A Briefreader's Guide to Briefwriting

By Karin Ciano

A buzzer sounds in chambers. I leave my desk to open the door and greet a courier arriving with a short stack of banker's boxes on a cart. "Are these all for me?" I ask. "They are," the courier replies. We roll the boxes back to my office. I thank him, and he leaves. If we were back in New York City, I suppose I would owe him a tip. I open one of the boxes and see that another motion for summary judgment has arrived.

I was a federal law clerk for seven-plus years, during which I had the privilege of working with three different judges in the District of Minnesota. Federal judges frequently rule on civil motions, which are typically supported by memoranda of law (which I will call "briefs") and exhibits. Even though judges divide the work among their chambers staff in different ways, reading briefs is consistently part of a law clerk's job. For years, I read briefs for a living. I read lots of them—good, bad, and ugly—and I loved it.

In a judge's chambers, a law clerk is like a sous chef. My role was to assist the judge as needed in preparing for argument. At a minimum, this would mean delivering a clean, organized copy of the briefs and supporting material to the judge in advance of the hearing. Like most clerks, I also considered it my job to understand the parties' arguments, to review the major legal authorities on which they relied, and to catch any significant mistakes of law or fact. At the judge's request, I would prepare a bench memo prior to the hearing. After the hearing, when the judge reached a decision, I helped the judge transform that decision into a written order.

Federal law clerks have a remarkable opportunity to read arguments on a wide range of subjects that are drafted by lawyers who have varying levels of skill and experience. Although law clerks do not share the judge's burden of decision-making, they are close enough to the process to observe what writers can do to make briefs helpful and memorable. From the perspective of an experienced reader, I offer some thoughts about writing briefs.

Some decisions in life must be made quickly, often with little information and too much emotion: whether to turn the steering wheel to the left or the right to avoid a collision; what to take along when evacuating your home in the middle of the night; whether a sick child needs a doctor in the morning or an ambulance now. By contrast, a great deal of effort goes into ensuring that judicial decision-making is reasoned, unbiased, and (relatively) leisurely. In our district, litigants often had months to conduct discovery before filing a dispositive motion. When a dispositive motion was filed, courtesy copies of the opening brief usually arrived 45 days before the hearing date. For the next 24 days, while I worked on other matters, the brief waited in my office until joined by its opposition. At that point, if time permitted, I would review both briefs; if not, the briefs would wait another 12 days until the reply brief came in.

Why not read each brief as soon as it comes in? There are three reasons for waiting: Cases settle, hearing dates move, and many other matters need attention. Law clerks learn that time spent reading too far ahead may be time wasted. Unless things were very quiet in chambers, I usually turned to any given dispositive motion two to three weeks before its hearing date.

When you think about it, this method makes sense. Judicial decision-making is a process of distillation. The marriage of 80-plus pages of written argument and hundreds of pages of depositions and documents may produce a judicial order that is less than 20 pages long. From a range of real-world possibilities, the judge makes a binary decision: Is the motion granted or denied? Skilled brief writing aids this process.

Briefs are a tool designed to deliver necessary information to the reader at the right time, dispassionately and within an accepted framework of law—in other words, to maximize information, minimize emotion, and make sure the decision-maker has the benefit of balanced input. At their best, good briefs model this process of distillation,

transforming complex information into the basis for a reasoned binary decision.

When it is time to read the briefs, I open the boxes. Clerks quickly develop a process for shucking a motion, and in these days of electronic filing, very little paper must be physically present on a desk. First comes sorting: In our district, we receive two copies of each brief and its supporting materials. One pristine copy becomes the judge's working set and returns to the box until needed. The other copy, my working set, is usually dispersed randomly around the office so that each document may be retrieved with a swift roll of the desk chair. Having located a legal pad, pens, sticky notes, and a highlighting marker, I begin to read.

Reading briefs means reading with a purpose. Initially, I orient myself, making sense of the case and developing the framework into which facts and arguments will later fit. Who has sued whom? If the plaintiff wins, what does he or she want? Who made this motion, and what decision do they seek from the court? On what issues and facts will that decision turn? As I read, I write down what seem to be logical questions in the order that they come up. Why now? Why here, rather than in another court? What will be the impact of other pending motions, for example motions to amend or motions for additional discovery?

