replicate the situation of your reader because your reader is a relative novice on the subject. Judges are, for the most part, generalists. One might think that because they are experienced and wise they must know everything. They don’t, of course. Yes, some judges have seen the problem before and they know the answer without the benefit of briefs. If the issue is briefed, however, your research should put you ahead of the judge, at least as to the particular issue. This is why I used the analogy of the poor teacher. If you learn everything before you start writing, you increase the chances of leaving your most important reader behind. If you begin writing before you know too much, you will be able to take the same steps that the judge must take to solve the problem the way you want it solved. It is like the difference between demonstrating how to climb a rock formation that you climbed recently as opposed to one you climbed years before.

Unless the problem is fairly simple, I usually do not know the entire argument when I start writing. I do want to understand where to begin, so I can begin at the right spot. I also research enough so that I know the argument will not lead to a dead end. It doesn’t bother me that I don’t know the complete answer when I begin. I will figure it out along the way and I want to be open to the argument as it unfolds so that I don’t miss a step because of faulty

10. This may be an original contribution, at least in this form, by me. It produced some levity at the Woods Fuller workshop. I said: “Well, you’re probably thinking, that explains Van Patten’s briefs.” The point, however, I believe, is very important.

11. With all due respect, no one does.
assumptions.

Let’s try another visualization. In the Black Hills of South Dakota, there is a place of miraculous beauty called Spearfish Canyon. In Spearfish Canyon, there is a place called Roughlock Falls. A hiking trail takes you to a spot below the falls, where you can observe from about 50 yards away. If you are adventuresome, you may choose to walk upstream to experience the exhilaration of standing under the waterfall. To go from the spot where the hiking trail ends to the falls, requires skill, judgment, and a little nerve. No one knows every step to get there, unless perhaps the way has been traversed many times. You must be careful. There is cold, flowing water, moss that makes some of the rocks slippery, and less than perfect visibility caused by shadow and glare. You don’t need to know all the steps in advance, as long as you know how to take the next step. So, you take the first step and then you look and figure out how to take the next step. Flatness, stability and slipperiness of the various rocks, depth and strength of the water flow, all enter into the calculation. Once you take the step, then your vantage point changes. You likely see something that you didn’t see from the step before.

Like the task of writing the brief as a series of propositions, making your way to the falls is a series of decisions made one step at a time. If you were to ask these two college professors how to get to the falls, the poor professor would say something like: “It’s actually unimportant. Roughlock Falls is not significant enough to bother with, but if you want to do it, just go.” Or, “just follow me” and the professor dashes off upstream before you can figure out how to get started. In other words, the poor professor is not much help. The good professor, however, would say something like: “Yeah, I understand your problem. You have to think about many factors—flow, slipperiness, stability, visibility. I can’t be with you every step, but I can tell you a few things to watch out for and perhaps how to make wise decisions.” The difference between the two professors is obvious. One is worthless as a guide. The other gives you the benefit of his or her experience and speaks to you (sometimes years later) as you make the decisions. If you begin writing before you know too much, you will be a better guide for the judge as the argument proceeds from proposition to proposition.

If you do not have the entire argument in mind before you start, you will be more open to the argument as it unfolds. You can’t get from the hiking trail to the falls without encountering problems. If you decide ahead of time that you know all the problems, you may well miss those problems that cannot be seen from dry land. The judge will have problems along the way and will be left without a guide, or at least without you as a guide. If you are open to the argument, you will figure out that certain ways are dead ends and you will be able to retrace your steps. You have to be honest about it. If you are not open

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12. Sometimes you use footnotes to show the Judge that certain ways are dead ends. This allows you to maintain the flow of the argument in the text while accounting for a question that may be bothering the Judge: “Why don’t we go that way?” You, the guide, explain why.
to the argument, you will ignore the problem and forge ahead and fall in.\textsuperscript{13}

Another reason to begin writing at an early stage is that if you wait until you know everything, you are likely to start writing too late to meet your deadline. I believe this is particularly a problem in moot court. The insecurity connected with taking on a new area is daunting. There is a temptation to keep researching until “the answer” is found. This may not leave enough time for the able execution of the written argument. This phenomenon is also known to happen on occasion in practice.

Openness to the argument allows you to have a freshness of outlook that your good professor had. You should view the brief as a teaching opportunity. Don’t replicate the failures of the ineffective professors from your past. Begin writing before you know too much.

8. Let Westlaw or Lexis help with foundation and the difficult steps. Foundation is relatively easy to create with computer-assisted research. When I started practicing in 1973, research technology was decidedly more primitive. The attorney I worked for would often come to me and ask: “Find me a case that stands for this proposition . . . .” Under pre-Westlaw conditions, this was sometimes difficult. With Westlaw or Lexis, the “needle in a haystack” search is almost like magic. “Find me a case that sets forth the applicable standard of review.” No problem. “Find me a case that states the elements for fraud.” No problem. “Find me a case that holds that the earth is flat.” Well, that maybe a problem because it might not be out there. But if it is, it can be found within seconds.

