The Craft of the Criminal Appeal

Jack S. Nordby

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THE CRAFT OF THE CRIMINAL APPEAL

By Jack S. Nordby

In this Article Mr. Nordby discusses effective advocacy in a criminal appeal. Most of his remarks will apply to preparation and presentation of appeals in any court, but Mr. Nordby also examines in detail the requirements of practice in the Eighth Circuit Court of Appeals.

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The author wishes to acknowledge the helpful suggestions of Mr. Robert Tucker, who has for some twenty years been the Clerk of the Court of Appeals for the Eighth Circuit, and Mr. W. Wayne Buckner, Appeals Expediter for the Eighth Circuit.
I. FOREWORD: THE NATURE OF A CRIMINAL APPEAL

An appeal, Hinnissy, is where ye ask wan coort to show its contempt f'r another coort.

—Finley Peter Dunne, Mr. Dooley Says: The Big Fine

One of the majesties of our legal system is that the lowest rascal may invoke the powers of the loftiest courts to vindicate his rights. Indeed, as Mr. Justice Frankfurter observed: “It is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people.”


Judge Lay of the Eighth Circuit Court of Appeals said in a commencement address published in 46 N.D. L. Rev. 269, 273 (1970):

Judge Pound of the New York Court of Appeals made the statement sometime ago that best summarizes the concern with due process in criminal procedure when he said: “Although the defendant may be the worst of men the rights of the best of men are secure only as the rights of the most violent and most abhorrent are protected.” I wonder if it would not cast some light if lawyers and judges, who profess to understand the law, could respond to informal criticism of the Supreme Court by paraphrasing Judge Pound saying, that we should all remember “that the rights of the best of men are secure only as long as the rights of the worst of men are protected.”

John F. Dillon wrote in his LAWS AND JURISPRUDENCE OF ENGLAND AND AMERICA 152 (1894): “The most satisfactory ideal I have ever been able to form of justice is embodied in the picture of a judge courageous enough ‘to give the devil his due,’ whether he be in the right or in the wrong.” He was, perhaps, echoing Sir Thomas More, as reported in William Roper’s LIFE OF SIR THOMAS MORE 41 (1822): “[If the parties will at my hand call for justice, then . . . were it my father stood on the one side, and the devil on the other, his cause being good, the devil should have right.” Quintillian warns against
Only a robust government can afford to extend such tenderness to its transgressors. Or perhaps the converse is closer to the truth: only a society which guarantees the greatest protections to the least of its members can expect to prosper. In either case, appellate review of criminal convictions plays a most important role in our mechanism for preserving ordered liberty. It is fair to say that safeguards of liberty are most often forged in the federal circuit courts; the Supreme Court decides few cases, the federal district courts publish relatively few opinions of precedential value, and the state courts cannot speak conclusively upon federal constitutional issues. We do not, I think, overvalue the federal criminal appeal if we say that it makes the Federal Reporter the chief repository of our most rudimentary rights, privileges, and immunities.

The appeal of a conviction to a federal court of appeals is, for practical purposes, the last resort, the Gettysburg of the criminal process. The likelihood that the Supreme Court will grant certiorari, much less reverse the conviction, is usually so slight as not to enter rational calculations. Yet one might as well begin by danger of excess in such efforts at neutrality: "For there is sometimes, in unprincipled judges, a foolish propensity to give sentence against their friends, or in favour of parties with whom they are at enmity, and to act unjustly that they may not seem to be unjust." 1 QUINTILLIAN'S INSTITUTES OF ORATORY 257 (J. Watson trans. 1822).


3. See note 6 infra.

4. Moreover, the federal courts have often been the forum for vindication of constitutional rights denied by state courts, particularly under civil rights acts, e.g., 42 U.S.C. § 1983 (1970), and the habeas corpus provisions, 28 U.S.C. § 2254 (1970). See, e.g., Townsend v. Sain, 372 U.S. 293 (1963). Recently, however, the Supreme Court and lower federal courts have begun to reverse the trend toward federal court intervention into issues arising in state prosecutions. See, e.g., Stone v. Powell, 428 U.S. 465 (1976) (federal courts will not hear claims of fourth amendment violations where the accused had a chance for full and fair litigation of the issue in state court); Holmberg v. Parratt, 548 F.2d 745 (8th Cir. 1977) (quoting Stone).

5. In a recent article, Judge Godbold of the Fifth Circuit refers to the same event, reminding advocates writing briefs that President Lincoln's Gettysburg Address was a mere ten sentences long. See Godbold, Twenty Pages and Twenty Minutes—Effective Advocacy on Appeal, 30 Sw. L.J. 801, 816 (1976).

6. In 1975, for example, only 17 appeals from federal criminal convictions found their way to the United States Supreme Court. Of these 17, only three were decided against
recognizing a hard truth: an appeal from a criminal conviction is probably going to fail. The large majority of criminal appeals are affirmed; and they are going to be affirmed no matter how competent, diligent, and imaginative appellant’s counsel may be. It is as simple as that, and that may be reason enough to discourage a sane and reasonably self-confident lawyer from making the effort. Few fields of professional endeavor hold less promise of success. Advocacy on behalf of criminal appellants is not a pursuit for the lawyer whose vanity cannot envision or absorb defeat.

The defendant has already lost all the major battles, or there would be no occasion for the appeal. A presumptively impartial and competent judge has ruled against him on all dispositive points of law; a jury has found the facts against him. Appellate counsel’s gaze meets a bleak battleground, strewn with the car- rion of fallen issues; the only remaining hope is to revive the lame and halt for a last assault in the court of appeals.

At trial, the defendant is clothed with the presumption of innocence as well as myriad rights, privileges, and benefits of the

the government. See The Supreme Court — 1975 Term, 90 Harv. L. Rev. 1, 281 (1976) (tabulating the cases in which full opinions were written).

7. Figures provided by the docketing clerk of the Eighth Circuit indicate that the 995 filings in fiscal year 1976 were allocated as follows:

<table>
<thead>
<tr>
<th>Category</th>
<th>Percent</th>
</tr>
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<tbody>
<tr>
<td>Criminal</td>
<td>15%</td>
</tr>
<tr>
<td>United States Civil</td>
<td>31%</td>
</tr>
<tr>
<td>Private Civil</td>
<td>43%</td>
</tr>
<tr>
<td>Agency Cases</td>
<td>9%</td>
</tr>
<tr>
<td>(labor board cases; social security)</td>
<td>9%</td>
</tr>
<tr>
<td>Original Cases</td>
<td>2%</td>
</tr>
<tr>
<td>(mandamus, prohibition)</td>
<td></td>
</tr>
</tbody>
</table>

And of the 995 cases, the following percentiles of reversals occurred:

<table>
<thead>
<tr>
<th>Category</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Criminal</td>
<td>3%</td>
</tr>
<tr>
<td>(reversed in part or remanded, add 1/2%)</td>
<td>3%</td>
</tr>
<tr>
<td>United States Civil</td>
<td>3%</td>
</tr>
<tr>
<td>(reversed in part or remanded, add 1/2%)</td>
<td>8%</td>
</tr>
<tr>
<td>Private Civil</td>
<td>8%</td>
</tr>
<tr>
<td>(reversed in part, add 2%; remanded, add 1%)</td>
<td>1%</td>
</tr>
<tr>
<td>Agency</td>
<td>1%</td>
</tr>
</tbody>
</table>

Criminal case reversals would include appeals by the government, further reducing the success ratio of criminal defendants.

8. Chief Judge Stanley Fuld, formerly of the New York Court of Appeals, has said that 80% of all criminal appeals would probably be affirmed even if government counsel submitted only a token brief. Steinberg, The Criminal Appeal, in Counsel on Appeal 8 (A. Charpentier ed. 1968).

9. See Coffin v. United States, 156 U.S. 432, 453-60 (1895) (relating the history of the presumption from Biblical times), aff'd second hearing, 162 U.S. 664 (1896). See also Cupp v. Naughten, 414 U.S. 141 (1973) (instruction that "[e]very witness is presumed to speak the truth" does not necessarily place the burden of proving innocence upon the defendant).
The weighty burden of proof beyond a reasonable doubt is on the government, and the defendant need do absolutely nothing and may still win. On appeal, the positions are reversed. Presumptions favor the result below. Therefore the burden of going forward and the burden of persuasion are on the appellant, who has had his day in court and is no longer viewed by the law as an underdog in need of artificial advantages.

Counsel should not have to be reminded by the reviewing court that it does not sit as a super jury to retry the facts, or to second-guess exercises of the trial judge's discretion. As Judge Bright of the Eighth Circuit has put it: "We judges are not going to let you re-try your case on appeal . . . ." The task is usually not to sponsor a theory of innocence or to persuade a factfinder of a lack of proof, but to demonstrate that despite his proved guilt, the defendant deserves a new trial because of technical defects which amount to denial of a fair trial. Thus, a radical difference in attitude, approach, and destination distinguishes appellate counsel from the trial lawyer.

The goal of an appeal is reversal. Counsel's role, every bit as much as at trial, is that of the advocate. Defeat is never acceptable, nor can he take satisfaction merely in a job well done, even if, as occasionally happens, the court praises losing counsel's efforts. But, of course, there must be satisfaction—a scholar's sat-

10. See U.S. Const. amend. V (immunity from double jeopardy; privilege against self-incrimination; right to due process); id. amend. VI (rights to trial by jury, confront witnesses, compel testimony of favorable witnesses, and counsel).