A reader must orient, with or without help; good briefs help by including an introduction. Like a bad movie trailer, a helpful introduction offers one spoiler after another, fully disclosing all the chase scenes and explosions and giving away the ending. Both sides' introductions, read together, would become my executive summary, or elevator story, of the case. A fellow clerk might ask me, "What are you working on?" After reading the introductions, I would be able to answer readily—for example: "An excessive force case. A driver fled from a traffic stop, was chased by a police dog, and was bitten. Liability will turn on whether the officer gave a proper warning and what the city's policy required." Of course, the introduction oversimplifies complex cases—and that's the point.

To be completely effective, the introductions must speak to one another. It helps the reader tremendously if the parties can agree on basic parameters. If the parties cannot agree on what type of case it is, the reader of the briefs is in for a long and bumpy ride.

If the brief had no introduction or lacked organization, I would then turn to the argument in the brief, reverse engineering an outline. What's the legal basis for the motion? Is it a familiar standard of review, or is it new to me? Is it based in the Federal Rules of Civil Procedure, in a substantive statute, or in a combination of the two? Is the substantive area of law familiar or new? Does the applicable case law appear to be settled or evolving? And, most important, how exactly does the law support the decision the court is to make? I would note down statutes, leading cases, and unfamiliar words—a sort of shopping list for later research. As I discovered answers to my earlier questions, I wrote them down as well.

Years of reading briefs have left the impression that most motions turn on questions of application. Lawyers remember application, of course: the third letter in IRAC, an acronym for Issue, Rule, Application, and Conclusion, was introduced in the first year of law school. Application is notoriously difficult to describe in practice. In a garden-variety motion, the parties agree on the issue to be decided and on which Federal Rule of Civil Procedure governs. The parties may even agree on the elements of the substantive claims and defenses and cite identical statutes and leading cases. The dispute is in the details, and the details are in the application.

These details need support. For example, imagine trying to convince a reader that summary judgment is proper because a supervisor's harassment of a Title VII employment plaintiff was not based on sex. The issue is clear, and the legal rule has been established for decades. Yet to reach the desired conclusion—either the harassment in this particular case was based on sex, or it wasn't—the rule must be applied to facts, and the plaintiff's facts at that. Thus, the decision will turn on application, which usually means that the decision will turn on the brief writer's ability to draw analogies to, and distinctions from, prior cases, applying the same law to similar facts.

As a reader of briefs, I paid special attention to the application paragraphs, carefully reading the cases that are proposed as examples and counterexamples. Reading through examples helped illuminate where a line ought to be drawn in a fact-intensive inquiry. If the writers of the briefs did not provide those examples, and none were discussed at the hearing, then it would fall to the clerk to find them.

A word about facts is in order. Many of us can recite from memory the summary judgment standard requiring that disputed facts be taken in the light that is most favorable to the nonmoving party. Yet in practice, many movants' briefs emphasize disputed facts. (My apologies, movants, but it's obvious.) I found this practice, although perhaps intended to tell a better story, meant I was in for a long and bumpy sidetrack. First, I reviewed the movant's brief with a skeptical eye, disregarding disputed facts and the law as applied to them. Then, I read an opposing brief determined to set the facts straight, even at the expense of legal argument. Next, I would tease through the factual record, deposition by deposition, to obtain a clear picture of the nonmovant's evidence. Finally, I would look for law to apply to the nonmovant's facts, which, if I were lucky, one side would have remembered to include in its brief.

When both sides agree on the proper legal standard, they are free to devote more space to the determinative issue: how that standard will apply to the facts. For me, that third letter of IRAC was by far the most useful part of most briefs. If other courts, high or low, had occasion to apply the rule to similar facts, I found it worth reading, even if the prior opinion itself was not binding. Finding examples need not be onerous. All it takes is two cases in which courts have reached two different conclusions when applying the rule to similar facts. Explain why the one you like is similar, why the other is completely different, and the rest of the argument will jump into sharper focus.

In issues of first impression, the difference is not in the details. The parties' visions of the legal universe may be so

The other question that is sometimes overlooked is the following: Exactly what makes one worldview better than the other in this case? The answer may be obvious to the parties who have been litigating the issue, but is rarely that self-evident to the reader.

different that their briefed arguments may seem to sail past each other without making contact. The cases themselves may not be particularly controversial or newsworthy, yet they draw judicial attention to gaps in the law, and it is the court's task to resolve them.

As a law clerk, I loved these legal issues; they were among the most interesting, best argued cases ever. Will a jurisdiction adopt the business judgment rule of *Auerbach* or *Zapata*? Is this case governed by the familiar six-year statute of limitations or by a brand new two-year statute? These are the nail-biters of a law clerk's world.

