# BRIEF WRITING TIPS from FEDERAL CIRCUIT CLERKS

## A MOST IMPORTANT AUDIENCE

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There is no doubt that strong legal brief writing paves the way for success. In fact, I often hear my colleagues opine that cases are mainly won and lost on the briefs. But while judges are certainly the primary and final audience of briefs filed with the Federal Circuit, judges are not your only audience. You are also writing to another important audience: the judges' law clerks.

My law clerks serve an indispensable role. They help me as I formulate and reach my judgment in each case. We discuss the merits of each case over the course of several meetings. As part of that process, my clerks pore over the briefs, the evidentiary record, and any relevant legal authorities. They then prepare an analytical memorandum that summarizes the key legal issues, each party's arguments, and the important facts on which the case may turn.

I suspect that over the course of their clerkship, each of my clerks will have reviewed more than 100 briefs, often conducting multiple read-throughs per brief. In addition, they attend oral arguments and observe which issues resonate with the different judges on the panel; assess whether the briefs fully educated the panel about those issues; and analyze the degree to which certain brief-writing tactics ultimately enhanced or diminished a party's likelihood of success.

I am often asked to provide my views on the keys to successful brief writing. For this article, I thought about my clerks' own valuable perspectives. So I enlisted two of my current clerks—Aaron P. Bowling and A. Victoria Christoff—to recommend strategies for writing persuasive, effective briefs. Both are top-notch clerks. The following are their unique insights, which I am sure will assist you in crafting a successful brief to the Federal Circuit. —*Judge Reyna*

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### Strategy 1: Effectively Leveraging the Court's Concurrent Review of Party Briefs

At the Federal Circuit, case briefs and the joint appendix are delivered to judges as a collective packet, all at once, about 45 calendar days before oral argument. When the rubber-band-bound materials arrive in chambers, we typically have no familiarity with the case. We do not review briefs when they are first filed, and any motions filed by the parties would have been resolved by a "motions panel" of judges that may be entirely different from the panel deciding the merits. As a result, we form our first impression of a case months after briefing is complete, when we read the briefs collectively, sometimes in one sitting.

Upon reviewing the briefs, we are generally responsible for providing our judge with a detailed summary of the case—a "bench memo." While the format and content of bench memos vary across judges, the concept is essentially the same: to research and summarize the parties' arguments and to identify points for further discussion and consideration. Depending on the court's caseload in a given month, we may have a week or less to conduct this process for each case.

We realize that the above insights may not immediately strike litigants as revelatory. But we believe that litigants who better understand the court's review process can shape the organization and content of their briefs in a complementary fashion. We've highlighted two general strategies that take advantage of this process: the first is to strategically select issues and order arguments; the second is for a party to adopt the role that best leverages its position in the briefing order. In our experience, briefs that employ these strategies are more compelling because they are clear, concise, and easily comprehended by the court. And ultimately, we believe these strategies increase a party's odds of prevailing on appeal.

#### *Strategically Selecting Issues; Ordering and Tracking Arguments*

The issues presented to this court are often technical and multi-faceted. In many cases, the parties overcomplicate these issues by the manner in which they present their arguments. It may begin with an appellant brief that raises a half dozen separate issues on appeal. The appellee may then enumerate and characterize the issues differently. The appellee may also reorder the arguments relative to the appellant's opening brief. Mix in a few convoluted section headings, and the briefs sometimes read as if the parties are talking past each other.

We think the court's brief-review process suggests a different approach. Given our short timeline for reviewing the briefs and preparing an analytical summary for the judge, clarity is paramount. We think the parties are best served by narrowing the appeal and organizing their brief in a way that ensures the court understands the precise nature of the arguments and the manner in which those arguments align with their opponent's.

For appellants, this means leveraging their opportunity to initially frame the issues for the court by carefully selecting and presenting the issues on appeal. We've witnessed a surprising number of appellants who robotically appeal every aspect of the lower tribunal's decision, without earnestly assessing the strength of those arguments or the most beneficial order of issues on appeal.