11. A reviewing court must entertain a presumption of validity as to the decision and the correctness of the proceedings in the lower court. Cf. Johnson v. Zerbst, 304 U.S. 458, 468 (1938) (habeas corpus proceeding). Conversely, the reviewing court will not indulge a presumption which is unfavorable to the challenged ruling. See, e.g., Bear Lake & R. Water Works & Irrigation Co. v. Garland, 164 U.S. 1, 25 (1896). Or, as it has been expressed: "On appeal all intendments are in favor of the correctness of the judgment." Kirk v. St. Joseph Stock Yards Co., 206 F.2d 283, 287 (8th Cir. 1953) (civil case).

12. See, e.g., United States v. McColgin, 535 F.2d 471, 473 (8th Cir. 1976) (quoting Glasser v. United States, 315 U.S. 60, 80 (1942): "The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it."); Civella v. United States, 509 F.2d 896, 898 (8th Cir. 1973) (per curiam) (appellate court does not try cases de novo).

13. The Eighth Circuit court has stated: "It is a fundamental rule of our appellate procedure that the trial judge will not be reversed after using his considered judgment on discretionary orders provided there has been no abuse of such discretion." Kansas City Star Co. v. United States, 240 F.2d 643, 649 (8th Cir.), cert. denied, 354 U.S. 923 (1957). For a discussion of abuse of discretion, see notes 167-74 infra and accompanying text.


15. Judge Godbold of the Fifth Circuit observes: "[E]very judge has a collateral inter-
satisfaction and an advocate's satisfaction—in the work of preparing the appeal if advocacy is to be effective. Confidence that the job has been done well will communicate itself to the court, as will a lack of confidence, in both the brief and oral argument. Only what appellate counsel writes and says remains between the accused and the prison door. If the advocate is not persuaded of his cause, the court is not likely to be.

The best description I have seen of appellate counsel's task is found not in a study of appellate advocacy, or even of law, but in a work of literary criticism. In his book, Aspects of the Novel, E.M. Forster wrote:

"Genuine scholarship is one of the highest successes our race can achieve. No man is more triumphant than the man who chooses a worthy subject and masters all its facts and the leading facts of the subjects neighbouring. He can then do what he likes."

Perhaps more than any other aspect of the law, appellate practice calls upon all the advocate's most important resources. The job is difficult, the stakes high. In criminal cases, the Constitution is usually more or less directly implicated. Research is crucial; writing is crucial; speaking is crucial. There is seldom any margin for error. Yet, unlike in the heat of trial, there is time to reflect, study, rewrite, and rehearse. This time to master the case enables counsel, in Forster's phrase, to "do what he likes." This is perhaps the only true advantage falling to appellant's counsel.

If I have learned nothing else from my experience in appellate advocacy, if I can impart no other wisdom, there are two principles which I believe must be assimilated by appellate counsel:

16. E. FORSTER, ASPECTS OF THE NOVEL 22 (1954); accord, O. HOLMES, SPEECHES 23 (1913) ("To be master of any branch of knowledge, you must master those which lie next to it ... "). There is a peculiar and lamentable lack of communication between the law and literary arts. This is strange and unfortunate, since both depend upon intellectual persuasion. Advocacy has been called an art, and surely it is. See, e.g., Prettyman, Some Observations Concerning Appellate Advocacy, 39 VA. L. Rev. 285, 285 (1953); Steinberg, supra note 8, at 3. See generally L. STRYKER, THE ART OF ADVOCACY (1954). But insofar as published opinions and law review articles represent the best of the bar's literary accomplishments, it must be admitted that as a profession we display all too rarely the lucidity, accuracy, and evocativeness which characterize the best prose. For some splendid exceptions, however, see THE LITERATURE OF THE LAW (L. Blom-Cooper ed. 1965) and 2 THE WORLD OF LAW: THE LAW AS LITERATURE (E. London ed. 1960).

17. See note 10 supra.
The probability of prevailing on appeal will be enhanced by counsel's perception of the real obstacles to success, and diminished by his ignorance of them.

An appeal is not the trial re-fought, but more nearly an inversion or mirror image of the proceedings below, with the operative mechanisms reversed; critical aspects of the trial often lose their significance on appeal, while other factors assume new importance.

Much of what follows is merely a gloss upon these observations. They are important throughout the appellate process: in evaluating the desirability of an appeal; in explaining the appeal to the client and estimating for him the prospects for success; and in preparing the brief and oral argument.

Set forth below are what I see as some of the more significant and sometimes less obvious tools of scholarship and persuasion which make for effective appellate advocacy. The applicability of any advice is, of course, subject to the peculiarities of each case and the rules of the jurisdiction involved. And this is not an exhaustive handbook of appellate practice, but a suggested approach to appellate craftsmanship, containing some general and some quite specific suggestions which I hope will, from time to time, point the way to a more effective technique.

II. THE APPLICABLE RULES OF COURT

Master the applicable rules. No apology is offered for this bit of elementary advice, for the rules are many, located in several places, sometimes complex, and frequently violated. Nothing is a more obvious and inexcusable blemish upon an appellate effort than failure to comply with them. For example: What size paper should be used for typewritten documents? I expect many lawyers will be mildly surprised, as I was some years after I began practicing, to realize they do not know the answer. If you do know, on


what authority do you rely? I pose such an apparently simple question hoping to emphasize the importance of knowing the rules, even in the most basic matters. Nothing could more eloquently proclaim counsel's ignorance of the rules than the arrival of his filings on paper of the wrong size.

I shall not review all of the rules in detail because they are readily available and for the most part easily understandable. Some selective guidance, though, may be helpful. All appeals to the United States Courts of Appeals from the federal district courts are governed by the Federal Rules of Appellate Procedure, as augmented by local rules adopted by the judges of each circuit. In addition to the local rules, the circuit court may adopt a Plan to Expedite Criminal Appeals. As the title suggests, the Plan addresses primarily the time limitations and priorities for processing criminal appeals. Many circuits have also adopted a


20. Adherence to the rule regarding paper size is not mere pedantry. Filing cabinets, bookshelves, and other repositories of legal papers are made of a certain size; a larger document simply will not fit without folding.


23. Fed. R. App. P. 47 allows a majority of the judges of each circuit to "make and amend rules governing its practice not inconsistent with these rules" and to "regulate their practice in any manner not inconsistent with these rules" in all cases not provided for by the federal rules. For a discussion of the local rules of the Eighth Circuit, see notes 30-39 infra and accompanying text.

24. Fed. R. Crim. P. 50(b) (1977) (requiring district courts to conduct "continuing study" of its criminal justice system and "prepare plans for the prompt disposition of criminal cases"); see, e.g., 8th Cir. Plan Expedite Crim. App. (1977). For a discussion of this plan as adopted by the Eighth Circuit, see notes 40-55 infra and accompanying text.

25. The objective and priorities of the Eighth Circuit's plan are as follows:
The objective of this plan is the disposition of criminal cases in this Court within a maximum of five months from the filing of the notice of appeal to the rendition of the decision of this Court.

... Priority is to be given to criminal appeals in this Court by court reporters in the preparation of transcripts of testimony, attorneys in the preparation of briefs and records and in scheduling professional and personal obligations, the Clerk of this Court in calendaring cases for argument or submission without argument, and the judges of this Court in the rendition of decisions and the preparation of opinions.

... The criminal appeals of persons in custody or whose liberty is reasonably
Plan for the Publication of Opinions\textsuperscript{26} to curtail the proliferation of published opinions.\textsuperscript{27} Finally, each circuit is required to have a Plan to Implement the Criminal Justice Act of 1964 which governs appointment and compensation of counsel for the indigent.\textsuperscript{28}

A thorough familiarity with each of these sets of rules is essential. The first step should be simply to read them, cover to cover, in order to be exposed to the substance of the rules and to gain some insight into the interrelations between the different sets of provisions. A knowledge of the Federal Rules of Appellate Procedure, although they are applicable in all the circuits, is inadequate because the local rules and the various plans may deviate significantly from them.

The local rules, plans, and timetable for appeals in the Eighth Circuit are discussed below. The location, personnel, and miscellaneous practical aspects of practice in the Eighth Circuit are set out in the margin.\textsuperscript{29}

believed to present a danger to society are to be given preference over other criminal cases.

\textsuperscript{26} See D.C. Cir. R. 13; 1st Cir. R. app. B; 4th Cir. R. 18; 7th Cir. R. 35; 9th Cir. R. 21 (1977); 10th Cir. R. 17. The Eighth Circuit adopted its plan on January 11, 1973. See 8th Cir. Plan Pub. Op. For a discussion of the Eighth Circuit's plan, see notes 56-61 infra and accompanying text.

\textsuperscript{27} See, e.g., 8th Cir. Plan Pub. Op. (1).


\textsuperscript{29} Local practices vary considerably in different circuits. The focus of this Article, to the extent it is not general, is upon practice in the Eighth Circuit; readers practicing in other jurisdictions should, of course, consult their local rules.