Westlaw or Lexis is the only way to deal with the difficult “needle in a haystack” research problems. Going back to Roughlock Falls, you are in the water, halfway to the Falls. You can’t see the next step because there is too much glare from the sun. Or, you are not sure what you see because the flowing water has created a distortion of the rocks below. You ask Westlaw, is there a rock down there? You do this by formulating the proposition that you think ought to be next and see if it is out there. Westlaw will tell you very quickly whether a rock like you describe is out there (and whether there are others that say that as well). If the rock is there, it is like magic. It allows you to take the next step. You can’t go on until you know the rock is there. I can tell with some briefs that something is missing in the writing process. If I am able to talk to the writer, I ask for a physical description of their work station. If the argument appears to be “authority poor,” I ask if the writer has immediate access to Westlaw. The response may be that he or she wanted to write out the argument and would look for authority later. I don’t like that answer. I like to stay close to where the rocks are. I don’t write without building the propositions one step

\textsuperscript{13} I see this with some regularity on exams. The student decides on an outcome at the beginning and makes the facts fit that outcome, whether they actually do or not. Anything to the contrary is misinterpreted or ignored. They don’t see the other side of the argument. They are not open to the argument and don’t see what the facts that don’t fit into their viewpoint actually suggest. As my late friend and mentor, Robert Willard, would say: “This is a full and complete statement of half of the problem.”
at a time. What is the point of trying to get from one point to another if there are no rocks in between? Why not do it in a series of steps? You need Westlaw or Lexis by your side when you write. I make a “to do” list, which doesn’t get more than two or three tasks long before I break from the writing and get on Westlaw. I don’t stray far from that. I don’t allow my thought process to get very far ahead of what is actually there in terms of authority. Computerized research goes hand-in-hand with the composition process. You go back and forth from one to the other. In a four or five page brief on a familiar area, I will probably go on Westlaw five to ten times. I don’t want to be too far ahead of where my authorities are going to allow me to go.

Computerized research is huge. It allows you to do things that are like magic. It has changed completely how I write briefs. The “good old days” were definitely not better in this regard. Let Westlaw or Lexis help with the heavy lifting on foundation.

9. Start with a winner, if possible. Ideally, every argument to be a winner. So, why not start with a winner? But I have already said that it is problematic if you try to win every argument. The first argument is particularly important because first impressions are important. You begin to build or lose credibility with your first argument. So, the corollary of this principle is: don’t start with a loser.

What if the cards you have been dealt on the matter are weak? Then go back to principle number 2 and think about how to win the race when you have weak cards. The argument may be more difficult. If so, don’t try to win it. Make sure you don’t lose it. If you can’t start with a winner, at least don’t start with a loser. You are not always able to start with a winner. Take advantage when it occurs. When the traditional sequence of the argument, however, requires you to start with what is not your strongest point, then don’t lose it.

Starting with a winner builds credibility. You can also build credibility by not trying to win where you can’t. Do a credible job while not losing. It may not lead directly to your Big C conclusion, but you must survive in order to get to the point where you can win.

10. Do your side first, then respond. Although you should start with a winner, if possible, you don’t necessarily start with your best point for the argument. It may be tempting to start with your best point, but try to refrain if it is a counter punch. Do the affirmative side of your argument first, then counter punch. It sets up the response so much better. The response is always better after dealing with why you win. Deal with your side and its problems first, then talk about the problems of the other side’s argument.

11. Don’t carry water for the other side. This is a corollary of the previous principle. It sounds the same, but it is different. What it means is don’t, out of a sense of fairness, describe your opponent’s argument so as to make it more intelligible than it actually is. Here is how this may occur. You think: “I can’t

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14. For example, you can tell the computer to read over a thousand volumes of the Federal Reporter, cover to cover, and it will usually do it in under ten seconds.
criticize something without first describing it.” That’s true, but you don’t have to carry water for the other side. This is a hazard more often than you might think because, as I have emphasized, shorter is better. So, as a way of setting up your counter punch, you might manage to take two or three pages of the other side’s ramblings and condense it down to something more understandable for the judge. If so, you are carrying water for the other side. It is a little like going over their witness’s direct examination on your cross. Don’t do it. You will find that you do it more often than you think. Usually, it is done in the interest of fairness. You don’t have to be fair, i.e., totally fair. You want to be fair to the argument, not fair to the other side. After all, the brief is a one-on-one communication with the judge that is completely permissible under the rules. Because it is an adversarial process, the judge cannot read two briefs at once. It is ex parte in that sense. You get to lay out your entire argument and talk with the judge without the other side interrupting. Lay out your series of propositions and don’t worry so much about the other side. Let the other side worry about their side of the argument.

