FROM MEMO TO BRIEF*

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Just as you have become accustomed to writing memos, it is time for you to switch gears and focus on writing a brief. Writing a brief does have some things in common with writing a memo: you still employ case analysis techniques, you still consider all sides of the issue, and you still provide the recipient of the brief with the information needed to make a decision. This handout will provide you with some of the basic comparisons between memo and brief writing. Your legal writing professor, however, is your best source of information on brief writing. Defer to your professor in all instances where your professor and this handout disagree.

Compared to the memo, the brief takes a stronger stance on the outcome of a legal issue and uses persuasive writing techniques to persuade the reader that one position on the issue is the correct one. Both your fact presentation and analysis will be crafted so that they read favorably for your client. In addition, the primary audience for a persuasive brief will be the judge deciding your case, not an attorney within your law office. Accordingly, your job will not be just to recommend action; your job will be to persuade the court to take the action your client desires. One of the first considerations in writing a legal document is how you will address some of the rhetorical elements in your document, such as purpose, audience, stance and scope. The chart below provides a comparison of how these elements change when you move from the memo to the brief.

### Differences in Purpose, Audience, Scope and Stance

<table>
<thead>
<tr>
<th>MEMO</th>
<th>BRIEF</th>
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<tbody>
<tr>
<td><strong>Purpose</strong>: Memos discuss, recommend, and advise. The memo objectively informs the reader about what the law is. It also helps develop a legal strategy with other attorneys. Although it is not a guarantee of a case’s outcome, it is an attempt to illustrate what the outcome will probably be when the law is applied to a particular set of facts.</td>
<td><strong>Purpose</strong>: Briefs argue. The brief seeks to persuade the reader that your application of the law to the facts is the correct one. Although a brief cannot be dishonest or misleading, it should emphasize favorable arguments and minimize the force of opposing arguments. The purpose is to win the case, using the law in the way most favorable to your client.</td>
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<tr>
<td><strong>Audience</strong>: Another lawyer, supervising attorney, your client.</td>
<td><strong>Audience</strong>: Opposing lawyer, judge, judicial clerk, your client.</td>
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MEMO

- **Stance**: Objectivity in research is necessary when writing a memo. Memo writers can then use the outcome of that research to present their client’s cases most favorably. However, memo writers are clear about both the weaknesses and strengths of a client’s case.

- **Scope**: The specific question, time and financial constraints will dictate how broad the scope of your memo will be. Remember, however, that memos form the basis for legal decisions. Accordingly, you should be honest about the strengths and weaknesses of your client’s case and what the law does and does not allow before making your recommendation.

BRIEF

- **Stance**: Objectivity in research is necessary when writing a brief. A brief writer, however, strives to use that research to create legal arguments and offer legal conclusions that cast his client’s case favorably. A brief writer emphasizes the strengths of his client’s case, while minimizing the weaknesses of his client’s case.

- **Scope**: The specific question, time and financial constraints will dictate how wide the scope of your brief will be. However, a brief writer usually knows the desired outcome. Accordingly, ensure that you search for all the legal arguments and materials that support your conclusion and prove that your client should prevail.

Comparing Components

MEMO

- **Caption**: informs the reader who wrote it, for whom the memo was written, what the memo is about, and the date.

- **Question(s) Presented**: presents an objective statement of the legal questions to be answered in the memo. It is often one sentence that alerts the reader to three things: the jurisdiction and controlling law, the scope of the question, and the most legally significant facts.

BRIEF

- **Title page or caption**: identifies the court, docket number, name of the case, side represented and names and addresses of counsel.

- **Statement of Issue(s) Presented for Review**: states the legal questions addressed in the brief. It also invokes the applicable law and the most legally significant facts. This section, however, uses the facts of the case and the applicable law to elicit answers that affirm the analytical reasoning of the brief.

## The Theory of the Case

Perhaps the most confusing aspect of writing a brief for the first time is grasping the concept of the theory of the case. Case theories are not discussed in conjunction with the memo and may seem like an ambiguous new concept when first introduced in the context of a brief.