The United States Court of Appeals for the Eighth Circuit is located at:

U.S. Court and Custom House
St. Louis, Missouri 63101
Telephone: (314) 425-5600

The judges of the court currently are:

Circuit Justice:
Harry A. Blackmun, Washington, D.C.

Chief Judge:
Floyd R. Gibson, Kansas City, Missouri

Circuit Judges:
Myron H. Bright, Fargo, North Dakota
Gerald W. Heaney, Duluth, Minnesota
J. Smith Henley, Harrison, Arkansas
A. The Local Rules of the Eighth Circuit

Several Eighth Circuit rules deserve particular attention. Extensions of time in criminal cases must be ruled upon by the court, not by the clerk; and it is the court's express policy that "[p]ast practices in liberally granting extension of time . . . will no longer be followed." In the Eighth Circuit, all criminal matters may be heard on the original record below, thus dispensing with the cumbersome and expensive task of preparing, reproduc-

Donald P. Lay, Omaha, Nebraska
Donald P. Ross, Omaha, Nebraska
Roy L. Stephenson, Des Moines, Iowa
William H. Webster, St. Louis, Missouri
Senior Judges:
M.C. Matthes, St. Louis, Missouri
Pat Mehaffy, Little Rock, Arkansas
Martin D. Van Oosterout, Sioux City, Iowa
Charles J. Vogel, Fargo, North Dakota

Visiting judges from other jurisdictions also regularly sit in many circuits, including district judges. Mr. Justice Clark sat on circuit courts, including the Eighth, after his retirement from the Supreme Court.

The clerk is Robert Tucker, and the appeals expeditor is W. Wayne Buckner. It is with these gentlemen that counsel will deal primarily in processing criminal appeals.

The court holds one general term beginning on the second Monday in September, and sessions at times and places designated by the court. 8th CIR. R. 1. Most sessions are in St. Louis, and all correspondence should be directed to the address above, but counsel should confirm the location of any appearance to avoid the embarrassment of arriving in St. Louis only to find that the court is waiting for him in St. Paul, where it ordinarily sits in June and October. The St. Louis airport is a good distance from the courthouse and you are well-advised to travel to St. Louis the day before rather than risk the imponderables of air and ground transportation.

Sessions begin at 9:00 a.m., but counsel should report to the clerk's office no later than 8:30 a.m. If you have not been admitted to the court, that can be accomplished through the clerk; forms will be provided by mail. A sponsor admitted to the court is required.

All cases are heard by three-judge divisions, 8th Cir. R. 2(a), unless an en banc hearing is ordered, Fed. R. App. P. 35; 8th Cir. R. 7, an increasingly rare occurrence. Unlike some circuits, the Clerk of the Eighth Circuit Court will inform you which judges are hearing a given case in advance of argument, but no earlier than the first of the month of the argument. This enables you to concentrate upon opinions or dissents by those judges.

For a bibliography of extrajudicial writings by present members of the Eighth Circuit Court, see note 256 infra. For a concise history of the federal courts in general and the Eighth Circuit Court in particular, see Gibson, Some Observations on Our United States Court of Appeals, 35 U. Mo. K.C.L. Rev. 261 (1967).

30. See 8th Cir. R. 2(d). See also Dranow v. United States, 310 F.2d 375, 375 (8th Cir. 1962) (per curiam) (court reluctant to extend time of filing briefs in criminal cases when appellant is at liberty).
31. 8th Cir. R. 10.
ing, and transmitting a lengthy record and appendix. Appellate
counsel must, however, designate the portions of the record
"necessary" to the appeal, and the legal issues to be raised.33

The Eighth Circuit has three requirements for briefs which
augment the Federal Rules of Appellate Procedure; although
relatively minor in themselves, noncompliance with them will be
glaringly conspicuous.34 First, a "preliminary statement" must be
included which identifies the judge from whom the appeal is
taken, cites any reported decisions below, and states the grounds
for jurisdiction below and in the court of appeals.35 Second, an
alphabetical list of all cited authorities must appear after the
statement of each legal issue, with not more than four of the most
apposite authorities emphasized.36 Third, all briefs, including
those typewritten,37 must not exceed fifty pages.38 These direc-
tions are obviously to assist the court and violation of them will
annoy the judges39 and announce that counsel has not acquainted

33. 8TH CIR. R. 11A(2) (1977). See also 8TH CIR. PLAN EXPEDITE CRIM. APP. IV(B)(2)
(1977). For a discussion of limiting the appellate record and selecting the issues, see notes
88-174 infra and accompanying text.
34. See, e.g., Bell v. United States, 251 F.2d 490, 493-94 (8th Cir. 1958) (counsel's
"flagrant failure to comply with rule of this court" resulted in the Eighth Circuit's refusal
to review trial court's ruling on evidence, although the court did review for plain error and
found none).

For an extreme example of noncompliance, see Robinson v. United States, 333 F.2d 323,
325 n.1 (8th Cir. 1964), quoted in note 179 infra.
35. See 8TH CIR. R. 12(b). For a more detailed discussion of the preliminary statement,
see notes 188-89 infra and accompanying text.
36. See 8TH CIR. R. 12(d).
37. The Eighth Circuit rules permit the filing of typewritten briefs in all criminal cases
and require only five photocopies. See id. 11B. This spares the considerable expense and
time necessary for printing. See generally Willcox, Karlen, & Roemer, Justice Lost—By
What Appellate Papers Cost, 43 J. AM. JUD. SOC'y 6 (1959).
38. This limitation was recently promulgated by the court and has not yet been pub-
lished. Cf. FED. R. APP. P. 28(g) (principal briefs limited to 50 pages if printed, 70 if
typewritten). See also Smith v. Pollin, 190 F.2d 657 (D.C. Cir.) (per curiam) (110-page
brief exceeded court's 50-page limit; court dismissed appeal finding no injustice would
result), cert. denied, 342 U.S. 878 (1951).
39. The court is not unwilling to express its dissatisfaction with an errant attorney's
brief. In Lowe v. Taylor Steel Prods., 373 F.2d 65 (8th Cir.), cert. denied, 389 U.S. 858
(1967), a products liability case, the court noted its disapproval of "plaintiff's flagrant
violation" of its rules requiring a concise statement of the case, a concise statement of each
point argued, and a printed argument. Before holding against the plaintiff, the court said:
These rules are reasonable, sensible, simple and plain. There is no reason why
they should not be complied with. The violations here would fully justify our
refusal to accept plaintiff's brief and summarily dismiss his appeal. Neverthe-
less, but not to be taken as precedent or policy, we have laboriously read the
entire record, and read and reread plaintiff's brief in an effort to ascertain his
assignments of error and the validity thereof.
himself with the local rules or, what is worse, has simply not bothered to follow them.

B. The Plan to Expedite Criminal Appeals

The Eighth Circuit's Plan to Expedite Criminal Appeals contains detailed provisions governing preparation of the notice of appeal, the designation of record and issues, and time limitations. These requirements vary depending upon whether the evidence was presented in three days or less, or more than three days. In forma pauperis cases carry certain additional obligations. A combination notice of appeal and transcript order form is now provided to defense counsel at the time of the verdict.

The explicit purpose of the Plan is "the disposition of criminal cases... within a maximum of five months from the filing of the notice of appeal to the rendition of the decision..." Accordingly the Plan imposes time limitations substantially shorter than those of the federal rules. The court is quite serious about expedition, and the clerk is required to notify the court of any noncompliance. The court may "take any appropriate disciplinary action against any attorney... for failure to comply with... [the Federal Rules of Appellate Procedure] or any rule of the court." Moreover, the Eighth Circuit reserves the right to dismiss for failure to prosecute an appeal. The local rules also provide that the bond of an appellant released upon bail pending appeal may be revoked "if appellate procedures are not timely prosecuted..." With the trend toward speed in criminal

Id. at 67. See also Robinson v. United States, 333 F.2d 323, 325 n.1 (8th Cir. 1964), quoted in note 179 infra.
40. See note 88 infra.
43. See 8th Cir. Plan Expedite Crim. App. IV(C)(1) (1977) (discussing appellant counsel's duty to file the form).
44. Id. I. See generally note 25 supra (quoting objectives and priorities of the plan).
48. 8th Cir. R. 13.
49. Id. 10(e).
appeals, and since courts are naturally hesitant to forfeit an appellant's rights by dismissing an appeal because of his lawyer's neglect, it may well be that discipline of counsel will emerge as a preferred means of enforcing the rules. Quite apart from the ethical reasons for obedience, courts appreciate diligence, and conspicuous compliance with time limitations is one of those slight advantages an appellant cannot afford to be without.

The Eighth Circuit court is presently first among all the federal circuits in expediting both civil and criminal appeals. It has the shortest elapsed time for most stages of appellate proceedings; one exception is the time between oral argument and final disposition, due to the practice in some circuits, notably the Second, of deciding some appeals immediately from the bench at the time of oral argument. This occurs with extreme rarity in the Eighth Circuit.

C. The Plan for Publication of Opinions

The Eighth Circuit court has provided that opinions will not be published if the judges believe the decision has no precedential value and if it affirms or enforces a judgment solely on the basis that the evidence was sufficient or there was no legal error. An opinion will probably be published if it includes a new interpretation of law, involves a matter of significant public interest, or otherwise makes an appreciable contribution to the law.