12. Be aware of when you are on offense and when you are on defense. This is an extension of proposition number 2. If there are two ways to win a race, there are two possibilities in arguments—why you win and why you don’t lose. Because there are two parties in the case, there are also two ways for the other side to win. So, there are four possibilities to cover—why the plaintiff wins, why the plaintiff doesn’t lose, why the defendant wins, and why the defendant doesn’t lose. Think of the arguments falling in one of four quadrants:

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<thead>
<tr>
<th>PLAINTIFF</th>
<th>DEFENDANT</th>
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<tbody>
<tr>
<td>WINS</td>
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<tr>
<td>Π-Why Π Wins</td>
<td>Δ-Why Δ Wins</td>
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<tr>
<td>Δ-Why Π Doesn’t Win</td>
<td>Π-Why Δ Doesn’t Win</td>
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<td>LOSES</td>
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<td>Δ-Why Π Loses</td>
<td>Π-Why Δ Loses</td>
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<tr>
<td>Π-Why Π Doesn’t Lose</td>
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Notice that when the argument is in any particular quadrant, one side is playing offense and the other side is playing defense. That is, when the plaintiff is trying to show why the plaintiff wins, the defendant is trying to negate the argument, to show why the plaintiff doesn’t win. The defendant is counter punching, or playing defense. Where the plaintiff is attempting to show the second half of the affirmative argument, i.e., why the plaintiff does not lose, the defendant is also counter punching by trying to show why the plaintiff does lose.

The point here is that you play offense and defense differently. You argue them differently. When you get to a difficult point, the strategy may call for you to win or it may call for you not to lose. Be aware of what you have to accomplish. The amateur lawyer tries to win everything. The experienced
lawyer knows which points have to be won and which only need not to be lost. Evaluate each fight wisely. You measure success accordingly. Don’t feel frustrated because you can’t win everything. You are not supposed to win everything, not in moot court and not in practice. If it is a clear winner, then that case usually settles. Litigation concerns the close cases where reasonable minds can differ as to the appropriate outcome. Anyone can win a winner. Learn the pleasure of fighting not to lose.

13. Follow the traditional sequence of the argument, unless there is a good reason to do otherwise. What is the traditional sequence of the argument? It depends on the argument, of course, but there are commonly accepted approaches to the sequence of analysis. With a statutory problem, the sequence usually is: 1) text; 2) legislative history; 3) administrative regulations; and 4) cases. With a constitutional argument, the text often does not give the answer, but it is very important and it shapes the argument to follow. So, you always start with the text of the Constitution or constitutional amendment. Sometimes, it is also where you wind up. In the end is the beginning. The cases, however, are where you will devote your primary attention.

With common law cases, you start with your jurisdiction. If the answer within the jurisdiction is not authoritative or may otherwise be questioned on policy grounds, then you go outside to other jurisdictions. The Restatement is also a good source of authority on what the majority of jurisdictions have done on the question. The South Dakota Supreme Court usually considers it to be authoritative. On a common law question, the policy issues will shape the argument throughout. Follow the traditional sequence of the argument unless there is a good reason to do otherwise. If you don’t, you are likely to stick out, like an out-of-towner in New York City. The traditional sequence may force you to start with a difficult issue, rather than a clear winner. Forego the temptation to go out of sequence and put a winner first. It will look odd and will perhaps highlight your discomfort with the traditionally first issue. If the traditional sequence dictates that the statute comes first, then start with the statute. If the statute is not in your favor, then don’t lose it. “Although the statute appears at first glance to be against us, if you look at it carefully, however, you can see that it doesn’t answer the precise problem before the Court. Here is why it doesn’t solve the problem. . . . Here is why we need to go on to look at the court cases interpreting the statute. . . .” By showing the confidence to play the sequence in the traditional manner without losing, you survive so that you can make the

15. In contested cases, the text of the statute is usually never conclusive. If it was, there would be no contested case. The text may favor one side or the other. The side it favors says: “This is the ‘plain meaning’ of the statute. This is why we win.” The other side probably should not try to win, unless there has been a misreading of the statute. Instead, it should look for ambiguities or gaps in the language. “When the statute was drafted, the legislature was thinking about a different problem. They did not contemplate this problem and so the language of the statute is inconclusive.” If the statute doesn’t favor your side, don’t try to win. Try not to lose. Survive to fight where the fight can be won, like in the interpretation of the statute by the courts.

winning shot later on. Fight to win when the odds are more in your favor. When you can’t hit a winner, don’t try to hit a winner. Just hit it over the net and move to a position (maybe two or three shots down the line) where you can win.

If you are in a position to win later on, you may want to use the introduction to a section to show your “hole card.” Tip off to the Court why you will eventually win, but hold off with the enthusiasm (the Big C conclusion). Do it with restraint. Just show it, don’t argue it. Go through the sequence and build to why you win where the case is the strongest.

There are instances in which there is no traditional sequence. Perhaps the question involves whether the plaintiff has satisfied all five elements of a cause of action. It is probably good practice in that instance to start with your best argument, and run the sequence from strongest to weakest. The traditional sequence should be followed because it is what is expected. If you try to avoid the weak points, it will only stand out more. The judge will quickly note the break in the sequence. Embrace the weak points and learn the joys of counter punching.

