



FROM MEMO TO APPELLATE BRIEF

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Osamudia Guobadia and Jennifer Pogue,

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Now that you're getting comfortable with the art of memo-writing, it is time to switch gears and learn how to write a brief. This transition may seem overwhelming at first, but briefs and memos actually have more in common than you might initially think. Almost all the skills that you have learned your first semester, including legal research, case analysis, and organization, apply to both memos and briefs. This handout will provide you with some basic comparisons between memo and brief writing, and help to ease your transition from objective to persuasive writing.

As you know, the purpose of a memo is to answer a legal question, and your role as its writer is to objectively research and predict the answer. A brief, on the other hand, is written to persuade the reader that one position on the issue is the correct one. Additionally, while a memo is written for another attorney or for a client, a brief is written for the judge(s) deciding your case and your opposing counsel. Accordingly, your job is not only to recommend action, but to persuade the court to take the action your client desires. The chart below provides a comparison of how these elements change when you move from memo to appellate brief.

DIFFERENCES IN PURPOSE, AUDIENCE, AND SCOPE¹

MEMO	BRIEF
<p>Purpose: Primarily to answer a legal question about what the likely outcome will be when the law is applied to a particular set of facts.</p> <ul style="list-style-type: none"> • Objectively inform the reader about what the law is so she can make an informed decision. • Develop a legal strategy with other attorneys. 	<p>Purpose: Inform AND persuade the reader that your application of the law to the facts is the correct one.</p> <ul style="list-style-type: none"> • Emphasize favorable arguments and minimize the force of opposing arguments. • <i>Win</i> the case, using the law in the way most favorable to your client.
<p>Audience: Primarily another lawyer in your firm or organization; also often your client.</p>	<p>Audience: Primarily the appellate judge(s) who will decide your case, as well as their clerks; opposing counsel; your client.</p>
<p>Scope: Generally the scope of the memo is laid out for you by your supervising attorney.</p> <ul style="list-style-type: none"> • You may be constrained by the specific question or other financial/ constraints. • Because memos form the basis for legal decisions, be honest about the strengths and weaknesses of your client's case and what the law does and does not allow before giving advice. 	<p>Scope: Generally speaking, you should strive to include all the relevant arguments that prove your client should prevail.</p> <ul style="list-style-type: none"> • Stick to the issues the judge (or professor) has asked you to brief, or the ones that are of central importance to the case. • You may be constrained by a word limit or other financial/time constraints. • Also note that the standard of review may influence the scope of the brief (see further discussion below).

¹ For further information on the purpose, audience, and scope, consult: Mary Barnard Ray and Jill Ramsfield, [Legal Writing: Getting it Right and Getting it Written](#), 57, 219-21 (3d ed. 2000) and Linda Edwards, [Legal Writing and Analysis](#), 127, 162- 64(2d ed. 2007).

In addition to differences in purpose, audience, and scope, the brief and memo also have slightly different components. You are already familiar with the primary components of a memo. Although the exact format and content of a brief may vary slightly in each jurisdiction, the body of the brief usually contains four main parts that are similar to those in the memo: the Statement of the Issues Presented for Review, the Statement of the Facts or Statement of the Case, the Argument, and the Conclusion. Most courts will also require a Table of Contents and Table of Authorities, as well as a Summary of the Argument and a Standard of Review. Always remember to refer to your court’s rules (or your professor’s requirements) for specific requirements. The chart below compares the main components of the memo and brief.