50. See, e.g., United States v. Smith, 436 F.2d 1130 (9th Cir. 1970) (per curiam) (imposing fine on counsel rather than dismissing appeal). But see Smith v. Pollin, 190 F.2d 657 (D.C. Cir.) (per curiam) (overly long brief led to dismissal where no injustice would be done), cert. denied, 342 U.S. 878 (1951).

51. In the Ninth Circuit, for example, several lawyers who have failed to prosecute appeals have been subjected to fines. See, e.g., In re Morris, 521 F.2d 794 (9th Cir. 1975) ($300 fine); United States v. Birtle, 521 F.2d 134 (9th Cir. 1975) ($250 fine), cert. denied, 426 U.S. 947 (1976); United States v. Pearson, 476 F.2d 996 (9th Cir. 1973) ($100 fine).

52. ABA Code of Professional Responsibility EC 6-5 provides: "A lawyer should have pride in his professional endeavors. His obligation to act competently calls for higher motivation than that arising from fear of civil liability or disciplinary penalty."


54. Id.

55. 2d CIR. R. § 0.23 allows the court to promulgate the decision immediately from the bench if the "decision is unanimous and each judge of the panel believes that no jurisprudential purpose would be served by a written opinion . . . ." These decisions have little precedential value. See Burgin v. Henderson, 536 F.2d 501, 503 & n.7 (2d Cir. 1976); United States v. Joly, 493 F.2d 672, 675-76 (2d Cir. 1974).

56. Compare 8th CIR. PLAN PUB. OP. (2) with 8th CIR. R. 14.

57. See 8th CIR. PLAN PUB. OP. (4).
Unpublished opinions in the Eighth Circuit, which are clearly marked as not for publication, may not be cited since they are not uniformly available.\textsuperscript{58} Because you should always examine recent slip opinions before submission of the brief and before oral argument to be certain your citations are current, be alert to this admonition; the unpublished opinions appear among the court’s slip opinions.

Nonpublication does not reflect on the importance of the case, but merely upon its lack of value as a precedent.\textsuperscript{59} Although the client may believe he has been slighted, you might point out that nonpublication also means that his name and transgression will not be memorialized in the perpetuity of the \textit{Federal Reporter}.\textsuperscript{60}

Judge Bright has described the process by which appeals are screened to determine whether an oral argument or a full opinion is justified or desirable:\textsuperscript{61}

All of the circuits—with the exception of the Second Circuit which uses “affirmances from the bench” to cut short its workload—now employ so-called “screening procedures” in which a panel of judges, and sometimes law clerks acting under judicial supervision, gives a preliminary examination to the issues raised in each docketed case in order to determine three things: (a) whether there is any merit to the case at all, (b) if so, how difficult a case it is, and (c) whether oral argument would be of any value to its disposition. Based upon this evaluation, the meritless case receives short shrift, and is subject to “summary disposition,” usually by a brief order or short per curiam opinion. The case possessing merit is rated for full argument (30 minutes per side), limited argument (15 to 20 minutes per side), or for nonargument. A nonargument case may be a difficult one but is usually the sort of case where argument probably won’t assist the court. For example, it may be one where the court

\textsuperscript{58} See \textit{id.} (3). \textit{But see} Biebel Bros., Inc. v. United States Fidelity & Guar. Co., 522 F.2d 1207, 1212 n.1 (8th Cir. 1975) (judicial notice taken of an unpublished opinion “for the sole purpose of clarification . . .”).

\textsuperscript{59} See \textit{8th Cir. Plan Pub. Op.} (1).

\textsuperscript{60} The unsuccessful appellate attorney similarly may have an interest in nonpublication. His name will not be printed in the official reporter; his loss not “permanently bound for posterity.” \textit{See} Appleman, \textit{The Written Argument on Appeal}, 41 \textit{Notre Dame Law}. 40, 48 (1965).

\textsuperscript{61} Bright, \textit{supra} note 14, at 500 (footnotes omitted). Judge Bright also notes that of all federal appeals afforded an oral argument, approximately one-third result in full, signed opinions, one-third in per curiam opinions, and one-third in no written opinion. \textit{Id.} at 501 n.6.
must examine the whole record to determine if substantial evidence supports the trial court’s decision.

D. Timetable for Criminal Appeals in the Eighth Circuit

The following time limitations are presently in effect in the Eighth Circuit for the processing of criminal appeals. The method of computing time is based upon the provisions of the Federal Rules of Appellate Procedure. The day of the act or event from which the period begins is not included and the last day of the period is included unless it is a Saturday, Sunday, or legal holiday. If the designated period is less than seven days, Saturdays, Sundays, and legal holidays are not included in the computation.

You should, of course, consult the latest versions of all applicable rules before proceeding since time limitations are subject to change.

Notice of Appeal and Transcript Order Form

The notice of appeal and transcript order form must be filed in the district court within ten days from the date of judgment, which is ordinarily the date of sentencing, or within ten days from the entry of the appealable order.

62. The timetable is applicable only to criminal appeals. The time limitations in a civil appeal are different, and therefore the relevant provisions in the federal and local rules concerning civil appeals should be consulted.


64. See id. 26(a). Legal holidays include New Year’s Day, Washington’s Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving, and Christmas. Any other holiday appointed by the President or Congress is also included. State holidays are not included, except for the holidays of the state in which the case arose and in which the principal office of the Clerk of the Court of Appeals is located.

65. See id.

66. Id. 4(b). Although the district court may enlarge the time for filing the notice of appeal for excusable neglect, see United States v. Wade, 467 F.2d 1226, 1227-28 (8th Cir. 1972) (mere permission from district court to file appeal held sufficient finding of excusable neglect to satisfy rule’s requirement); Fed. R. App. P. 4(b); the courts of appeal may not enlarge the time. See United States v. Robinson, 361 U.S. 220 (1960) (construing predecessor to Fed. R. App. P. 26(b)); Fed. R. App. P. 26(b). Filing the notice is a jurisdictional requirement without which the courts of appeal may not hear the case. See, e.g., Morin v. United States, 522 F.2d 8, 9 (4th Cir. 1975) (per curiam); Smith v. United States, 425 F.2d 173 (9th Cir. 1970).
Statement of Compliance with Plan to Expedite Criminal Appeals

The statement of compliance with the Plan to Expedite Criminal Appeals must be filed by the appellant *in the court of appeals* within ten days after the filing of the notice of appeal.67

Appellant’s Designation of Record and Statement of Issues

The appellant’s designation of the record and statement of the issues must be filed *in the district court* within ten days after the filing of the notice of appeal.68

Appellee’s Designation of Record and Statement of Issues

The appellee’s designation of the record and statement of the issues must be filed *in the district court* within ten days after the appellant files his designation of the record and statement of issues.69

Docket Fee

The docket fee must be filed *in the court of appeals* within the time fixed for transmitting the record or when ordered by the clerk,70 which is always shortly after the filing of the notice of appeal.

Transcript from Court Reporter

The transcript must be filed in the district court within twenty days of the notice of appeal in cases where the evidence was presented in three days or less,71 or within forty days where evidence was presented in four days or more.72

68. Id. IV(B)(2).
69. Id.
70. FED. R. APP. P. 12(a). The docket fee, and all other fees to be charged or collected by the courts of appeal, must be uniform among the circuits. The Judicial Conference of the United States has the authority to prescribe these costs. See 28 U.S.C. § 1913 (1970). No docket fee is required in appeals *in forma pauperis*, but appointment of counsel is necessary in such cases. FED. R. APP. P. 24.
71. 8TH CIR. PLAN EXPEDITE CRIM. APP. IV(A)(3), IV(C)(4) (1977).
72. Id. IV(C)(4).
Transmittal of Record to Court of Appeals by Clerk of District Court

The record must be transmitted by the clerk of the district court to the court of appeals within twenty-one days after the notice of appeal has been filed, except that the clerk of the district court must transmit the notice of appeal and docket entries within twenty-four hours after the notice of appeal has been filed.

Appellant's Brief

Appellant's brief must be filed in the court of appeals on the date established by the clerk, not later than twenty-eight days after the record has been filed.

Appellee's Brief

Appellee's brief must be filed in the court of appeals on the date established by the clerk, not later than twenty-one days after the appellant's brief has been filed.

Appellant's Reply Brief

The appellant's reply brief, if any, must be filed with the court of appeals within seven days after appellee's brief has been filed. The reply brief is optional.

Oral Argument

The date and time of oral argument are set by the clerk. In criminal cases, the median time is presently thirty days after the filing of appellee's brief.

Opinion

The goal of the Plan to Expedite Criminal Appeals is to

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73. Id. IV(A)(4), IV(C)(3)(c).
74. Id. IV(C)(3)(a). The transmission of the notice of appeal and docket entries constitutes transmission of the "record on appeal" under Fed. R. App. P. 11(b), as construed in the Eighth Circuit; the transcript is not considered a part of the record so defined.
75. 8TH CIR. PLAN EXPEDITE CRIM. APP. IV(C)(1)(c) (1977).
76. Id. IV(C)(2)(c).
77. Id. IV(C)(1)(c).
80. JUDICIAL CONFERENCE REPORT, supra note 53, at 284.
have the court’s decision within five months after the filing of the notice of appeal, but the time of decision varies greatly according to individual cases.