14. Look for the tie-breaker; claim the middle as yours. This is very important for both moot court and actual litigation. Litigation is a battle over the middle. The one that can claim the middle will usually prevail. What is the middle? The middle is the established rule, the status quo, common sense, or the “mainstream.” The Democrats in the United States Senate have justified their filibuster of judicial nominations on the ground that the particular nominee is out of the mainstream. This is where they need to be because it is the only position that is politically acceptable to justify an extended filibuster. They are claiming the middle. If the question is whether the traditional law should be changed, the middle for the proponent of the status quo is the rule has served us well and there is no need to change, particularly with the facts of this case. The challenger will argue that the traditional way is flawed and must be abolished. One defines the middle as the established rule; the other defines the middle in light of current public policy. This is the task that you have in a closely contested matter. Find the middle and claim it.

The easiest way to claim the middle is to find a tie-breaker that will push the decision in your favor. What are the tie-breakers? Burden of proof is the most common one. On appeal, it is most often the standard of review. For example: “What the appellants must show is that the decision by the trial judge below is clearly erroneous.” Whoever owns the tie-breaker is ahead. Find it and claim it, if you can.

Always write with the standard of review well in mind. It is the most important tie-breaker for appeals. Many appeals are doomed by “trial lawyer’s syndrome.” The appeal infected by trial lawyer’s syndrome is primarily an attempt to tell the appellate court why the appellant should have won below. This is usually futile. What the appellant is supposed to do is demonstrate why the other side shouldn’t have won (or, possibly, the appellant shouldn’t have lost). The standard of review generally doesn’t allow the appellant to argue the case from scratch. The standard of review tends to be a throw-away section in

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most briefs. I think it is an advocacy opportunity. Try to state it with a point of
view. Here are two examples which reflect the different points of view for a
common appellate issue:

SUMMARY JUDGMENT—APPELLANT

The standard of review for a motion for summary judgment is well-
established:

In reviewing a grant or denial of summary judgment under SDCL 15-6-
56(c), we must determine whether the moving party demonstrated the
absence of any genuine issue of material fact and showed entitlement to
judgment on the merits as a matter of law. The evidence must be viewed
most favorably to the nonmoving party and reasonable doubts should be
resolved against the moving party. The nonmoving party, however, must
present specific facts showing that a genuine, material issue for trial
exists. Our task on appeal is to determine only whether a genuine issue of
material fact exists and whether the law was correctly applied. If there
exists any basis which supports the ruling of the trial court, affirmance of
a summary judgment is proper.¹⁷

In addition, the South Dakota Supreme Court has also observed: “Summary
judgment is a drastic remedy, and should not be granted unless the moving party
has established the right to a judgment with such clarity as to leave no room for
controversy.”¹⁸ Finally, questions of law are to be reviewed de novo, giving no
depREFERENCE to the trial court’s conclusions of law.¹⁹

Notice that this statement of the standard attempts to take some of the sting
out of the standard, which is otherwise against the appellant. Don’t overreach
here, however. Why is this last sentence in the indented quote included?
 Doesn’t it disrupt the point of view? Yes, but loss of credibility resulting from
selective quotation is much more detrimental. Take the hit with confidence
because there is much more in this quote that helps. The ending is strong
because the paragraph ends with the two most important propositions from the
appellant’s point of view.

SUMMARY JUDGMENT—APPELLEE

Summary judgment is appropriate under S.D.C.L. [section] 15-6-56 when
the entire record reveals that there is no genuine issue on any material fact
and that the moving party is entitled to a judgment as a matter of law.²⁰
The nonmoving party, however, must present specific facts showing that a
genuine, material issue for trial exists.²¹ Disputed facts become material

¹⁸. Richards v. Lenz, 539 N.W.2d 80, 83 (S.D. 1995) (citing Jewson v. Mayo Clinic, 691 F.2d 405
(8th Cir. 1982)).
¹⁹. Lewis v. Aslesen, 2001 SD 131, ¶ 6, 635 N.W.2d 744, 746; Kohl v. Amundson, 2001 SD 4, ¶ 6,
if they affect the outcome of a case under the law, "that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." 22

The point here is that disputes of fact do not automatically insulate the case against summary judgment. If the non-moving party lacks an essential element of the cause of action or defense, the disputed facts will not prevent the granting of summary judgment.

The standard of review is central in every appeal. Appeals are not level playing fields. The standard of review defines who will be working uphill and who will be coasting downhill. Don’t omit this opportunity to claim the middle or, at least, to contest the other side’s claim of the middle.

15. Use simple, declarative sentences. This one came to me as advice from former Professor and Dean Mike Driscoll. When I asked him about the success that his moot court teams achieved during the 1970’s, he told me that their mantra was: “Write the best brief, win the tournament.” How do you write the best brief? “Use simple, declarative sentences.” Subject, verb, object; subject, verb, object. As opposed to what? Starting sentences with long dependent clauses. For example: “On the evening of May 15, at 10:15 p.m., in the parking lot of Wal-Mart in Sioux Falls, South Dakota, [subject, verb, object].” Lawyers do this a lot. Academics are even worse. The dependent clause gets in the way of the proposition. It is a prelude to the subject, verb, and object. It delays what the sentence is about. It makes the sentence longer. A simple, declarative sentence tells the reader right away—subject, verb, and object. Worse yet is subject, long dependent clause, verb, and object. Don’t put distance between your subject and your verb. You may use dependent clauses to break up the repetition of subject, verb, and object. 23 Simple declarative sentences are too primitive to use for the entire argument. Dependent clauses should provide relief, not take over as the primary form of the sentences.