Briefs in cases of first impression, although fascinating and often very well written, may suffer from two flaws. The first is the notable absence of Plan B (granted, there may be none). But a reader may reasonably wonder: Is this issue really so black-and-white? Could one party still win under the rule proposed by the other party? Must this hotly contested issue actually be decided? Does the issue have to be decided now, or would it be better decided by a jury based on a full record at trial? Lawyers are used to arguments in the alternative; they offer the decision-maker greater flexibility. Committing everything to a single argument is bold, but if the court agrees in part with the other side, and the brief has not mapped out an alternative route, the court must find its own way.

The other question that is sometimes overlooked is the following: Exactly what makes one worldview better than the other in this case? The answer may be obvious to the parties who have been litigating the issue, but is rarely that self-evident to the reader. If it's a choice between two equally well established bodies of law, either of which could be applicable, what's the reasoned basis for choosing one over the other? Has the legislature or the Supreme Court expressed a preference? Is one more analogous, better reasoned, more recent, or a better fit with our facts? The court's decision must explain why one rule prevails and, again, if the briefs do not offer supporting reasons, the court will find its own.

Fortunately, judges are used to making decisions in a winner-take-all world. But trial courts are not in the business of making law; therefore, briefed arguments on issues of first impression have the opportunity to be especially helpful. Consider the possibility that the parties may view the decision in starker terms than necessary. Is there a third way? If so, a good brief will reveal it. If not, a good brief will explain why the choice is truly necessary and will provide explanation and authority to support the choice.

Part of the fun of clerking arises from dealing with the variety of topics that cross our desks, but there is a certain amount of repetition. In a given week or month, a judge might hear three motions—all in employment cases, or contract cases, or patent cases. When reading a number of briefs on the same subject, I learned to value writers who knew how to make the subject of their brief memorable. One technique I have found effective as a reader is the use of narrative structure.

Scholars have written a great deal about the way we organize information through narrative. As described by Anthony Amsterdam and Jerome Bruner, in *Minding the Law* (2000), the beginning of a story may be understood as a "steady state," which is disrupted by "trouble." Drama ensues until a resolution concludes the story—either restoring the old steady state or creating a new one. Memorable narratives follow this ancient and familiar structure. Writers may use it to present a version of the facts that is both vivid and easy to recall.

The organizational power of narrative can also be harnessed to organize a coherent story of the law. For example, consider the fleeing suspect bitten by a police dog. The brief for the police officer seeking summary judgment might present a legal "steady state," in which law enforcement must be free to make split-second decisions and to use reasonable force. The plaintiff's lawsuit, suggests the brief writer, threatens to disrupt this ordered world by challenging the officer's ability to do his or her job. Therefore, the brief writer offers the court an opportunity for resolution: the motion for summary judgment. Grant the motion, the brief writer may suggest, and the lawsuit "trouble" vanishes. But the writer of the opposing brief argues that this is not the case: The legal "steady state" is a world in which law enforcement must respect citizens' rights and where injured victims of excessive police force may seek redress through the courts. By making this motion, argues the brief writer, the officer threatens to put the injured plaintiff out of court. The brief writer concludes that the judge can resolve the "trouble" and restore the balance by denying the motion and allowing the case to proceed to an appropriate resolution—that is, trial before a jury.

Narrative can also paint a memorable picture of evolving law. For example, consider the case of *Bell Atlantic Corp. v. Twombly*. Readers of this journal undoubtedly recall the moment in May 2007 when the U.S. Supreme Court abruptly retired the venerable "no set of facts" standard of *Conley v. Gibson*. Suddenly, brief writers nationwide had to reconsider their arguments for and against Rule 12(b)(6) dismissal. A state of uncertainty prevailed until the Court issued *Ashcroft v. Iqbal* in 2009, and some might argue the standard continues to evolve.

Consider the narrative of *Twombly* as it might have been briefed shortly after the decision. A brief opposing dismissal might cast *Twombly* as the "trouble" that disrupted 50 years of notice pleading. Such a narrative cries out for resolution. Now that *Twombly* has upended

the "steady state," what is a court to do? Fix *Twombly*, the brief writer might urge, by construing it narrowly or by giving the plaintiff an opportunity to amend his or her motion to conform with *Twombly*'s requirements. Through the movant's eyes, however, the narrative takes a different shape. The movant's brief might argue that the real "trouble" is the proliferation of substantial settlements in weak cases—the product of generous pleading standards and prohibitively expensive discovery. Far from being the problem, argues the brief writer, *Twombly* is the solution crafted by the Supreme Court to restore the balance; the court only needs to follow it.