Petition for Rehearing

The petition for rehearing, if any, must be filed in the court of appeals within fourteen days after the entry of judgment. The petition for rehearing is optional.

Issuance of Mandate

The court will issue its mandate twenty-one days after the entry of judgment, unless the mandate is stayed by a motion or by the filing of a timely petition for rehearing. The mandate will issue seven days after the denial of a petition for rehearing and immediately upon a filing of a copy of an order by the Supreme Court denying certiorari.

Petition for a Writ of Certiorari

The petition for a writ of certiorari must be filed in the Supreme Court within thirty days after the entry of the Court of Appeals’ judgment or its order denying a petition for rehearing. All inquiries concerning certiorari should

83. Id. For a discussion of the general inadvisability of filing the petition for rehearing, see notes 267-69 infra and accompanying text.
84. Fed. R. App. P. 41. If the defendant was released on bail by the district court, this will ordinarily continue until after the mandate issues. Upon issuance of the mandate, absent other orders or agreement, the district court will issue an order directing the defendant to surrender for service of his sentence, usually a week or 10 days later.
85. Id.
86. Sup. Ct. R. 22(2). No mailing period is provided for in the time allowed for filing the writ, unless the case arose in a district court outside the contiguous 48 states, in which case the writ will be deemed timely filed if it is airmailed within the time period. See id. Otherwise, a petition must be received at the Supreme Court on or before the due date. The Court has someone available 24 hours to receive papers.
Sup. Ct. R. 22(2), however, is not jurisdictional and the Court may hear a case even if the petition is received after the due date. See, e.g., Schacht v. United States, 398 U.S. 58, 63-65 (1970) (petition filed 101 days after period had expired was accepted because petitioner had not caused delay). The Schacht Court stated: "The procedural rules adopted by the Court for the orderly transaction of its business are not jurisdictional and can be relaxed by the Court in the exercise of its discretion when the ends of justice so require." Id. at 64. The courts of appeals do not have the same freedom. See note 66 supra.
Mailing time is allowed, however, in the circuit courts. See Fed. R. App. P. 25(a) (briefs
be directed to the Clerk of the Supreme Court. 87

III. LIMITING THE RECORD

Except in cases where the evidence is heard in three days or less, 88 appellant’s counsel must, within ten days after filing the notice of appeal, designate “only those portions of the original record and transcript of testimony necessary for a determination of the appeal.” 89 This is important for several reasons, and you should not designate all or most of the record simply out of caution. In consultation with government counsel, before filing the notice of appeal, 90 appellant’s counsel should determine the parts of the record to be eliminated. 91 Ordinarily agreement will be reached easily.

Limiting the record has these benefits: it saves the clerk the time and considerable expense 92 of producing unnecessary copies; it forces you to analyze your strategy and focus the issues; and, above all, it spares the court the necessity of reading transcripts and documents with no bearing on the issues. 93 Here, as in compliance with other rules, the avoidance of court annoyance deserves careful consideration. 94 In short, the record should contain everything the court needs to know and see to understand the issues, but no more. The designated record can be supplemented

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87. The Clerk of the Eighth Circuit will decline to answer questions regarding certiorari. The United States Supreme Court Clerk may be telephoned at (202) 252-3012.

88. If the evidence is heard in three days or less, counsel does not have to designate the “necessary” portions, but may order the entire record. This consists of the transcripts, the notice of appeal, the docket entries, the indictment or information, any district court memorandum or opinions, the judgment and sentence, and any other materials deemed by counsel to be necessary. See 8TH CIR. PLAN EXPEDITE CRIM. APP. IV(A)(2) (1977).

89. See 8TH CIR. R. 11A(2) (1977); 8TH CIR. PLAN EXPEDITE CRIM. APP. IV(B)(2) (1977).

90. The transcript must be ordered on the same form as the notice of appeal. See 8TH CIR. PLAN EXPEDITE CRIM. APP. IV(C)(1)(a) (1977). See also id. IV(C)(2)(a) (requires appellee’s counsel to cooperate in preparation of the form).

91. FED. R. APP. P. 10(d) permits an alternate method of making an appellate record. Although the practice is not widely followed, see Godbold, supra note 5, at 806-07, the rule allows counsel for both sides to agree to a stipulated record. If the district court approves the statement, the parties may process the appeal without the need for reproduction of the legal documents.

92. Currently 50 cents per page.

93. See Huxman, Preparation of a Case for Presentation to the Circuit Court of Appeals, 25 KAN. CITY L. REV. 139, 139-41 (1957).

by either counsel or the court when the need arises.95

Certain items are always included in the record: the docket entries; the indictment or information; any district court opinions, memoranda, or orders challenged on appeal; the notice of appeal; and the judgment and commitment.96 Pleadings which define an appellate issue or confirm that it was raised and preserved should be included. For example, a written motion for severance or for new trial should be included if those issues are raised. Significant motions and rulings not directly related to an appellate issue might be included to preserve a relatively complete picture of the proceedings, or at least mentioned in the statement of facts. Ordinarily the parties’ memoranda of law are not included.

As to the transcript, include only those matters which bear directly or indirectly upon the appellate issues. Eliminate everything else.97 Challenged evidence on the question of guilt must be included if sufficiency of the evidence is raised or prejudice of an error must be demonstrated. Testimony which is merely cumulative or unchallenged should be eliminated. Frequently testimony of experts98 and mere foundation witnesses99 is of this kind. Exhibits should not be designated unless they truly bear on the issues. This is especially true of voluminous or dangerous exhibits; firearms and drugs will never be transmitted unless the court requests them.100

Written requested jury instructions should be included only if the court’s instructions are attacked or have an indirect bearing upon issues, such as where challenged evidence is stricken or its application limited by instruction. If instructions are in issue, the entire charge should be included because instructions must be reviewed as a whole.101

95. See 8TH CIR. R. 10(d) (court may order additional transcript when abbreviated record is used); 8TH CIR. PLAN EXPEDITE CRIM. APP. IV(A)(2) (1977). See also Fed. R. App. P. 10(e) (court may correct misstatement or omission by supplementing record).


97. The court prefers to have counsel err by including too little rather than too much. Additional items may be requested later if necessary. See note 95 supra.

98. For example, the lengthy and complicated testimony of a chemist, pathologist, or fingerprint expert may have no effect save tedium if there is no dispute as to the type of substance, the fact and cause of death, or the source of the print.

99. For example, the testimony of law enforcement officers establishing the chain of possession of evidence or of custodians of records is generally not needed in the record on appeal.


101. See, e.g., Cupp v. Naughten, 414 U.S. 141, 146-47 (1973); Boyd v. United States,
If there were no objections to government counsel’s opening or closing arguments, they may be eliminated. But if one side’s argument is included, both should be, since objectionable remarks may have been invited or justified by adverse counsel’s argument. The summations should be included if counsel argued to the jury a point of challenged evidence, or conceded an issue of proof and the sufficiency of evidence is challenged. Occasionally the arguments may be useful to summarize the case for the court.

The Federal Rules of Appellate Procedure provide: “If determination of the issues presented requires the study of statutes, rules, regulations, etc. or relevant parts thereof, they shall be reproduced in the brief or in an addendum at the end, or they may be supplied to the court in pamphlet form.” Although the Eighth Circuit rules allow criminal cases to be heard on the original record, it is advisable to include items in the brief or addendum if they are especially relevant, or require close scrutiny and repeated reference. For example, it may be helpful to reproduce a challenged search warrant.

When in doubt, be guided by the important rule that will echo like a refrain through this paper: Do what will be most helpful to the court, to adverse counsel, and to yourself. Remember that the record, the brief, and even the oral argument are not so much like a lecture to be passively heard as like a set of keys to unlock the mysteries of the case or a map to guide the court to the proper destination. All the keys and signposts must be there, but remember the annoyance you experienced if you ever had to find the correct key from a multitude of more or less similar specimens, or follow a road on an outdated map or a map of too small a scale.

IV. SELECTION OF APPELLATE ISSUES

I said earlier that a criminal appeal is in many respects the reverse of the trial. This principle bears some scrutiny as we


102. See, e.g., Thomas v. United States, 281 F.2d 132, 136-37 (8th Cir.) (government counsel’s allegedly improper closing argument not reviewed because record did not include all arguments), cert. denied, 364 U.S. 904 (1960). See also Donnelly v. DeChristoforo, 416 U.S. 637 (1974) (effect on due process from a state prosecutor’s improper summation).

103. FED. R. APP. P. 28(f).

examine what is perhaps the single most telling aspect of an appeal: formulation of the issues.\textsuperscript{105} At trial the accused has the presumption of innocence; the burden of going forward with proof beyond a reasonable doubt is on the prosecution; nearly all advantages are to the defense.\textsuperscript{106} Now, however, the appellant has been convicted; the burden shifts to him; and the presumptions favor the legal and factual determinations below.

Beyond these legal principles of appellate review, other obstacles confront the appellant.\textsuperscript{107} Reversal is a painful and costly business. It ordinarily requires a tacit or explicit finding that a district judge, who is probably known to and respected by the appellate judges, committed prejudicial error and abused his discretion, or that counsel for one or both sides committed deliberate or negligent error. It means that time and expense will be spent on a new trial and that a convicted criminal will either go free or have another chance at his freedom despite a verdict of guilty. Crime is unpopular with judges and their time is at a premium. All of these are elusive but real influences, and trivial errors or perfunctory argument will not overcome them. As a Georgia judge said a century ago:\textsuperscript{108}

The court erred in some of the legal propositions announced to the jury; but all the errors were harmless. Wrong directions which do not put the traveler out of his way, furnish no reason for repeating the journey.