Why is there a tendency for the dependent clause to take over? Lawyers and academics like nuance. That is what dependent clauses do—nuance and qualification. Fight the tendency to have too much of this. Make the writing more straight-forward and direct. I suspect that there is a mild personality disorder at work here. Writers who are addicted to dependent clauses prefer the perceived accuracy that nuance and qualification bring. The wordiness that accompanies this attempt at completeness brings out the editing pencil. By the end of the editing process, the writer believes the editor to be a barbarian and the end result feels almost like a comic book. It feels so primitive and unnuanced and some even express a sense of loss of integrity through the process. For others, this is not a problem. Their personality allows them to be comfortable with a more simple approach to the argument. It is probably useful to understand from which direction your personality brings you. Adjust accordingly or an

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23. Dependent clauses are also very useful in providing transition.
editor may have to do it for you.

Editing legal writing is, after structural issues, primarily a matter of trimming words. Most of the people involved in legal writing load up their sentences with too much unnecessary stuff. It is not unusual to trim 15 to 20% of the words and lose little, or nothing, in the process. The detail orientation of these writers serves them well in many areas of the law, but not in all things. Advocacy is not about information, it is about persuasion.

Brief writing is not supposed to earn you the Nobel Prize for Literature, not even the Pulitzer. What you are trying to do is win a case for a client. It’s about advocacy. It’s not about elegance and nuance. It’s about winning. The one who makes it the simplest usually wins and simple means simple, declarative sentences. Use dependent clauses sparingly.

16. **Be sensitive about word choices.** Word choices are important. They affect focus, sharpness, tone, emotion, passion, and themes. I use a thesaurus whenever I write. Your first choice is not necessarily the right choice. It should at least get you to the right page. Then look at the “menu” and think about whether another word is more appropriate for what you want to accomplish at that point. Use your word choices to reflect your themes or your sense of urgency. The amateur writer vacillates between neutrality and shrillness. Understand your own personality and how that may be reflected in your writing. You may have to adjust by kicking it up a notch or toning it down. Your level of intensity must be appropriate for where you are in the brief. Like a singer, you must give yourself some place to go with the emotion. If you start out too dramatic, you have nowhere to go. Think of your role as akin to writing a script. You set the tone of each scene. At this level, there is plenty of room for style and nuance. I would much rather see the nuance go into short sentences with astute word choices.

17. **Look for sound bites and metaphors.** Sound bites are simple reasons why you should win. They may also be used as themes for your case. They might seem a little primitive or bumper-sticker-like—slogans more than reasons. But persuasion often works in the simplest ways. By sound bites, do I mean how to talk to the media? No, although that may come in handy as well. Rather, it is how to talk to the judge, how to talk to the jury, even how to talk to the other side in short, direct ways. You develop sound bites by thinking: “How do I tell the average person why we should win, why the other side is wrong.” One-liners that carry message in a memorable way are intellectually respective and effective. They take work, but are fun to discover.

I am convinced that in my toughest losses (i.e., where I believe I am right and I still lose), it is because I haven’t worked enough on sound bites for the case. The argument may be right on paper, right intellectually, but if I lose, it is because I came up short on the sound bites. You need short, pithy, memorable reasons why you should win and the other side should lose. This is huge. It also

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24. See also the discussion of proposition number 25.
sets up your oral argument. You need to think about it early. Don’t leave that to chance and the inspiration of the moment.

Metaphors are probably more important at the trial court level. They are a little showy for appeals. Don’t neglect them, however, because they have a lot of power. They also make good sound bites. Think of the ones I have used so far. Roughlock Falls, walking with the judge, best professor / worst professor. Metaphors have the power to bring the matter down to a nugget of wisdom. Metaphors are a form of analogy. It works by comparing the issue to something that we already know. It will not work if it is simply name-calling. If it works, it breaks down sales resistance because it appeals to common experience and allows the reader or listener to connect the dots. Metaphors have great power to persuade. A metaphor can also pose risk if opposing counsel can turn it around on you. Choose your images wisely.

18. The statement of facts should be like an opening statement. You should view the statement of facts as an advocacy opportunity. It is an opportunity to tell the story your way. Before you start, you should think seriously about themes (why you win) for your argument. Pick at last three and write them down. Read them out loud ten times. Then, without actually mentioning any of the themes, write your statement of facts. Does this make a difference in the word choices, the tone, and the sense of urgency? It should. The themes will show up in your conclusion, but they should be the underlying forces that shape your statement of the facts.25 Not to do so is a lost opportunity.

With briefs, either at the trial court level or the appellate level, I spend a lot of time working on the statement of facts. The primary focus of the brief may be legal, but the factual context for the legal decision is crucial. The story is important for setting a tone. If your facts are good, fine. Don’t tell it neutrally. Make sure the reader knows whose side you are on. When the facts are not so good, greater care with the story is necessary. Like learning how to argue not to lose, telling a story with bad facts is an important skill. I usually don’t start on the legal argument until my statement of facts is where I want it.