A theory of the case is your unifying idea or concept of the case. It is the implicit message in your brief that will tie together the factual, legal, and policy issues in your brief. It is

- **Brief Answer**: a short answer to the question(s) presented. It also normally includes a brief explanation of the legal basis for that answer.

- **Statement of the Facts**: an objective and complete description of the legally significant facts relevant to the discussion section.

- **Discussion**: the heart of the memo. This section is where you present the legal answer, using basic concepts of legal writing, including logical large-scale and small-scale organization and case analysis. This section discusses both the strengths and the weaknesses of your client’s case, synthesizes the law, and uses that law to address arguments on both sides before making a recommendation.

- **Conclusion**: a more thorough summary of the analysis in the memo than the brief answer. It should not repeat what came before; instead it should synthesize your findings, recommend a strategy, and advise your client.

- **Summary of the Argument**: a statement of the major conclusions in your brief and the reasons supporting those conclusions. This section usually does not include citations to cases, statutes or regulations, but is still specific to the client’s case under review. The Summary of the Argument should be self-contained so that a reader who had the time to read this section only would still understand the essence of your argument.

- **Statement of the Case**: an account of the facts of the case as told from your client’s perspective. Although it should not dishonestly omit important legal facts, it should seek to make the court sympathetic to your client. This section also includes the case's procedural posture.

- **Argument**: the heart of the brief. This section contains your favorable interpretation, analysis, and application of the law to your client’s case. The argument section still uses the basic concepts of legal writing, including logical large and small-scale organization, and case analysis. The argument section also still addresses counterarguments. However, what makes the argument section most effective is how counterarguments are distinguished and thus rendered inapplicable to your case. Instead of objectively examining both sides of the case, weaknesses in your client’s case are minimized, while strengths in your client’s case are highlighted.

- **Conclusion**: states what it is you want the court to do, i.e. affirm the lower court’s decision.
the sense of direction you create for the reader through the structure of your brief. By inventing a unifying theme, you create a mechanism by which the reader processes your brief: readers can more easily process one idea into which several other ideas fit than process several, separate ideas.‡

For example, in a case where a prison warden has imposed several restrictions on the prisoners, a unifying theory would be that the restrictions, as a set, constitute a necessary and appropriate security plan for the prison. Each restriction is then valid as an integral part of a prison security plan, rather than a separate, unrelated restriction.

Alternately, you might be defending a client who maintains he was falsely arrested. Your implicit theory of the case might be “you got the wrong guy.” Using this theory, each argument in the brief, from “the arrest warrant was invalid,” to “the police did not take appropriate measures to ascertain your client’s identification” would all be written so as to emphasize that the wrong man was arrested.

Or suppose your client is being prosecuted for stealing from a store. But your client is very poor and was only stealing food to feed his family. Your theory of the case might be that your client had no choice. Using this theory, your facts section might be crafted to emphasize your client’s difficult financial situation, the young ages of his children, the fact that he had conducted a thorough job search, or was unable to obtain public assistance in time. Additionally, you might use as precedent in your analysis section cases in which courts were lenient on people convicted of stealing in order to support their family. Alternately, your opponent’s theory of the case might be that theft laws should be strictly construed and enforced.

You will find that developing a strong theory of the case is particularly necessary when you are dealing with new or unsettled areas of the law. When a court has not already definitively decided an issue, it may be more open to a new perspective on the issue. In such a situation, a well-developed case theory can be of great benefit to your client.

### Persuasive Writing Techniques

Now that you’ve developed your theory of the case, you can begin examining persuasive writing techniques; your theory of the case will determine which persuasive writing techniques are most useful to you. To start, here are six areas you can focus on:§

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1. Standard of Review in Appellate Briefs:

The standard of review is the criteria that a court uses to evaluate the decisions of the court below. The standard of review determines the latitude afforded to an appellate court to substitute its judgment for that of the trial court. For example, appellate courts have much more latitude in reviewing constitutional cases involving individual rights than administrative law cases involving technical facts and rules. The standard of review adopted in a case will depend on the nature of the case and the case’s procedural posture when the decision of the court below was issued.

