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IS BRIEF-MAKING A LOST ART?

A brief, as its name implies, should be short and concise. The lexicographers define it as "an epitome, a statement in few words, an abridgement of a client's case, a statement of the heads or points of a law argument."

In England, the name is applied to the document furnished by the solicitor to the barrister to enable the latter to present the cause understandingly to the court. In the United States the word has come to have a more restricted meaning, and, especially as applied to appeal cases, it means the statement of law and fact filed for the information of the court and opposing counsel. "The grand rule to be observed in drawing briefs, consists in conciseness with perspicuity."[1]

"A brief, in addition to an abbreviated statement of the case, should contain a summary of the points or questions involved, with a citation of the authorities relied on, and an argument based upon both which should be characterized by perspicuity and conciseness."[2]

The Supreme Court in 1872 amended Rule 21[3] stating the requisites of a brief filed in that court, and the rule has remained substantially in that form until the present day.

These requisites are:

I. A concise abstract, or statement of the case, presenting succinctly the questions involved, and the manner in which they are raised.

II. An assignment of the errors relied upon, which, in cases brought up by writ of error, shall set out separately and specifi-

1. *Tidd's Practice*, p. 774.
2. *Anderson v. Neal*, 88 Ind. 320.
3. 14 *Wallace*, xi.

cally each error asserted and intended to be urged, and, in cases brought up by appeal the assignment shall state, as specifically as may be, in what respect the decree is alleged to be erroneous.

III. A brief of the argument, exhibiting a clear statement of the points of law or fact to be discussed, with reference to the pages of the record, and the authorities relied upon in support of each point.

The Circuit Courts of Appeals and the Appellate Courts of the states have adopted similar rules. The key-note of every definition of a brief is brevity, abridgment, conciseness.

The courts not only in their rules, but not infrequently in their opinions, oral and written, have emphasized the importance of these characteristics and have directed, requested and almost implored counsel not to disregard them. That they have been disregarded to such an extent that a brief—namely a concise perspicuous statement of fact and law—is becoming a *rara avis,* cannot be gainsaid.

The twentieth century lawyer, to paraphrase Bulwer Lytton's language seems to think that—

> **In the lexicon of law, which fate reserves**
> **For courts and judges, there is no such word**
> **As—*brief.***

Half a century ago, when the law was more of a science and less of a business than it is to-day, the lawyer took a personal pride in presenting to the court the best product of his brain which hard and conscientious labor could produce. He did not delegate this work to stenographers, clerks and office boys. He did not patronize law factories where briefs are quoted at so much per dozen with a liberal discount for cash. He sat alone in his library, often at night, and did not abandon his task until he had reduced the facts to their last analysis, stated the principal questions of law and had cited, one or perhaps two, leading authorities in support of those propositions which might be regarded as debatable. Occasionally there was a short quotation from a report or text-book, but generally the judges were expected to examine the authorities at fountain head. Those having an indirect bearing or based on doubtful premises were ruthlessly cast aside; it was the survival of the fittest. The single purpose of the brief was to put the court in possession of the salient features of the case in as few words as possible. The writer of the brief did not waste his time and energies in arguing inconsequential and technical exceptions. He knew that "judges are people," and that even the most careful and conscientious judge can hardly avoid being prejudiced against a case where the most

trivial points as well as the most weighty are given the same prominence.

A federal judge in one of the western circuits had before him a motion to dismiss a pleading. After listening to the first point, which was that the paper was not properly folioed, he surprised counsel by announcing: "The point is overruled and the motion is denied." "But your Honor," exclaimed the excited lawyer, "I have eight other points which I wish to present." "I think it will hardly be necessary," replied the judge, "as I invariably deny a motion that *begins that way.*" Somewhat arbitrary and abrupt, no doubt, and yet, considered from the view point of common sense, there is much that may be urged in support of the judge's position. It is, to say the least, quite possible that a lawyer who brings such trivialities to the attention of the court has no substantial grievance of which to complain.

The wheat is lost in the bran, and one who has been detected in offering bran to those in search of wheat, must not be surprised if he be regarded with suspicion even when he proffers the genuine article.