A true and effective selection of issues can only flow from a mastery of the case—the record below and the applicable law. In framing the issues, you are setting the ground rules and aligning the forces before the reviewing court. It is only from knowing the forces arrayed against you that you may most effectively formulate issues and position yourself to be in most effective control. Only then can appellant’s counsel, in Forster’s phrase, “do what

\textsuperscript{105} Rufus Choate, the noted nineteenth century advocate, once said: “The best argument on a question of law is to state the question clearly.” Littleton, Advocacy and Brief-Writing, 10 PRAC. LAW. 41, 48 (Dec. 1964).

\textsuperscript{106} See notes 9-11 supra and accompanying text.

\textsuperscript{107} See K. Llewellyn, The Common Law Tradition 19 (1960) (lists, in addition to “the American appellate judicial tradition,” 14 other steadying factors in appellate decision-making); Steinberg, supra note 8, at 6 (suggesting that appellate court “with its instinctive desire to hold firm the bastions of organized society against harmful and antisocial conduct” is counsel’s greatest obstacle). See also notes 125-74 infra and accompanying text (the four pitfalls in issue selection).

\textsuperscript{108} Cherry v. Davis, 59 Ga. 454, 456 (1876) (Bleckley, J.).
he likes.” Here are what I believe to be the most important considerations in this process:

A. The Strength of the Evidence

Cases are rarely reversed for insufficient evidence because on appeal the evidence is viewed most favorably to the verdict. A brief is only weakened by a spurious argument on the point.

At the same time, however, if the evidence is relatively weak, that weakness should be emphasized in the statement of facts and the argument. The impact of the argued errors will always emerge more persuasively when the evidence is marginal. Evidentiary errors in particular will have more force when it can be legitimately said that the erroneously received or excluded evidence might have altered the result. Similarly, errors in jury instructions, the misconduct of counsel, and any other impropriety in the presence of the jury will be more damaging when the evidence is weak. Therefore, though you should be hesitant to argue the insufficiency of the evidence as reversible per se, it is quite proper to insist that errors be viewed more critically in a close case.

B. Consolidation of Closely Related Issues

Issues should be consolidated. Proliferation of issues beyond three or four passes the point of diminishing returns, burdening the court with disparate arguments, fragmenting the attack, and diluting the impact of all. Separate errors of a similar nature, or closely related issues, should be combined into a single coherent argument with such subdivision as may be necessary.

109. See text accompanying note 16 supra.

110. See, e.g., Glasser v. United States, 315 U.S. 60, 80 (1942); United States v. Reed, 446 F.2d 1226, 1228 (8th Cir. 1971), aff’d second appeal per curiam, 461 F.2d 1106 (8th Cir. 1972); Peterson v. United States, 411 F.2d 1074, 1078 (8th Cir.), cert. denied, 396 U.S. 920 (1969), aff’d second appeal per curiam, 467 F.2d 892 (8th Cir. 1972).

111. See, e.g., Lowe v. United States, 389 F.2d 108, 112-13 (8th Cir.), cert. denied, 392 U.S. 912 (1968); Patterson v. United States, 361 F.2d 632, 636 (8th Cir. 1966); note 143 infra and accompanying text. For a discussion of the harmless error doctrine, see notes 125-43 infra and accompanying text.

112. Judge Bright writes: “In the criminal case, of course, counsel—especially appointed counsel—may have a constitutional obligation to raise all points of error. But even there, raising a plethora of meritless claims of error reduces by comparison the strength of other, more meritorious claims that he may have.” Bright, supra note 14, at 504.

113. A good example is the improper receipt of evidence combined with either an erroneous instruction regarding it or the prosecutor’s comments upon it or both.
The interrelationships among issues should be demonstrated as forcefully as possible in an attempt to show that although errors in isolation may not appear prejudicial, the cumulative effect is. In *Sheppard v. Maxwell*, for example, the Supreme Court reversed a murder conviction because of the overall effects of prejudicial publicity and the trial judge's handling of it—the "totality of circumstances"—not because of any single news story or individual error.

Mr. Justice Cardozo wrote: "Due process is a growth too sturdy to succumb to the infection of the least ingredient of error"; and it is true that counsel diserves his cause by hyperbolic estimates of the harm of insignificant error. Yet a violation of due process need not fit any predetermined mold or parallel any previously adjudicated error. Mr. Justice Frankfurter has said: "Representing as it does a living principle, due process is not confined within a permanent catalogue of what may at a given time be deemed the limits or the essentials of fundamental rights." And, changing his metaphor from the elusive organic one to a more famous and useful image, he wrote: "No single one of these circumstances alone would in my opinion justify a reversal. I cannot escape the conclusion, however, that in combination they bring the result below the Plimsoll line of 'due process.' The Plimsoll line, or load line mark, is a mark on the side of a ship which by its relation to the waterline demonstrates that the vessel is or is not safely loaded. The image illustrates vividly the fatal cumulative effect of individually tolerable errors.

The interaction of errors may also affect the type of relief available on appeal. In *United States v. Frol*, for example, a narcotics conspiracy conviction was reversed and remanded for judgment of acquittal. The issues were only two: whether the incriminating out-of-court statements of a co-conspirator were impro-

115. Id. at 352; accord, Estes v. Texas, 381 U.S. 532 (1965). But see, e.g., Murphy v. Florida, 421 U.S. 794 (1975); United States v. Calvert, 523 F.2d 895, 902-03 (8th Cir. 1975) (reversal not warranted absent showing of prejudice from publicity), cert. denied, 424 U.S. 911 (1976); United States v. Delay, 500 F.2d 1360, 1365 (8th Cir. 1974) (no abuse of discretion not to change venue when voir dire showed that the jury was unaffected by publicity).
119. See WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1741 (1971).
120. 518 F.2d 1134 (8th Cir. 1975).
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perly received in evidence; and whether the evidence was sufficient without those statements to sustain the conviction. The evidence was not overwhelming and thus the impact of the co-conspirator evidence was fairly demonstrable. But to obtain the reversal for judgment of acquittal, rather than merely a new trial, it was essential to argue also the insufficiency of the evidence as a matter of law.\textsuperscript{121}

C. Willful or Avoidable Error

An error should tend to be viewed more seriously if it appears to have been deliberate or avoidable, because reversal will then supposedly have a salutory deterrent effect and the rebuke implicit in reversal will seem more deserved. Prosecutors' improper questions or comments may fall in this category,\textsuperscript{122} as may erroneous instructions where the proper instructions were requested, supported by authority, and denied.

At the same time, however, appellate courts will not readily condemn the trial judge or government counsel,\textsuperscript{123} and you should not make your work more difficult by requiring the court to find misconduct as a prerequisite to reversal. Thus, while the deterrent effect of a reversal may be a legitimate and even attractive concern, the attack should not be leveled at the judge or prosecutor personally except in extreme or aggravated cases. The challenged actions should be so far as possible depersonalized,\textsuperscript{124} with

\textsuperscript{121. See id. at 1138.}

\textsuperscript{122. Reversal, however, is usually not warranted unless the misconduct deprived the appellant of a fair trial. See, e.g., United States v. McGrady, 508 F.2d 13, 20-21 (8th Cir. 1974) (although court had "misgivings" about propriety of prosecutor's reference to grand jury proceedings in closing argument, the reference did not deprive appellant of a fair trial), cert. denied, 420 U.S. 979 (1975); McDonnell v. United States, 457 F.2d 1049, 1052-53 (8th Cir.) (prosecutor's remark, although deserving of censure, was not grounds for a new trial), cert. denied, 409 U.S. 860 (1972); Isaacs v. United States, 301 F.2d 706, 735-39 (8th Cir.), cert. denied, 371 U.S. 818 (1962).

The reason for this rule was suggested in United States v. Miranda, 556 F.2d 877, 880 (8th Cir. 1977) where the Eighth Circuit court said: "The trial court can best control the course of arguments and is in position to weigh the mischief of improper argument."

\textsuperscript{123. In United States v. Porter, 441 F.2d 1204, 1213 (8th Cir.), cert. denied, 404 U.S. 911 (1971), the court said: "When comments of the trial court exceed the boundaries of fair discipline by official disparagement of counsel or of a litigant's case, then error must follow." The Porter court reviewed the record and determined that the case presented was a "strong" case against the defendants and therefore the error complained of was not sufficiently prejudicial to require reversal. 441 F.2d at 1213-16.

\textsuperscript{124. See, e.g., Anderson v. Federal Cartridge Corp., 156 F.2d 681, 686 (8th Cir. 1946) (civil suit) ("A brief should not contain language disrespectful to the court nor to opposing counsel and ordinarily a brief containing such scurrilous and scandalous matter should

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the emphasis upon the damage to the defendant and the prospective benefits of reversal.