In moot court, the statement of facts is often viewed as a throw-away—a section to be done after the argument sections have been completed. When so viewed, it is a simple restatement of the facts from the record. I think this is a mistake. Although the record is a “given” in these competitions, it should nevertheless be viewed as an advocacy opportunity.

Treat the statement of facts like an opening statement. Tell the story your way. Don’t argue it, but tell it in such a way that by the end of the statement of facts, there is the feeling of a winner. “This isn’t right, an injustice has been done (or was attempted by the other side).” Or, “This isn’t nearly as bad as the other side is claiming. They are just trying to ignore their own bad facts or the legal consequences of clearly established precedent.” Because you don’t argue directly, there is plenty of opportunity for nuance. You are like a screenwriter.

25. This exercise should take place early in the process. Articulating your themes early will shape everything that follows.
setting the tone for the story to follow.

19. Don’t carry the argument with modifiers. Modifiers—adjectives and adverbs—certainly have their place. They provide nuance and qualification. They help to set the tone and the sense of urgency. Don’t carry the argument with them, however. By themselves, they don’t persuade. They can persuade, but not directly. They play the supporting role, not the lead role, in persuasion. What should carry the argument? Strong propositions which use strong nouns and strong verbs. Adjectives and adverbs are cheap argument. Anyone can say: “That’s ridiculous.” or “That’s unreasonable.” Argument by labels or name-calling will generate sales resistance. What is it that allows a person to disagree when you are trying to persuade? Facts are harder to dispute than opinions. If this is true, then the reason that adjectives and adverbs don’t sell as well is that adjectives and adverbs tend to be opinion. For example, this is a fireplace. Sure. This is a beautiful fireplace. If you want to resist, you might think: “Well, I’ve seen better” or “That isn’t my favorite style.” Beautiful is an opinion; fireplace is not. Another example, a car is a car. Fact. The car was driving 65 miles per hour. Fact. The car was going fast. Opinion. The more opinion you have in your presentation, the more likely it is that you will generate sales resistance. Opinion allows the reader or listener to have a different opinion. Facts ordinarily do not. Use adjectives and adverbs carefully.

The worst are probably the labels that beg the question—mere, clear or clearly, obvious or obviously. Why? Because in addition to the relative weakness of modifiers, these also involve an internal contradiction. How many times have you seen “It is clear that…” in a brief? If you have to tell the reader that something is clear, aren’t you talking down and implying that the reader is slow? Telling the reader what to think will generate sales resistance. If, instead, you lead the reader to that conclusion and the reader does it without being told to, you not only skip the normal sales resistance, you affirm the reader’s common sense and the conclusion will stick. If it is clear, then why do I get the sense that you are using the word to seal the deal? Maybe it isn’t so clear. Moreover, if it isn’t clear to the reader at that point, you confirm the sales resistance and you lose credibility. If it has to be said, it isn’t clear or obvious. The use of clear or obvious in a brief is way too dangerous.

Don’t tell readers or listeners what to think. Take them to the edge of the conclusion and allow them to draw it for themselves. Carry the argument with fact and law, shaped by opinion. It is a matter of emphasis, but it is observable in weaker briefs, particularly if you are on the other side. Argument driven by modifiers is inherently weak.

20. Watch out for too much passive voice. This is another essential principle of composition from Strunk & White. What are the problems with the passive voice? The subject, verb, object format loses its punch. Passive voice is more indirect and uses more words. For example, the earlier sentence in

passive would read: “The impact of the subject, verb, object format is weakened through the use of the passive voice.” My theory is this may be the result of bad habits picked up in grade school. If you dreaded the 500 word essay, you were probably drawn to the passive voice. You don’t have to think of as many thoughts because each thought will use more words in the passive voice. In addition, you can hedge your bets because the passive hides responsibility. The actors drop out of the picture and things just happen without apparent cause. This habit may become, over time, an addiction. So, editing is easy—trim and trim some more. Trim off the excess fat.

A corollary to this principle is watch out for too much active voice. Active voice is great for talking to juries, especially in opening statement. You can use almost 100% active voice because you want the story to be vivid. Similarly, when you close, you want it to be intense. With a brief, however, there is a certain decorum. You don’t talk to the judge the same way you talk to the jury. Some passive voice is necessary. Too much active voice will make the judge uneasy because it will sound like you are talking to a jury. You should use the passive voice in a brief to give relief from the intensity. In a poor brief, the ratio of passive to active will exceed two-thirds. In a good brief, the ratio may well be reversed—one-third to two-thirds. This is a generalization, of course. The point here is to be aware of the balance. So, don’t trim off all the fat caused by the passive voice. A little marbling makes the meat taste better.

21. **Write a strong conclusion.** In addition to driving the argument with strong propositions, another distinctive aspect of my briefs is the taking of the conclusion at the end seriously. I am in the vast minority on this, but I’m right on this one. What is the prevailing practice on this matter? “For the foregoing reasons, the appellant [appellee] respectfully requests this Court to reverse [affirm] the decision of the lower court and to remand the case for further proceedings.” This is an important missed opportunity for advocacy. What is the opportunity? You can tell the judge in one or two paragraphs why you should win. The entire brief leads up to this.