These examples are summaries, the kind of notes I might make while reading a brief. The actual use of narrative in briefs themselves tends to be more subtle. Narrative structure is powerful medicine and an effective way to frame arguments as well as facts so that they are memorable.

All motions presuppose a problem in need of a fix. Identifying the "steady state," "trouble," and "resolution" in the litigation may bring greater order to a brief and reinforce the argument that a particular conclusion is appropriate. The same technique can be used to present evolving, uncertain, or otherwise problematic law.

The process of ruling on a motion might be compared to travel. If you are the movant, you aim to plan a familiar and comfortable trip. The brief should guide the reader on a clear spring day over flat, open ground toward a city, which is visible from a great distance, sparkling in the sunlight. The journey may be long, but the route is plain, and the destination appealing; clearly, many other travelers have passed this way before.

To the motion's opponents, the trip should seem as appealing as being pulled backward through a hedge. The brief deposits the reader alone in a forest at night. The visibility is poor, and the footing is terrible; nearby animals make strange noises; vines and branches keep hitting the reader in the face. Suddenly, it starts to rain. Then the brief offers a weak light, illuminating a path to retreat, and the reader gratefully follows the road home.

I have exaggerated for effect, but the principle holds. Metaphors communicate vividly, quickly, and memorably. With a single image, a metaphor can explain virtually anything: the state of the law, the progress of the litigation, the relationship of the parties. Used well, a metaphor can lift heavy concepts and pry arguments out of tight corners.

For example, consider an acrimonious dispute between business partners. One founded the business, hired the other, and, after years of training, brought her on as a partner, expecting her to take over the shop. Instead, the protégé founded a competing venture. The actual dispute might be over a contract or over the rights to intellectual property, but the writer of the brief may convey much more about the dispute by using a metaphor to describe the parties' relationship. Is the business founder a controlling parent? Is the protégé an ungrateful child? Or are they both more like spouses who ought to be seeking an amicable, equitable divorce? As with narrative, the choice of metaphor implies a resolution.

Narrative and metaphor are no more persuasive than other rhetorical devices are, nor are they a substitute for argument. Decisions are made based on fact and law. Where narrative and metaphor may help, in my opinion, is in presenting a brief's arguments in a format that is easily understood and readily remembered, which is helpful to a reader faced with a large stack of briefs to read.

Reading briefs takes time, and a considerable part of that time may be spent trying to figure out what the brief writer is trying to say. Rhetorical devices like narrative and metaphor can help simplify that task.

The reply brief is the movant's only opportunity to respond in writing to arguments raised in the opposing party's brief. Before the days of electronic filing, motions in our district were given an argument date only after the reply brief came in. As a result, with all the briefs to choose from, I would often read the reply brief first.

Sometimes I missed the old days. A good reply brief is the perfect preview of an argument. The reply brief provides just enough information to orient the reader, then cuts quickly to the one or two opposing arguments the movant thinks are most worth fighting over. As with a mystery novel, starting at the end does not necessarily diminish the reader's pleasure in the story; instead, it allows the reader to better appreciate the significance of details.

Be advised: the reader may treat your reply brief as a caboose or an engine, so draft accordingly.

Conclusion

By the time the morning of oral argument arrives, I have read the briefs, front to back and side by side. I have taken notes and made outlines; have pulled copies of the key cases (most likely pertaining to the application); and have gathered the materials to bring into the courtroom. The oral argument is our first opportunity to hear from the lawyers—live and in person. The judge will ask them questions. Afterward, the judge will reach a decision, and the court's order writing process will begin. If the brief writers have done their job well, I will look forward to it. **TFL**

Karin Ciano is a sole practitioner in Minneapolis focusing on trial and appellate briefwriting and civil rights law. She clerked for U.S. District Judges James M. Rosenbaum and Ann D. Montgomery and U.S. Magistrate Judge Arthur J. Boylan. She has taught in the Lawyering Program at New York University School of Law and as an adjunct at William Mitchell College of Law and the University of Minnesota Law School. She is solely responsible for the views and opinions expressed in this article, and can be reached at karin.ciano@gmail.com.