D. The Four Pitfalls: Common Doctrinal Obstacles to Success on Appeal

Quite apart from the merits of the issues presented—sometimes, indeed, despite the conceded correctness of the appellant's position—the courts have fashioned a number of devices for avoiding reversals. Among these, four deserve individualized comment because they are common, they are foreseeable, and in some cases they can be disarmed or evaded; in other cases they will dictate abandonment of an issue. A great many appellate arguments are vulnerable to their undermining force, and each issue should therefore be tested against them.

1. The Harmless Error Doctrine

Few if any trials are altogether free of error, yet few errors result in reversals. Without doubt the commonest reason for this is the "harmless error" doctrine. Much has been written on the subject; indeed few principles seem closer to the appellate judge's heart. It is a seductively simple phrase, and it means in practice pretty much what it says: "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." But it is a principle more easily described than applied, for notoriously it is impossible to determine, or even to inquire into, what processes of thought or debate led to a jury verdict.

Some constitutional errors are per se harmful, such as the use in evidence of a coerced confession; deprivation of counsel at

be stricken from the files."'); Smith v. Simpson, 140 F. 712 (8th Cir. 1905) (brief "marked by contemptuous references" to lower court was stricken from files "in order that such practice may not seem to be sanctioned or encouraged"). See generally F. Wiener, supra note 18, § 83(d), at 258-61.


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trial\(^{129}\) or at a critical pretrial proceeding;\(^ {130}\) trial by a judge whose pay is contingent upon the result;\(^ {131}\) trial in a community whose jurors are exposed to prejudicial publicity;\(^ {132}\) denial of a speedy trial;\(^ {133}\) conviction by a jury instructed with an unconstitutional presumption against the accused;\(^ {134}\) and purposeful racial discrimination in the selection of grand or petit jurors.\(^ {135}\) But this rule of "automatic reversal"\(^ {136}\) will seldom be found applicable on appeal because such errors, being so clearly proscribed, do not often occur and, when they do, probably result in mistrials.

The Supreme Court has held, however, that constitutional errors may be harmless. *Chapman v. California*\(^ {137}\) is the key decision and reading it is indispensable to an understanding of the harmless error doctrine. Under a California constitutional provision explicitly authorizing the practice, the prosecutor in *Chapman* commented extensively upon the defendant's failure to testify. The Court held that this practice violated the defendant's rights under the fifth and fourteenth amendments,\(^ {138}\) but it concluded that "there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction."\(^ {139}\)

Mr. Justice Black then undertook to fashion criteria and a method for applying this rule. Once a constitutional error in receiving inadmissible evidence is established, the question, he wrote, is "whether there is a reasonable possibility that the e-

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\(^ {134}\) See *Bollenbach v. United States*, 326 U.S. 607, 614-15 (1946). *See also Cupp v. Naughten*, 414 U.S. 141 (1973) (instruction that "[e]very witness is presumed to speak the truth" does not, when considered as a whole, negate the presumption of defendant's innocence).


\(^ {137}\) 386 U.S. 18 (1967).

\(^ {138}\) Id. at 20-21. The Court had held similar comment to violate the defendant's constitutional rights in *Griffin v. California*, 380 U.S. 609 (1965).

\(^ {139}\) 386 U.S. at 22.
Lurking in this question is the first crucial characteristic of the harmless error rule: to decide if an error contributed to the result, the reviewing court clearly must put itself in the position of the jury, expose itself to every factor which led to the verdict, immerse itself in "the totality of the circumstances" of the trial.  

This permits, indeed requires, appellant's counsel to return to the more congenial terrain of the trial courtroom, to recreate the congeries of errors, irregularities, and evidentiary weaknesses that led to the result.  

Moreover, and perhaps most important, once a constitutional error is shown, the burden shifts to the prosecution to prove beyond a reasonable doubt that it was harmless.  

Appellate review of nonconstitutional errors, of course, proceeds differently. The appellant has the burden of showing the error and its harmful effect, and an error "which in a close case might call for reversal may be disregarded as harmless where the evidence of guilt is strong."  

If an error is not clearly constitutional, appellate counsel should have an eye upon the malleable concept of due process of law; a record devoid of constitutional errors may, nevertheless, in its totality, deny due process. And is not any error that is reasonably likely to have affected the result a probable denial of due process, therefore a constitutional error and (because of its effect on the result) harmful?

140. Id. at 23 (quoting Fahy v. Connecticut, 375 U.S. 85, 86-87 (1963)).
141. Harrington v. California, 395 U.S. 250, 254 (1969) ("Our judgment [on the question of harmless error] must be based on our own reading of the record and on what seems to us to have been the probable impact of the . . . [error] on the minds of an average jury."); Reed v. Wolff, 511 F.2d 1369, 1370 (8th Cir. 1975) (same); see Sheppard v. Maxwell, 384 U.S. 333, 335-57 (1966).
143. Lowe v. United States, 389 F.2d 108, 112 (8th Cir.) (quoting Garner v. United States, 277 F.2d 242, 245 (8th Cir. 1960)), cert. denied, 392 U.S. 912 (1968). Or, as the Supreme Court put it in Lutwak v. United States, 344 U.S. 604, 619 (1953): "In view of the fact that this record fairly shirks the guilt of the parties, we cannot conceive how this one admission could have possibly influenced this jury to reach an improper verdict. A defendant is entitled to a fair trial but not a perfect one."
2. Errors Not Preserved in the Court Below

Another distressingly common rationale for affirmance is the widely applied rule that the reviewing court will refuse to entertain issues not raised in the court below.\textsuperscript{144} This principle penalizes the defendant for the lapses of his lawyer, without regard to the justice of the result, and as such it makes little sense.\textsuperscript{145} Yet few rules of appellate review are so well-established and counsel must be prepared to come to terms with it. There are principally two ways to avoid its impact in proper cases.

First, there is the "plain error" rule, which provides that "plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."\textsuperscript{146} Plain error is no easier to define than harmless error. Calling an error plain, of course, does not make it so. There is no explicit requirement that a plain error be of constitutional dimension; but conversely, even constitutional errors are not necessarily plain errors.\textsuperscript{147} To be noticed, an unpreserved error must ordinarily be both obviously wrong and obviously prejudicial,\textsuperscript{148} and if it is, it will probably amount to a denial of due process.

One of appellate counsel's more difficult chores is to search the record for errors unnoticed in the trial court; the serious appellate lawyer will never limit his reliance to the motions and objections made by trial counsel.\textsuperscript{149} In most cases reviewing courts will refuse to consider unpreserved errors, or dispose of them summarily.\textsuperscript{150} In fact, the courts cannot even agree whether notice of plain error is mandatory\textsuperscript{151} or discretionary.\textsuperscript{152} Nevertheless an appellate lawyer has not acted competently unless he has detected, by the

\textsuperscript{144} See, e.g., Levitt v. United States, 517 F.2d 1339, 1347 (8th Cir. 1975); Brennan v. Maxley's Yamaha, Inc., 513 F.2d 179, 184 (8th Cir. 1975).
\textsuperscript{145} See text accompanying notes 50-51 supra.
\textsuperscript{146} Fed. R. Crim. P. 52(b).
\textsuperscript{147} See, e.g., Shaw v. United States, 403 F.2d 528, 530 (8th Cir. 1968); Robinson v. United States, 327 F.2d 618, 623-24 (8th Cir. 1964).
\textsuperscript{148} E.g., United States v. Guerrero, 517 F.2d 528, 531 (10th Cir. 1975); United States v. Brown, 508 F.2d 427, 430 (8th Cir. 1974) (overruled on other grounds in United States v. Flum, 518 F.2d 39, 44 n.9 (8th Cir. 1975)).
\textsuperscript{149} This conclusion applies even when trial counsel is appealing the case.
\textsuperscript{150} See, e.g., United States v. Vaughan, 443 F.2d 92, 94-95 (2d Cir. 1971).
\textsuperscript{151} See, e.g., United States v. McGee, 464 F.2d 542, 543 (5th Cir.) (per curiam), cert. denied, 409 U.S. 989 (1972), second appeal dismissed per curiam, 489 F.2d 703 (5th Cir. 1973).
\textsuperscript{152} See, e.g., United States v. Hendrix, 542 F.2d 879, 883 (2d Cir. 1976); United States v. Indiviglio, 352 F.2d 276 (2d Cir. 1965) (en banc).
antennae of research and experience, every act and omission in the proceedings leading to the conviction which violated a right and may have contributed to an unjust result.

Indeed the second vehicle for transporting a previously unnoticed error to the appellate court is the sixth amendment; trial counsel's ineptitude or inaction may amount to a denial of effective assistance of counsel. Errors in this category might also be raised by collateral attack either after appeal or instead of it.153

Traditionally, the test for evaluating the performance of trial counsel for sixth amendment purposes has been whether the trial was a "farce" or a "mockery of justice."154 This standard is both unfair to the client and an insult to the legal profession, however, for it is far below the level of competency clients deserve and by which lawyers ought to be measured. Moreover, the standard tends to do injustice because reviewing courts understandably hesitate to malign trial lawyers and trial judges for participating in mockeries of justice.