We know from other contexts, for example, that you want to finish strong with a witness, whether it is on direct or cross. With oral argument, you want to finish strong. These are examples of the recency principle. Why are briefs so wimpy at the end? Conclusions are essential ritual and nobody pays any attention to them. A concise statement of why you should win the case provides a much stronger finish to the brief.

Let us consider a few examples:

If the law is to continue to command respect, it must make basic sense. To say that a claim accrues even when there is no factual or legal basis for making a claim is to require the filing of unsubstantiated and potentially frivolous claims. The February 17, 1998 letter shows a party who is aware of the injury and who was beginning to make a diligent inquiry into

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its cause. [The Plaintiff] had no evidence prior to that date which would have supported a claim against the United States.

This Court should reverse the judgment of the District Court and remand the case for further proceedings.

The Defendants took advantage of an elderly woman and did not disclose to her or to her counsel that they had delivered a different kind of policy than what had been represented. There was no knowledge of this fraud and the Defendants remained silent while a solution to the diminishing cash value problem was being sought. Silence will not discharge the duty to disclose in this case.

Appellant respectfully requests this Court to reverse the judgment of the Circuit Court and to remand the case for further proceedings.

Fraud can be accomplished through a lie or through concealment. This is a case involving both. [The Plaintiff] was lured to South Dakota with promises of a better opportunity for a successful radiology practice. He had the confidence in himself to accept the challenge without asking for or expecting any guarantees. What he did not bargain for was that the deck was stacked. Had he known that it was stacked against him, he never would have come. If there were obstacles, he should have been told and not led on. This is fraud.

For the reasons stated herein, the Appellant respectfully requests this Court to reverse the order of the lower court and to remand the case for further proceedings.

This case illustrates the destructive force of wrongful litigation. Surely there must be a threshold that must be met before a lawyer can file a $110,000 lawsuit on account of a $583 repair bill. Can an attorney put a family through the anxiety, uncertainty, frustration, panic, terror, despair, and expense of litigation without at least taking minimal steps to ensure that there is a credible basis in fact, law, or equity for the lawsuit? We have policies that encourage citizens to use the judicial system to resolve differences, but there must be limits.

The contractor’s lawyer lost his perspective in this case. He got caught up in the emotion and did no independent factual investigation prior to filing the lawsuit, even though the homeowner’s letter gave him a road map for such an investigation. He filed a defamation suit without evidence of a publication, and therefore without evidence of falsity or lack of privilege. He had no evidence of damage, other than the fact that his client had not been paid $583. The judge in the underlying lawsuit found that he did not do a proper investigation before filing the lawsuit and assessed sanctions. The Appellants wish through this lawsuit to recover the rest of their damages.

“[In the kingdom of the blind, the one-eyed man is king.” This is a case about a family—patient, trusting, honest, hard-working, good people—and a very, very flawed contractor. The [Plaintiffs’] dream of a life in rural South Dakota has been shattered by an incompetent and
unscrupulous contractor. The dream has turned into a nightmare. The
[Plaintiffs] remain in a precarious situation, as to basic shelter as well as
financially. They can’t fix it; they can’t walk away. They need some
justice and this Court is the only place they can get it.

The [Plaintiffs] respectfully request this Court for a judgment in their
favor and for an award of damages and attorney’s fees which this Court
deems just.

Throughout the entire process of this litigation, the burden has always
been on the [Plaintiffs]. They have shouldered the burden of tremendous
expense for over four years. They continue to carry a construction loan
and have paid over $55,000 in construction loan interest with no progress
made on the principal. The [Plaintiffs’] family has endured the burden of
trying to live a life with some semblance of normalcy in conditions not
very far from homeless people who must make do in dangerous,
condemned old buildings.

Throughout the litigation process the [Plaintiffs] have borne the burden
of proof. [The Defendant] kept very little in terms of books, hours, and
receipts. The [Plaintiffs] had to reconstruct the accounting to establish
hours, prices, and allowances, with nothing but recklessly generated
billings that are difficult to trace to anything. [The Defendant] sat smugly
on the witness stand blowing off every question about records and
bookkeeping as though he had no responsibility whatsoever to be
accountable to people who had given him over $179,000 for the worst
construction disaster [the Plaintiffs’ expert] had ever seen.

How can this lawsuit make it right for the [Plaintiffs]? No one can give
them back the last several years with the anger, frustration, suffering, and
despair. Nothing can replace the ruined keepsakes, the loss of privacy, the
lost time. Above all, the [Plaintiffs] cannot escape the trap. They cannot
 go back and they cannot go forward without relief from this Court. They
have come to this Court, asking for some justice. The Plaintiffs
respectfully request restitution in the amount of $179,131.69,
consequential damages in the amount of $68,665.00, pre-judgment interest
in such amount as is warranted by law, and for attorney’s fees in such
amount as to the Court seems justified in this case.