We recommend that appellants omit arguments with an objectively low rate of success. Overburdening the court with improbable arguments can muddy the waters and dilute the strength of other arguments. For example,[1] one judge recently took the opportunity at oral argument to articulate a preference for considerate issue selection:

> Can I just tell you how much I appreciate that you limited your arguments on appeal to what you thought were the most successful arguments, and didn't raise every single issue from the [proceedings below]? Because that rarely happens, and I really appreciate appellate counsel selectively making their arguments and not throwing the kitchen sink at us.

After selecting the issues worthy of challenge, appellants should also carefully consider the order in which they present those issues. We've witnessed numerous appellants who bury case-dispositive issues near the end of their brief. Or worse, they fail to clearly alert the court that resolution of an issue is dispositive. Other appellant briefs lead with difficult evidentiary challenges, leaving the relatively cleaner legal challenges until later in the brief, after the case has been introduced as an uphill climb. In our experience, some of the most compelling appellant briefs avoid these pitfalls by strategically presenting their strongest, most impactful arguments first. They shine a spotlight on case-dispositive issues. They clearly parse out the factual and legal sub-aspects of each issue and then separately address those challenges in a thoughtful order.

For appellees, we think the court's brief-review process encourages an ordering of arguments that exactly tracks the appellant's brief. In our experience, this tactic provides the court with a clear, point-by-point rebuttal of the appellant's brief, without any confusion as to how the parties' arguments align. This also helps highlight arguments the appellant *does not* raise, thus confining the scope of appeal and preempting a drifting reply brief. For example, one appellee began its argument by emphasizing the arguments the appellant failed to raise, and the resultant narrowness of the appeal:

> On appeal, Appellant presents no meaningful challenge to the Board's legal analysis. *See, e.g.*, Appellant Br. 27-45. Appellant, for

> example, does not challenge the Board's claim construction. *See* Appx8-10. Nor does Appellant dispute that the Board correctly applied this Court's legal precedents on anticipation. *See* Appx15-18. Instead, Appellant frames its appeal as a direct challenge to the Board's fact finding, rearguing factual issues that the Board carefully considered and resolved against Appellant. Appellant Br. 27-45.

In some circumstances, the appellee may wish to intentionally depart from the appellant's organization. This approach may be advantageous when a single argument undercuts several of the appellant's arguments (e.g., mootness, jurisdiction, etc.), or when the appellant's organization is simply too convoluted for the appellee to formulate a cogent response. In those situations, we recommend that the appellee achieve clarity in a different way: using clear, repeated cross-references.

In our experience, the most effective appellee briefs use simple notations or citations throughout the argument to inform the court precisely which of the appellant's arguments they are intended to address. Depending on the issues presented, these notations may cite specific pages or entire sections of the opponent's brief. For example, the appellee quoted below cited to the appellant's brief more than 40 times and, in a few instances, indicated when its counterargument undermined entire "section[s]" of the appellant's brief:

> Appellant includes a section of its brief arguing that claim construction "requires that the intrinsic evidence be considered as a whole," re-listing the same specification excerpts and prosecution statements cited earlier. Br. at 44-47. Appellant has the right general legal principle, but widely misses the mark in its application.

As we are analyzing and summarizing the parties' arguments by flipping back and forth between 50- to 70-page briefs, these types of cross-references are invaluable to ensure we have fully appreciated the alignment of the parties' arguments. Clarity is king.

***Appellant as the Storyteller and Teacher; Appellee as the Trustworthy Fact-Checker***

By rule, appellants are also tasked with providing the factual background relevant to the appeal. This, of course, allows appellants to assume the role of storyteller to a wholly unfamiliar reader, painting a picture of the proverbial "dark and stormy night" on which they allegedly suffered unfairness at the hands of a lower tribunal error. But it also provides another opportunity to the appellant: to teach the court.