COMPARING COMPONENTS OF THE MEMO AND BRIEF²

MEMO	BRIEF
<p>Question(s) Presented: Presents an objective statement of the legal questions to be answered in the memo, the crux of what you’re writing about.</p> <ul style="list-style-type: none"> Includes 3 elements: the jurisdiction, the legal issue, and the most legally significant facts. 	<p>Statement of Issue(s) Presented for Review (the “Issue Statement”): Identifies and describes the legal issue(s), invokes the applicable law, describes the most legally significant facts.</p> <ul style="list-style-type: none"> Differs from the Question Presented in point of view, as it is persuasive. An effective Issue Statement should suggest an outcome, using the relevant facts and the applicable law to elicit an answer that affirms the analytical reasoning of the brief.
<p>Brief Answer: Provides a short answer to the question(s) presented.</p> <ul style="list-style-type: none"> Usually includes a brief explanation of the legal basis for that answer, including some of the main legal elements or buzzwords. Generally, there are no formal citations or quotations in this section. 	<p>Summary of the Argument:³ A statement that previews the major conclusions in your brief and the reasons supporting those conclusions.</p> <ul style="list-style-type: none"> This section does not usually include formal citations or quotations, but is still specific to the client’s case under review. Should be self-contained so that a busy reader could read only this section and still understand the essence of your argument. Your Theory of the Case (discussed below) should be apparent in your Summary of Argument.
<p><i>[The Standard of Review is not typically included in memos.]</i></p>	<p>Standard of Review:⁴ The level of deference the reviewing court must give to the lower court’s decision.</p> <ul style="list-style-type: none"> Includes citation to cases that use the appropriate standard. See further discussion below, on page 5.

² For further discussion on all of these elements, consult: John C. Dernbach, Richard V. Singleton, A Practical Guide to Legal Writing & Legal Method, 18791, 21524 (2d ed. 1994); Mary Barnard Ray and Jill J. Ramsfield, Legal Writing: Getting it Right and Getting it Written, 24, 56, 62-63, 92-93, 174-76, 184-88, 289-90, 358-60, 364 (3d ed. 2000); Kristen Robbins-Tiscione, Rhetoric for Legal Writers, 216-25, 237-54 (2009).

³ A Summary of Argument should “contain a succinct, clear, and accurate statement of the arguments made in the body of the brief” and not “merely repeat the argument headings”. Fed. R. App. P. 28(a)(8).

⁴ For further discussion on Standards of Review, see the Writing Center handout, “Identifying and Understanding Standards of Review.”

MEMO
<p>Statement of the Facts: An objective and complete description of the legally significant facts relevant to the discussion section.</p> <ul style="list-style-type: none"> • Keep in mind that if you use a fact in your analysis section, it should also appear in your Statement of Facts. • The beginning or end of this section typically includes procedural history of the case (to the extent there is any), and what the client hopes to achieve. <p><i>[The Statement of the Case is not typically included as a separate section in memos. While the procedural history is very important in appellate briefs, it is often nonexistent (or at least, of little importance) in memos. Thus, to the extent there is any procedural history in a memo, it is typically included as part of the Statement of Facts.]</i></p>
<p>Discussion: The heart of the memo, which objectively answers the question presented using basic concepts of legal writing.</p> <ul style="list-style-type: none"> • Discusses both the strengths and weaknesses of your client’s case, using synthesized rules of law, and uses that law to address arguments on both sides before making a recommendation. • Organized around the law, according to good small- and large-scale organization.⁵ • Includes citations to all legal authority.
<p>Conclusion: A summary of your analysis which synthesizes your findings, recommends a strategy, and advises your client.</p> <ul style="list-style-type: none"> • It is a more thorough summary of the analysis than provided in the Brief Answer.