The brief of fifty years ago contained little that was counterfeit, it was the product of hard, intellectual labor, labor freely and enthusiastically bestowed, it was honest thought distilled and crystallized. Such a brief is before me as I write. It was used over a quarter of a century ago by one of the leaders of the bar of New York in arguing a cause before the Supreme Court of the United States which involved a large amount of money and several important and novel questions. *Imprimis,* it occupies but forty-seven printed pages. The writer of the brief did not assume, as is often the case to-day, that the court knew by intuition the names of the parties, the character of the action and the result in the court below. He prefaced the brief with a short "preliminary statement" setting forth these facts.

Next follows a "statement of the case" in which the testimony is sifted and condensed until the contents of a record containing over six hundred pages is clearly and succinctly stated in less than ten pages.

The contention of the parties is then stated generally and the errors complained of are set out. No member of the court having read the first twelve pages could fail to appreciate the salient facts and the exact nature of the dispute regarding them.

A lawyer who has never held a judicial office does not, I think, fully appreciate the importance of getting the principal facts and the main contention between the parties firmly fixed at the outset

in the mind of the court. When he has done this, his labor is half over. When he enters upon his argument, the judge is able to give him calm discriminating attention instead of hunting with nervous haste through the record to find out how the controversy arose.

I recall hearing a cause argued before Judge Blatchford when he was circuit judge. The counsel for the complainant was one of those fuliginous debators, a breed not wholly extinct, who deem it wise to plunge directly into the heart of the argument without putting the court in possession of the facts upon which the argument rests. In vain the judge pleaded for information but without result. After arguing for three hours the counsel resumed his seat, leaving the judge in a maze of cryptic problems from which there seemed to be no exit. The counsel for the defendant was one of the leaders of the patent bar, noted for the clearness and candor of his statements. As he arose to address the court he was met by the following inquiry from the Bench: "Mr. ——, will you kindly tell me what this case is about?" Evidently embarrassed, Mr. —— endeavored to avoid the task thus thrust upon him, saying: "I much prefer, your Honor, that you should receive a statement of the facts from my learned adversary." "I appreciate your reluctance," replied the judge, "but I have not the slightest idea what this controversy is about and I would deem it a favor if you would inform me."

Thus challenged, there was no alternative but to proceed and in fifteen minutes he had made the case so clear that it was understood, not only by the judge, but by all who listened to the lucid explanation. The pity of it was that the complainant's case was made so plain that judgment was ordered in his favor.

Returning to the brief in question, the "points," eight in number, are stated, the facts bearing on the point under discussion are briefly reviewed with citations to the folios of the record where they appear in full and the authorities, few in number, bearing on the proposition debated, are cited. Occasionally a sentence or two is quoted from a peculiarly apposite statement found in a syllabus, or an opinion, but the brief is not loaded down with page after page of quotations either from the authorities or the record. In conclusion, the court was asked to reverse the decree. It was reversed.

Such briefs are sometimes met with at the present time but they are the exception, not the rule. The age of combinations, bureaucracies, telephones and stenographers is at hand, but is still in its infancy. Some of us may yet live to behold a machine where the pleadings and proofs are inserted in a condensing hopper, passed through a solution of text-books and syllabi and from there to a

drying chamber, to be deposited finally in a receiver attached to the clerk's desk, in the form of a completed brief.

It is to-day as difficult to find a hand-made brief as it is to find a hand-made shoe.

The prevailing characteristics of the modern brief are discursiveness and prolixity. In the courts of the United States a brief under thirty pages is the pleasing exception and there are authentic instances where they have exceeded eight hundred printed pages. *Valde deflendus!*

What is true of the federal courts, is, I am informed, also true of the state courts. It seems to be thought that quantity and not quality is what will most surely convince the courts.

A few years ago a cause was tried before the writer where the points in controversy were so sifted at the argument that but one simple question was reserved for decision. Counsel united in requesting that they be permitted to furnish briefs. In vain the court suggested that such a course was unnecessary as there was no dispute upon the facts and he only desired to examine an authority or two on the law. At last the court yielded and permission was given upon the express understanding that the briefs were not to aggregate more than ten pages. In due course the briefs arrived, there were but ten pages, it is true, but in one of the briefs they were royal octavos; and printed thereon in agate type was matter enough to cover forty pages of ordinary size. No notice was taken of the imposition, the court feeling that any fine imposed upon the author of the brief as a juggler should, in all fairness, be returned to him as a reward for his pre-eminence as a humorist.

Few men can resist the temptation to argue every question which the record presents, no matter how inconsequential. They forget that in all probability the cause will ultimately turn upon one fundamental proposition and that he will succeed who has the ability to discover and present this proposition in the clearest light.