There are several different standards of review. For example, under “de novo review,” the widest review, an appellate court is free to substitute its legal conclusions for that of the lower court, without extending deference to the reasoning or decisions of the lower court. Under a more limited “clearly erroneous review” an appellate court is more deferential to a lower court’s finding of fact, and reviews only for clear errors. The standard of review varies from state to state, and from issue to issue. In order to determine the applicable standard of review for your case, you will need to research prior cases in your jurisdiction that address the same issues you are addressing in your brief. You should include the standard of review in your brief and cite to the case(s) that state the appropriate standard of review.

Remember that the standard of review will inform the scope of your writing. If you are writing about a factual issue and the applicable standard of review is clearly erroneous, you will need to focus on the facts of the case and why the court below did or did not make any clear errors. If you are writing about a legal issue and the applicable standard of review is de novo, you can focus on the legal mistakes the court below did or did not make. Additionally, the standard of review will influence the way in which you craft your “Issues Presented” section; under a clearly erroneous standard, the issue presented might focus on the lower court’s mistakes. Under a de novo standard, the issue presented might focus on the original legal questions. The standard of review is critical because it defines the scope of issues that the court will actually be reviewing.

2. Reasoning:

Analogical comparative reasoning, already familiar to you because you used it in writing your memo, is the most traditional form of legal analysis. It is most useful when there is particular precedent on the legal issue in question because it shows the reader that the courts in your jurisdiction would make a similar conclusion when dealing with the facts of your case. In brief writing, comparative reasoning does the same thing. It shows the validity of your legal analysis and thus adds to the persuasiveness of your brief. When you have clear precedent, you can directly import the comparative reasoning techniques you learned in writing your memo into your brief.

For situations in which direct precedent is lacking, however, you might consider a particular form of neoclassical reasoning, like analogy within deduction.” Analogical reasoning begins by defining the rule (the major premise) by stating the statute, or synthesizing precedent. The client’s situation (the minor premise) is then proven by analogizing it to previous

supporting cases. Next, counterarguments are disproved by distinguishing the client’s case from those cases from which the counterarguments originate. After having proven that the client’s case is more like the supporting cases, and less like the cases from which counterarguments originate, a conclusion on your client’s case can then be made.††

Another form of reasoning uses the legal trends available in your own jurisdiction. Surveying the laws in your jurisdiction will allow you to determine what the trends in legal thinking are. Once you have determined the trends, you can then frame an argument with that trend in mind. You can also use persuasive authority to illustrate what the application of law should be in your jurisdiction.

Another reasoning technique is to frame the arguments in the context of legal process. Legal process focuses on the fairness of procedural treatment. Finally, you could also frame your arguments in the context of critical theory or law and economics. As a brief writer you can use any of these reasoning techniques. The important thing to remember is that you are using the theory and making the arguments that best serve your client’s needs.

3. Purpose and Audience:

As discussed in the chart on page one, there are differences in the purpose and audience as you move from memo to brief writing. In writing your brief, be particularly aware of the purpose and audience of your document. Let your purpose inform all the choices you make throughout your brief from your overall organization to your word choice. Ask yourself, “could this paper be organized in way that will make my client’s case seem stronger to the reader?” or “could I use a word here that minimizes (or emphasizes) the effect of my client’s actions?”

In addition, be very specific about who your audience is. Are you writing to a trial or appellate court? Trial courts emphasize precedent. Thus a trial court will be comparing the rules, reasoning and policy of your case, to previously decided cases. Accordingly, analogizing your case to a prior case decided by the trial court might be your best legal strategy. If this is new law, however, trial courts will be interested in theories, politics, empirical data, and other convincing information.

Alternately, an appellate court will focus on whether the trial court applied the law correctly or made any legal errors. If the appellate court decides the trial court made mistakes, it will then have to consider whether the mistakes dictate a reversal of the trial court under the standard of review. Arguing that the trial court committed a reversible legal error may be your best legal strategy for an appellate court.