BRIEF
<p>Statement of the Case: A short section describing the procedural history of the case, including the nature of the case (i.e. civil or criminal, tort or contract), the history of the proceedings, and disposition below.</p> <ul style="list-style-type: none"> • Some courts require a separate Statement of the Case; others expect this information to appear within your Statement of Facts or in the Argument section. Again, always consult the court’s rules or your professor’s requirements for specific guidelines.
<p>Statement of the Facts: An account of the facts of the case as told from your client’s perspective</p> <ul style="list-style-type: none"> • Should seek to make the court sympathetic to your client by emphasizing the favorable facts and downplaying the unfavorable ones, without dishonestly omitting important legal facts. • Your Theory of the Case (discussed below) should also be apparent to the reader from reading the facts section. • Facts should generally have citations to the record below.
<p>Argument: The heart of the brief, containing your persuasive interpretation, analysis, and application of the law to your client’s case.</p> <ul style="list-style-type: none"> • Uses the same basic concepts of legal writing in the memo, including rule synthesis, large- and small-scale organization and case analysis. Should seek to shape the law and by doing so preempt opposition’s points. • Should highlight strengths in your client’s case and minimizes its weaknesses, presenting the law from the perspective most favorable to your client. • The Theory of the Case (discussed below) should be woven throughout your Argument.
<p>Conclusion: States exactly what it is you want the court to do.</p> <ul style="list-style-type: none"> • A court will not grant relief that is not requested, so the conclusion should state the relief sought precisely. • Unlike in the memo, the conclusion in a brief should not have any law or reasoning. • It is often a single sentence, i.e., “For the reasons above, the lower court’s decision should be affirmed.”

⁵ For further discussion on organization, see the Writing Center handout, “Crafting Mid-level Organization.”

THE THEORY OF THE CASE⁶

One of the challenges of writing a brief for the first time is grasping the concept of the Theory of the Case (or the “Core Theory”). Because a memo presents an objective application of the facts to the law, there is no Theory of the Case in a memo. It is a tool unique to persuasive writing.

The Theory of the Case is the unifying idea or concept of the case. It is the completion of the sentence “My client should win because . . .” It is the implicit message in your brief that will tie together the factual, legal, and policy issues. It is not a legal theory like negligence or self-defense. Rather, it is a simple, factual theory that will help your reader empathize with your client and see the facts in a way that is most favorable to your client. While the facts explain what happened, and the law explains the legal implications of what happened, the theory explains *why* it happened.

Your Theory of the Case should be evident throughout your brief, particularly in your Summary of Argument, Statement of Facts, and throughout your Argument. The theory should mesh with your organizational framework and be supported by the facts of your case and relevant law. It should be subtle, woven throughout your document so that your reader is able to articulate it after reading your brief, even though you don’t state it outright. The persuasive power of your Theory of the Case is it allows your reader to sympathize with your client even before she understands the relevant law. For this reason, it is important to take advantage of the theory’s opportunities for persuasion early on in your brief.

A Theory of the Case should unify the various parts of the brief. In a brief with multiple legal issues or elements, a single unifying theme helps the reader to process all the different components. 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. In such a situation, judges may be more open to a new perspective on the issue.

When determining an effective Theory of the Case, brainstorm a number of potential theories and consider the advantages and disadvantages of each one. Your intended audience, the legal and factual framework of the case, and the organization of your brief may influence your choice among legal theories. You should also consider what theory your opponent is likely to choose, as this may influence your decision to choose one theory over another.⁷

Examples of Theories of the Case:

- You are representing a party injured in a car accident. Your *legal theory* might be that the other driver was negligent, but your *Theory of the Case* might be that “he was in a rush.” Throughout the brief, you highlight facts that support your Theory of the Case, for example that the driver was speeding, late for an appointment, or not paying attention.⁸
- You are representing a state prison in a case where a prison warden has imposed several restrictions on the prisoners. Instead of treating each restriction as separate and unrelated

⁶ Diana R. Donahoe, Legal Research & Writing (Aspen 2006, 3d ed. 2008).

⁷ Id.

⁸ Id.

from one another, a unifying theory could 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, and you've presented your client's actions in a favorable light.

- If you represent an indigent client who stole food to feed his family, your Theory of the Case might be that your client had no choice. Tugging at the judge's heartstrings is often an effective way to get her to rule in your favor.⁹ Using this theory, you could craft your Statement of Facts to emphasize your client's difficult financial situation. In your Argument section, you would highlight these facts to bolster your legal arguments.