Mr. Webster was retained to argue in the Supreme Court a cause which had gone decisively against the plaintiff in the court below. When the cause was about to be reached, Mr. Bosworth, the attorney, came to Washington for a consultation. Mr. Webster sat with half-closed eyes as the attorney droned on from one hopeless position to another. At last he paused, saying: "Well, Mr. Webster, that is the case with a single exception; there is another point which we did not argue in the Circuit Court, but I think I should call your attention to it." As he unfolded the discarded point, Webster's interest became more and more intense and when it was fully explained he sprang to his feet, his great eyes flashing

with triumph, and exclaimed: "Mr. Bosworth, by the blood of all the Bosworths who fell on Bosworth Field, that is *the* point in the case." And it was.

Of course the ability to seize the strategic point, whether in the forum or on the battle-field, is given only to the "divinely gifted man."

The Websters are always in command, the Bosworths always in the ranks.

From Aristotle to the present day human minds have been divided into two classes, the rifle and the shot-gun types. The former use a bullet; they do not always hit, but when they do, they bring down big game; the latter use bird shot; they always hit something, but never kill anything.

Why is it that the art of brief-making has declined? There is more average ability in the profession to-day than ever before. The twentieth century lawyer is as able and industrious as his brother of a half century ago. What, then, is the reason? May it not be found in the changed environment and the intense activity of modern life? To keep pace with the age, the lawyer is compelled to resort to modern methods. Where there was one report to examine there are now a hundred; where there was one statute to construe there are now fifty; where there was a page of testimony to review there is now a volume. Small wonder that the lawyer of to-day seeks the assistance of digesters, stenographers and typewriters. The result is not a carefully thought-out argument; it is a digest. Everything bearing on the issue is found in the modern brief—somewhere. It is, however, so hidden in the wilderness of quotations from record and reports that it is apt to escape the attention of the most careful reader. At almost every term of court several of these bulky volumes appear.

Contemplate the cruelty of asking a judge, who has to dispose of several hundred cases annually, to study a printed book ten inches long, seven inches wide and one and a half inches thick. The mere physical act of reading it understandingly will occupy a week. It is an example of "man's inhumanity to man." In contemplating such a document one is forcibly reminded of Macaulay's review of "Nares's Memoirs of Lord Burghley." After stating the dimensions of the book and the weight of the paper consumed, he says: "Such a book might, before the deluge, have been considered as light reading by Hilpa and Shallum, but unhappily the life of man is now three-score years and ten, and we cannot but think it somewhat unfair in Dr. Nares to demand from us so large a portion of so short an existence."

There surely is no necessity for quoting *ad infinitum* from the record and the authorities. The judge must read the testimony and to insert it in the brief compels him to read it twice. If a leading case be cited it is fair to assume that the judge is familiar with it, and, if it be an ordinary case, no careful judge will rely on the quotation without examining the context. And yet the modern brief is often filled with quotations which have become household words alike of the judges and the counsel. These quotations have done such yeoman service that they are often used to identify the case. No member of the patent bar, for instance, will fail to know what is meant when the "Advancing Wave Case,"[4] or the "Nose of Wax Case"[5] is referred to, and every admiralty lawyer knows well what is meant when the "Refrigerator Case"[6] is mentioned.

A cause was recently presented to a federal court, in which several parties were interested, involving many perplexing questions of fact and law. Eight counsel appeared and every statement made was disputed by one or more of the opposing counsel. Recess arrived while yet the case was in an impenetrable fog. When the court reconvened the judge held up the eight briefs aggregating a volume an inch and a half in thickness and exclaimed: "I have been endeavoring to find out what the truth about this case is from an examination of these briefs. It is impossible; it would take a week to read them. Counsel who present such briefs to a busy judge should be disbarred." For a moment there was consternation in the court-room, but the senior counsel relieved the situation by saying: "We have to thank your Honor for the impartiality of your ruling; we are all treated alike; we all go over the bar together." The laugh which followed was joined in heartily by the judge. The remark of the judge was not made in anger. It was, in a way, the expression of a feeling of resentment that he should be required to struggle through such a mass of conflicting statements to get at the truth which might have been made so clear. It was the unpremeditated protest of one who had suffered mental agony in trying to fathom the mysteries of the modern brief. To adopt the words of the translator of the Inferno, it was "the passionate outcry of a soul in pain."