†† For more on other forms of neoclassical reasoning, including induction to form the rule, deducting using example, deduction using elements and neoclassical fallacy, see: Jill J. Ramsfield, The Law As Architecture: Building Legal Documents 314-70 (West Group 2000).
4. Structure and Organization:

In organizing the arguments in your brief, consider which structure will maximize the persuasiveness of your arguments while still making them easy to follow. Ordering the parts of your brief to maximize their persuasiveness is different from memo writing, where the parts of the memo are organized to maximize understanding of the issues.

In making decision on organization of your brief, think about the relative strengths and weaknesses of your arguments, the proportioning of your arguments, and the flow of your arguments. You might want to bury a weaker or less important argument between two strong arguments. You might give your strongest arguments the largest proportion of the paper, to convey its importance. You may decide to finish with a strong argument, rather than begin with it, because it only makes sense after the weaker arguments have been discussed.

5. Point Headings

Point headings can be used in memo writing to guide your reader through your memo. Point headings in a brief should do more than guide your reader; they should also be concise arguments for your side. In a brief, point headings and sub-headings are located within the body of the Argument section and are also listed in the Index. In addition to providing an outline of your arguments, they serve as thesis statements for the major sections and sub-sections of the brief. As such, they provide the reader with a persuasive and concise summary of the legal argument in that section.

Because point headings include the legal conclusions and the basic reasons for those conclusions, they are a great place to convey your theory of the case through use of persuasive sentence structure and language. Consider the following point headings, both of which might be used in a case where your client, a doctor, is facing liability for failing to successfully sterilize a former patient:

1. The plaintiffs should not get any damages.
2. The court should not award the plaintiffs damages for the costs of raising their normal, healthy daughter to majority age because a healthy child is not a legally recognized injury.

The second point heading is more effective because it not only states the legal conclusion, but also uses emotion-provoking language to state the legal conclusion and legal reasoning persuasively. It subtly tells the reader “there is no reason for damages here--raising a healthy daughter is a gift, not an injury.”

6. Small Scale Techniques:

There are also techniques you can use when structuring your sentences and choosing your words that will increase the persuasiveness of your brief:

‡‡ For further discussion on point headings, see the Writing Center handout, “Writing Effective Point Headings.”
When structuring your paragraphs and sentences, you might emphasize important information by placing it at the beginning or end of a paragraph or sentence. Additionally, you can emphasize key points by placing them in shorter sentences and repeating them throughout the document. When structuring your individual sentences, you can place points you want to emphasize in main clauses and points you want to de-emphasize in dependent clauses.

In choosing your words, be more descriptive when you want an image to remain in the reader's mind, and less descriptive when you want the reader to forget the image. Descriptive language can also be useful in conveying your theory of the case. For example, if you believe that your client committed a crime because he was young and naïve, you might want to subtly emphasize his youth and naiveté in the statement of the facts by using the facts that draw attention to his age or lack of life experience. You might also use titles to convey deference to authority, i.e., referring to your client as Officer Harding or Dr. Ossining.

Finally, remember when employing persuasive techniques in your brief not to go overboard. When writing becomes overly dramatic, you will lose credibility with the court. Consider the following examples, both of which might be used in a brief arguing that a doctor inappropriately medicated your client:

1. Kaitlin Waters was on a large and complex daily regimen of drugs, including…
2. Kaitlin Waters was mercilessly drugged into a lifeless vegetative state for every minute of her life.

The second sentence is negative and overly dramatic. It leaves the reader wondering whether this is really an accurate description of the facts. In contrast, the first sentence still leaves the reader with the impression that your client was taking too much medication. It does so, however, through use of actual facts and persuasive descriptive language like “large” and “complex.”

**CONCLUSION**

As you begin work on your own brief, keep in mind the development of your Theory of the Case. Before you begin writing think about how you will address each of the four basic rhetorical elements (Purpose, Audience, Scope, and Stance) elements in your brief. Finally, as you begin to write, focus on using persuasive writing techniques that will emphasize your client’s position and prove your recommended outcome is the best choice.