The Federal Circuit is a court of limited subject matter jurisdiction, and our cases often present a host of unique legal and factual circumstances. Our patent cases often relate to nuanced technologies, while our trade and government contract cases sometimes entail convoluted fact patterns involving numerous government agencies, regulations, and internal agency rules. In our experience, the strongest appellant briefs recognize the court's potential unfamiliarity with obscure legal or factual contexts. They teach the court about the parties, the relevant legal doctrines, the importance of specific facts, and how a particular case fits into our precedent. This teaching-focused brief writing is particularly valuable for clerks, who may only have a few years of litigation experience and may be entirely unfamiliar with certain aspects of the law involved in a given appeal. For example, the appellant below opened its brief with a simple, easy-to-understand explanation about photoplethysmography—the blood-flow measurement technology at issue in the appeal:

> The '941 patent relates to photoplethysmography (PPG), a technique for using light to measure changes in blood volume in a living body. Light is projected into living tissue, and the reflected light is detected after its interaction with the skin, blood, and other tissue. Appx485-486 at ¶¶26-27. The volume of blood affects the intensity of the reflected light. Appx485-486 at ¶27. Because the volume of blood fluctuates with each heartbeat, a PPG sensor detects a pulse wave that is synchronized with the subject's heartbeat. *Id.*

For appellees, our brief-review process favors a responsive brief that includes a short, punchy background section in which the appellee serves the role of fact-checker and defender of the tribunal below. Savvy appellees paint themselves as the trustworthy party telling the "real" story. They provide important context to the facts presented by the appellant, fill gaps in the narrative, and highlight the appellant's omissions and mischaracterizations.

The most powerful appellee background sections are sometimes only a page or two long. They keep in mind that we likely reviewed the appellant's factual background a few hours earlier, and they therefore provide a brief, targeted counterstatement of facts that undermines the appellant's narrative, point-by-point.

Effective appellee briefs may also point out what the appellant concedes, and how those concessions fit into the larger narrative. The appellee in the below example highlighted the appellant's concession that an affirmance on claim construction requires an affirmance of the Patent Trial and Appeal Board's (Board's) unpatentability conclusions:

> Appellant's brief concedes that if the Board's construction is upheld, then there can be no error in the Board's finding of unpatentability. *See* PBr. at 11 n.1 ("[T]he claim construction issue will be dispositive"). Appellant's subsidiary arguments challenging the Board's invalidation of other claims as obvious all depend entirely, by Appellant's own clear admission, on its proffered construction of "fanning the wafer."

By leveraging the court's general practice of concurrent brief review, and by keeping in mind our role of summarizing and outlining the parties' respective arguments, litigants can provide more compelling briefs that ultimately improve their odds of success.

**Strategy 2: Addressing and Using the Standard of Review to Your Advantage**

At the Federal Circuit, the standard of review is pivotal. It is the lens through which we view each of the parties' arguments. Cases often turn on the level of deference afforded to the lower tribunal. Many times, judges on the panel may strongly disagree with the lower tribunal's decision, yet the standard of review will bind their hands and require affirmance.

Of course, parties are required by local rule to identify the standard of review in their briefs. But parties often fail to fully integrate the standard into their arguments, and they fail to shape their briefs in a way that complements the standards involved. We have identified two ways in which some of the most effective briefs use the standard of review to their advantage.

***Accurately, Clearly, and Strategically Reciting the Standard of Review from the Outset***

All too often, parties fail to accomplish the simple task of reciting the standard of review. Sometimes, the omission appears to be a mistake. Other times, the party seems to be avoiding an unfavorable standard. Either way, it can prove costly.

Omitting or mischaracterizing the standard of review won't alter our analysis—it will only diminish the litigant's credibility. In our experience, briefs are more compelling when they admit and then address a difficult standard of review. For example, the party quoted below confronts the abuse of discretion standard head-on, but then contends that its case is "one of the rare cases" in which that standard is met:

> The decision to enhance damages is within the discretion of the district courts and this Court almost never disturbs the exercise of that discretion. This, however, is one of the rare cases in which the district court abused its discretion in deciding such a motion.

Effective briefs also strategically select the articulation that best supports their case. For example, this court has articulated the substantial evidence standard in over a dozen different ways. Litigants should use this variability to their advantage. For example, the appellant below found it advantageous to emphasize this court's obligation to examine the evidence that cuts against the agency's conclusion:

> "Substantial evidence is more than a mere scintilla." Substantial review asks "whether a reasonable fact finder could have arrived at the agency's decision" and requires examination of the "record as a whole, taking into account evidence that both justifies and detracts from an agency's decision."