Alright, you say, that’s fine for the plaintiffs. What do you have for the
defendants of the world? Answer: the same thing. Where do you find it? Talk
to your clients and articulate their sense of injustice. You can get a lot of your
themes for your case from them. It starts at the initial meeting. Why are you
here? Why not just pay money? “It wouldn’t be right. They are just trying to
hold us up. They are greedy, they are exaggerating, they are liars.” The themes
come from your client’s sense of justice or injustice.

What is a good conclusion about? It is about conveying in less than a page
the sense of injustice or poor policy that will occur if the court rules against you.
Alternatively, it is the justice that will be served if the court says yes to your
client. The conclusion states the themes that have shaped the argument
throughout the brief. The themes will come with reflection on the case and emotional investment in your client's cause. You must find it, even when you don't like your client. Dig until you find something. With a criminal defendant who may be difficult to like, find it perhaps in your sense that government shouldn't act in the way they did. With a defendant who is liable, find it in the sense of overreaching on damages by the plaintiff. Make the emotional investment in the case and express it directly in your conclusion.

22. Leave time for tightening and polishing. Presentation is important. A sloppy brief makes a different first impression than a clean, tight brief. You should try to leave two days before the deadline in order to first tighten, then polish. Tightening involves going back through and bringing out the themes, strengthening the propositions, and editing the paragraphs, one by one. Each paragraph has a purpose and a good editor will push you when your paragraphs are better in your mind than on paper. Polish follows after this and is best done by someone else. Attention to detail will be rewarded. You can usually tell what the last twenty-four hours was like for the writer by looking at a few pages near the end. Either there is polish or panic. You can sometimes almost smell the fear. If the judge senses fear or panic, your credibility plummets.

If possible, do your own typing. There are still quite a few attorneys that don't have direct control over the final written product. Writing on the computer is materially different than writing by hand. You are far more willing to make changes, to try out certain options, and to shape the brief in light of presentation issues. By working through a secretary, you are far less flexible. The secretary can do other functions, like polish of the final draft.

23. Less is more. Don't ruin a brief with self-inflicted mistakes. One such mistake is trying to do too much. Just as oral argument is not a replication of the brief, so is the brief not a replication of all your research. You don't have to do it all. Persuasion works better if you allow the reader or listener to get there first. This is one of the keys to jury persuasion and one of the keys to persuasion generally. If I tell you what to think, I will generate more resistance than if I tell you A, B, C, and D and ask you what you think should be done about it. Of course, the brief is a series of propositions that lead to the Big C conclusion, but don't overdo it. Resist the impulse to pound the table and close the deal. Persuasion is soft sell.

The brief is not an encyclopedia of all knowledge relating to the problem at hand. The impact may be diminished with too much information. The word "intelligence" comes from two Latin words which, when put together, suggest the act of one who looks around among different things and makes choices, gathering some and leaving others. Some things are better left out. This shows judgment and maturity. A less experienced advocate includes too much out of a sense of insecurity. Less is more.

24. Write and speak with a sense of urgency. When I lived in Sioux Falls, I would drive to church on Sunday morning in keeping with the spirit of a day of rest. If we were running a little late, however, my wife would say: "Drive like you have a sense of urgency." I think it is important in persuasion to have a
sense of urgency. It is one thing to tell the court about rights and about what the
cases say or how a statute should be read. It is another to tell the court the same
information as if the outcome really mattered. The sense of urgency conveys the
message that the decision will have real and important consequences.
Underlying the sense of urgency is: “Judge, don’t make me go back and tell my
client that the system failed. Call it right, make the system work.”

Think through the themes that come from your emotional investment in
your client’s cause. Make these concrete. Don’t go over the top. You don’t
want to sound desperate, but you want to express an underlying sense of
urgency.

25. The one who makes it the simplest generally wins. I am convinced that
with almost every loss I experience (except for a few in which the only
explanation I have is that the system failed), it is due in some part to the failure
to make it simpler than the other side’s argument. I learned this the hard way at
the hands of Bill Taylor. I once had a case in bankruptcy court against Bill, who
is with the Woods Fuller law firm. Taylor, who had no expertise in bankruptcy
law, prevailed and he plainly kicked my butt in the process. How did this
happen? He made it simple. He wasn’t burdened by knowledge of the law.
Isn’t that interesting? Go back to a sense of simplicity. What would the case
look like if there was no law? You just tell someone why you should win,
without reference to any statutes or other cases. The law itself is not a burden,
but one can become a slave to the authority of the law and thereby miss its
simplicity. The solution you are urging should make sense. The law will take
care of itself in most cases because the law is ultimately a repository of common
sense. If you build the argument on what makes sense, the law will come.

This didn’t happen just with Bill Taylor. I’ve seen it again and again.
Now, I work for it. I try to make the case simple. When I lose, it’s because I
have made it too complicated. We are experts, usually ahead of the judge, and
certainly the jury. The problem is not knowing enough, but in making the sense
of the case come through in simple terms. Not simplistic, simple.

28. Note that this is different than building the argument one step at a time and staying very close
to the authorities. See supra proposition number 8. The focus here is on the themes which express your
argument in a simple, compelling way.