PERSUASIVE WRITING TECHNIQUES¹⁰

Once you've developed your Theory of the Case, you can begin examining persuasive writing techniques. Here are several things to keep in mind as you begin to write your brief:

1. Standard of Review in Appellate Briefs:

The standard of review is the level of deference the appellate court must give to the lower court's decision. It determines the latitude afforded to an appellate court to substitute its judgment for that of the trial court. The standard of review adopted in a case will depend on the nature of the case and the case's procedural posture when the lower court's decision was issued. It will vary from state to state and from issue to issue.¹¹

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. The standard of review is usually described toward the beginning of the opinion. As an advocate for your client, you should be looking for authority, including policy arguments, that supports the most favorable standard of review possible. If you're representing the appellant, you should argue for the least restrictive standard, the standard that maximizes appellate court's authority to overturn the challenged decision. If you represent the appellee, on the other hand, you should argue for the most restrictive standard, one that limits the appellate court's authority to overturn the trial court's ruling.¹²

The standard of review is critical because it defines the scope of issues that the court will actually be reviewing. Thus, it will inform the scope of your brief. 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 errors. Under this standard, your Issue Statement might focus on the lower court's mistakes.

For further discussion, see the Writing Center handout "Identifying and Understanding Standards of Review."

⁹ Id.

¹⁰ For further, more in-depth discussion of persuasive writing, see the Writing Center handout "Persuasive Writing."

¹¹ Questions of fact are usually entitled to the greatest level of deference on appeal, and are not usually reversed unless clearly erroneous. In contrast, questions of law are often reviewed without any deference at all, called *de novo* review. There is no universal standard of review for mixed questions of law and fact, and different courts treat these questions differently. Kristen Robbins-Tiscione, *Rhetoric for Legal Writers*, 239 (2009).

¹² Linda Edwards, *Legal Writing and Analysis*, 199 (2d ed. 2007)

2. Purpose:

Let the purpose of your brief inform all the choices you make throughout your brief, from your overall organization to your word choices. Every single component of your brief should be written in a manner that will convince your audience that your argument is the correct one. Always ask yourself, “Could I revise or change my brief in any way that will make my client’s case seem stronger?”

3. 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. Organizing a brief is often different than structuring a memo, where the parts are usually organized to maximize understanding of the legal issues. When organizing your brief, think about the relative strengths and weaknesses of your arguments, their proportioning, and their flow. Most legal writers choose to open with their best arguments. However, you will have to balance the relative strength of your arguments with what makes sense logically and chronologically. When choosing your organization, consider your Theory of the Case and make sure that your Theory fits within the organizational framework.

You should also be conscious of the amount of space you spend discussing each argument. Because both judges and professors usually have strict word limits, you will have to prioritize which arguments you will make and how much space to devote to each. Your strongest arguments should have the largest proportion of your brief’s words, which helps convey their importance. Remember, too, to address the counterarguments, while keeping your own arguments at center stage.

4. Point Headings:

Point headings are an important part of your persuasive presentation of your argument in an Appellate Brief. It is usually the first language a judge (or professor) will see in reviewing your brief, so it is important to guide your reader to your conclusions in your point headings. For further discussion and specific examples, see the Writing Center Handout “Writing Effective Point Headings”.

OTHER RESOURCES

- Laurel Currie Oates & Anne Enquist, Just Briefs, (2003).
- John C. Dernbach, Richard V. Singleton, A Practical Guide to Legal Writing & Legal Method, (2d ed. 1994).
- Mary Barnard Ray and Jill J. Ramsfield, Legal Writing: Getting it Right and Getting it Written, (3d ed. 2000).
- Kristen Robbins-Tiscione, Rhetoric for Legal Writers, (2009).
- Linda Edwards, Legal Writing and Analysis, (2d ed. 2007).
- Teaching Law E-book.
- Writing Center Handouts, available at www.law.georgetown.edu/writingcenter.