What is the explanation of this unquestioned tendency to prolixity? In a word, it is due, I think, to the ease with which speech can be converted into type by modern methods. Human beings like to discourse. It requires no great mental or physical exertion

4. *Atlantic Works v. Brady*, 107 U. S. 192; 200.
5. *White v. Dunbar*, 119 U. S. 47; 51.
6. *The Southwark*, 191 U. S. 1.

to lean back in one's easy-chair and pour out floods of erudition into the ears of a stenographer, whose rapid pen catches and holds captive the inspired thoughts until they are embalmed forever in imperishable type. While the modern brief-maker is lying back in ease the ancient brief-maker was bending over his desk and laboriously writing down each sentence. Is it not the change from one method to the other which has produced such Brobdingnagian verbosity in pleadings, proofs, briefs and opinions? It is so easy now-a-days to fill page after page with "words, words, words."

At a country club near New York I once met a lawyer and invited him to a game of golf. In reply he said: "I suppose I should stay here; I have an expert inside, dictating to a stenographer, but I will run in and ask him another question and I will have time to play at least nine holes before he finishes his answer." The joy of the game was marred somewhat by the reflection that sometime in the near future I might be required to read that answer.

The dictated brief begets the dictated decision with the result that the reports are filled with opinions, many of them wholly unnecessary and many of the necessary ones are, in length, entirely out of proportion to the unimportant question involved. It is at least debatable whether, in the matter of time, the dictated brief and opinion are economical. The dictated brief saves the time of the bar at the expense of the bench. The dictated opinion saves the time of the bench at the expense of the bar.

I fully realize that any one who advises the abolition of dictation will be regarded as a hopeless reactionist, but I submit that its uses should be greatly curtailed in the preparation of opinions and briefs. This should be so, at least, until the habit of putting thought into the fewest possible words has been acquired by a careful apprenticeship with the pen. Undoubtedly it is more luxurious to talk to a human writing machine than to bend over the desk, pen in hand, but can there be a doubt as to which produces the best results? Is it not certain that the forty-page opinion and the four hundred-page brief would disappear, if in their preparation the pen were substituted for the mouth?

Dictation is the enemy of clear, logical thought; it leaves no time for deliberation and condensation; the tongue must wag; there is no speed limit.

It is impossible to imagine that the Second Inaugural, the speech at Gettysburg, Webster's argument in the College Case or Erskine's plea in the Stockdale Case, were produced by such a process.

The pen is a great analyzer and a superb logician, unconsciously and almost mechanically it punctures the sham and specious argu-

ment, discovers sound reasoning and forces it into the light. Many of the tedious and unconvincing dissertations which now disfigure briefs would never appear if the author had attempted to formulate them with pen and ink. Let any skeptic test the truth of this assertion by a simple experiment.

A complicated bill in equity is before him, he is for the defendant and wishes to know if a demurrer will lie to the bill. He reads it over with care but is in doubt. He calls his stenographer and attempts to dictate an abstract, but the causes of action are so complicated and interlock at so many points that his doubt is still present. He then dismisses the stenographer, runs his pen through repetitions, substitutes for the language of pleading the language of common sense, strikes out conclusions of law and reduces the statement of fact to its lowest terms, and lo! the true pleading stands revealed—a moribund creature, without sufficient vitality to stand alone. Or suppose he is asked for his opinion as to the constitutionality, scope and meaning of one of the many thousand laws annually turned out by the forty-six statute works of this country which are running over time to create ill-considered legislation, much of which, whatever the motive of the lawmakers, results in perplexing commerce and retarding trade. Is the law constitutional, how much of it is new, what part of the old law is repealed, what portion of it remains in force? Let him subject it to the pen test, strike out redundant matter and unnecessary verbiage and rewrite what remains in simple language. He will then be able to get as near to the legislative intent as is possible for a merely finite mind.

It is freely conceded that the foregoing has been written from the view point of the bench. It is altogether probable that a member of the bar would trace the true cause of the difficulty to long and rambling opinions so prevalent of late.

If both judge and counsel have fallen into careless habits it is but another reason why both should return to methods which, though slightly antiquated, will in the end lighten the intellectual labors of the profession.

The law student should start right, the habits which he acquires at the school will go with him through life. He can follow no better rule than this—never dictate brief or thesis. And let him adhere to the rule after being called to the bar, at least until the habit of condensing and clarifying thought has been acquired by long apprenticeship with the pen.

Alfred C. Coxe.