On the other hand, the appellee below opted to emphasize this court's obligation to affirm even in the presence of a well-supported, inconsistent conclusion:

> Substantial evidence is that which "a reasonable mind might accept as adequate to support a conclusion." *Applied Materials*, 692 F.3d at 1294 (internal quotation marks omitted). "If two inconsistent conclusions may

reasonably be drawn from the evidence in the record, the PTAB's decision to favor one conclusion over the other is the epitome of a decision that must be sustained upon review for substantial evidence."

***Using the Standard of Review to Shape the Content and Organization***

In our experience, some of the most compelling briefs make the standard of review an ever-present fixture: they systematically weave it through each argument and conclusion. They may use the standard to show why certain evidence is relevant or irrelevant, or why some of their opponent's arguments, even if true, don't warrant reversal or remand under the applicable standard.

If, for example, we're applying de novo review, the lower court's decision likely has little bearing on the panel's judgment. Litigants need not spend time rehashing each aspect of the lower court's analysis. Instead, effective briefs emphasize the court's freedom to disregard the lower court's analysis under de novo review, and then focus the court's attention on what matters: the applicable legal authority and the implications of our ruling.

If, on the other hand, we are reviewing for substantial evidence, our judgment depends heavily on the lower court's analysis and the record below. Litigants should wed their briefs to both. Under substantial evidence review, our decision turns on the sufficiency of evidence relied upon by the lower tribunal—not whether the record also supports a different conclusion. Yet a surprising number of appellant briefs fail to shape their arguments around this standard, instead dedicating large portions of their brief to evidence that supports a different conclusion than that reached by the lower tribunal. In our experience, the most effective appellant and appellee briefs clearly identify the evidence supporting the lower tribunal's finding, and then argue why that evidence is either sufficient or insufficient to warrant an affirmance.

The following excerpt demonstrates how an appellee can quickly focus the court's attention on what matters: the evidence supporting the Board's finding.

Substantial evidence amply supports the Board's finding that a POSITA would have been motivated to modify the cam of the connector to make it translucent. The compelling teachings of the patent at issue, along with the expert's motivation-related testimony that is based largely on that reference, are the sources of that substantial evidence. Appellant's myriad arguments that the Board's translucency finding is not supported by substantial evidence are therefore without merit.

The standard of review is the foundation for each appeal before this court. In our experience, litigants who use the standard of review as the foundation of their brief maximize their likelihood of prevailing.

**Strategy 3: Double-Checking for Careless Mistakes**

In preparing this article, we identified several other careless mistakes we frequently see from even our most sophisticated parties. Accordingly, we conclude by providing a few seemingly simple reminders.

Parties should address each of their opponent's arguments. Without any counterargument, we may have no choice but to deem it undisputed or conceded. To the extent a party believes the opposition's argument is baseless and merits no attention, we recommend they say so, and quickly move on.

Similarly, parties should always address the authority cited by their opponent. A party that fails to do so may create the impression that it does not dispute its opponent's characterization of the cases and their applicability. It may diminish the weight of that party's own cited authority. If the cases are inapposite, distinguishing them in a footnote may suffice.

Finally, we advise against relying on nonprecedential or unpublished Federal Circuit cases, or on district court decisions—none of which bind this court. If that authority is necessary, we recommend acknowledging as much, and providing a specific rationale for its inclusion (e.g., issue of first impression and lack of other authority, a compelling on-point analysis, etc.).

**Concluding Remarks**

So there you have it. I hope you have found Aaron's and Victoria's recommendations useful. By incorporating these concepts into your writing practices, I believe you will craft more clear, thorough, and compelling briefs. One final note, when I discuss a brief for the first time with my clerks, they will often offer a general assessment of the brief, such as: well-written, confusing, persuasive, or disingenuous. More often than not, that assessment confirms and solidifies my own view of the brief. —*Judge Reyna* ■

**Endnote**

1. The excerpts provided in this article are transcriptions from oral arguments at the Federal Circuit and portions of public briefs filed before this court. We have modified the excerpts to remove party names, personal information, and other information not important for the purposes of this article.