Another questionable criterion for sixth amendment violations is the "lawyer's deliberate abdication of [his] ethical duty to his client."155 Whether the lawyer was malevolent or merely inept has little relation to the justice of the individual case, and no public policy seems to require or justify the distinction.156

The Eighth Circuit has recently reviewed and reformulated its approach to the question in a series of opinions, beginning in 1974 with Chief Judge Gibson's observations in Johnson v. United States:157

A more appropriate nomenclature for the standard would be to test for the degree of competence prevailing among those licensed to practice before the bar. The standard would refer more precisely to the professional competence of one who has completed a long and arduous course of study for a professional

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155. Robinson v. United States, 448 F.2d 1255, 1256 (8th Cir. 1971); accord, Lyles v. United States, 346 F.2d 789, 791-92 (5th Cir. 1965), aff'd second appeal per curiam, 362 F.2d 1010 (5th Cir.), cert. denied, 385 U.S. 952 (1966).
156. As Lord Devlin wrote in Behrens v. Bertram Mills Circus Ltd., [1957] 2 Q.B. 1, 17-18: "If a person wakes up in the middle of the night and finds an escaping tiger on top of his bed and suffers a heart attack, it would be nothing to the point that the intentions of the tiger were quite amiable."
license, and who has acquired some experience in applying legal principles and conducting court trials.

More recently, Judge Lay concluded in *United States v. Easter*:158

As we perceive the standard established in our prior decisions it is that trial counsel fails to render effective assistance when he does not exercise the customary skills and diligence that a reasonably competent attorney would perform under similar circumstances.

This is both a fairer and a more workable approach. The truly significant improvement is that appellants now have a reasonable expectation of obtaining review of errors which their trial counsel failed to raise, without showing that the latter was an utter incompetent or a scoundrel. It is, in effect, a new willingness to apply a harmless error test to actions of any trial lawyer whose performance falls perceptibly below reasonable competence; reversal still will not result unless the defense was "materially prejudiced."159

The unpreserved error, then, should not be automatically ignored, but it should only be raised where the error is quite clear and the prejudice fairly demonstrable.

3. *The Concurrent Sentence Doctrine*

Reviewing courts may also avoid confronting an issue by application of the concurrent sentence doctrine. It was recently stated concisely by Judge Henley for the Eighth Circuit court in *Sanders v. United States*:160

The concurrent sentence rule . . . is that where a defendant receives concurrent sentences on plural counts of an indictment, and where the conviction on one count is found to be good, a reviewing court need not pass upon the validity of the defendant’s conviction on another count or on other counts if a ruling in his favor would not reduce the time that he is required to

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158. 539 F.2d 663, 666 (8th Cir. 1976), aff'd second appeal, 552 F.2d 230 (8th Cir. 1977); accord, McMann v. Richardson, 397 U.S. 759, 770 (1970) ("reasonably competent advice" required).

159. Crismon v. United States, 510 F.2d 356, 358 (8th Cir. 1975). The phrase "materially prejudiced" is probably redundant, but the very redundancy reveals something of the court's attitude.

serve under the sentence imposed with respect to the valid conviction.

Strictly applied, this would mean that any appeal would be fruitless if any one count is invulnerable to reversal. Fortunately the rule is not always invoked, but is used at the discretion of the reviewing court.161

Judge Henley, continuing in Sanders, describes two exceptions to the rule's operation: "[I]t should not be applied in cases where its application would be substantially prejudicial to a defendant or expose him to a substantial risk of adverse collateral consequences that might flow from an invalid but unreversed conviction."162

The first exception, prejudice to the defendant, seems clearly to contemplate a possible effect upon the trial result: "whether it was likely that evidence relevant to counts on which the defendant was improperly convicted affected the finding of guilt on another count or on other counts . . . ."163 The concurrent sentence doctrine and the exception for prejudice is thus in effect also a species of the harmless error rule. Like that rule, it invites counsel to argue the totality of the circumstances leading to the convictions, and the interrelationships among errors, to demonstrate prejudicial error.

The second exception to the doctrine arises where there are "collateral consequences" from the unreversed conviction. These include the effect upon the thinking of the sentencing judge, even where the total sentence does not exceed that authorized for a single valid count; the effect upon the place and conditions of confinement; and the future use of the invalid conviction as a "prior conviction" under a recidivist statute.164 Other adverse consequences include the effect upon parole eligibility,165 the for-

161. E.g., United States v. Holder, 560 F.2d 953, 955 (8th Cir. 1977); Sanders v. United States, 541 F.2d 190, 193 (8th Cir. 1976), cert. denied, 429 U.S. 1066 (1977).
162. 541 F.2d at 193.
163. Id. at 194; De Pugh v. United States, 401 F.2d 346, 351-52 (8th Cir. 1968) (valid count remanded for new trial because of adverse effects from evidence produced on two invalid counts).
165. The court in United States v. Holder, 560 F.2d 953, 956 (8th Cir. 1977) has stated: "Until recently, we have lacked evidence that applying the concurrent sentence rule would influence parole status decisions. It now appears that the United States Board of Parole's regulations for determining parole eligibility necessitate a reassessment of that doctrine." For a list of parole criteria used by the federal parole board, see 28 C.F.R. § 2.20 (1976),
feiture of civil rights or privileges, and the greater social stigma of some convictions.

4. Discretion and Its Abuse

Reversal of any conviction will reflect adversely to some degree on the trial judge, who made the fatal error or failed to correct it. One of the greatest impediments to success on appeal is the respect and deference which appellate judges have for their colleagues on the trial bench. Federal district judges have a great deal of discretion in practically all phases of trial proceedings, and reversals will not result from discretionary rulings unless appellate counsel can demonstrate an "abuse" of discretion. Inevitably appellate judges are hesitant to condemn trial judges for abusing their positions, since that terminology carries with it connotations of either ignorance or deliberate violation of established rules. It is similar in this respect to plain error, although the latter term is more often used in connection with nondiscretionary acts.

The traditional test for abuse of discretion is illustrated in this formulation: "[D]iscretion is abused only where no reasonable man would take the view adopted by the trial court. If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion." This is a stringent standard indeed, one that would be serviceable as an equivalent of the plain error test. It presupposes a finding, in fact, that the trial judge was not a reasonable man. Only with trepidation and as a last resort would counsel undertake to persuade an appellate court of that.

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as amended by 42 Fed. Reg. 12,045 (1977), as amended by id. at 31,786, as amended by id. at 44,234, as amended by id. at 52,399.


167. E.g., Steinberg, supra note 8, at 10-11. Judge Jerome Frank even suggests that the trial judge sit with the reviewing court on the hearing of an appeal. See J. FRANK, COURTS ON TRIAL 252-53 (1950).

168. See, e.g., Cline v. United States, 395 F.2d 138, 142 (8th Cir. 1968); United States v. Holt, 108 F.2d 365, 369 (7th Cir. 1939), cert. denied, 309 U.S. 672 (1940).

169. See text accompanying notes 146-52 supra.

170. Delno v. Market St. Ry., 124 F.2d 965, 967 (9th Cir. 1942).

171. Indeed "abuse" of "discretion" may be self-contradictory, since discretion is by definition the right to act according to one's own judgment. But let us not further complicate the question.
Fortunately, another line of cases recognizes a "more generous standard of review,"172 well expressed by Judge Magruder of the First Circuit in In re Josephson:173

"Abuse of discretion" is a phrase which sounds worse than it really is. All it need mean is that, when judicial action is taken in a discretionary matter, such action cannot be set aside by a reviewing court unless it has a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors.

This is a much less perjorative and intimidating standard, and you will enhance your chance of reversal for an abuse of discretion if you can first persuade the appellate court that it is the correct standard. Reviewing judges are more likely to find that a trial judge made an error of judgment than that he was arbitrary, fanciful, and unreasonable.

Finally, an exceptionable exercise of discretion, like any other error, will more likely lead to reversal in a "close" case, for prejudice will be more probable than where the evidence is overwhelming.174 A candid evaluation of the strength of the evidence will therefore be necessary before you decide upon the wisdom of alleging as error a discretionary act.

Only after you have mastered the record can you perceive the issues; only after you have measured those issues against the foregoing criteria, and done the necessary research into the law, can you design the structure of the brief. Your approach to both the statement of facts and the arguments will be dictated by the surviving issues. I turn now to some important aspects of the preparation of the brief itself.

V. THE BRIEF

A good brief will be more than the sum of its parts. When the issues are well-chosen and well-phrased, when the brief is formally correct and concise,175 when the facts are fully and fairly stated,176 when the arguments are forceful and to the point,177 and when relief appropriate to the case is sought,178 each aspect of the

173. 218 F.2d 174, 182 (1st Cir. 1954).
174. See Osborne v. United States, 351 F.2d 111, 117-18 (8th Cir. 1965).
175. See notes 181-215 infra and accompanying text.
176. See notes 216-25 infra and accompanying text.
177. See notes 226-40 infra and accompanying text.
178. See notes 241-46 infra and accompanying text.
brief will lend force to the others. Conversely, an overly long, careless, unfair, or inaccurate brief will sap the appellant’s legal arguments of whatever inherent force they may have.

The brief's immediate impressions on the judge are critical. For good or ill, the first impression, the final impression, the lasting impression of the case will often spring from the appellant’s brief. The brief must persuade, and it will not persuade if it is read incompletely or grudgingly. It should be long enough to tell the judge everything he needs to know about the record and the law to decide the appeal, without being redundant, superfluous, or laboring the obvious. Yet it should be short enough to be read without tedium, boredom, or annoyance.

A. The Brief Must Be Formally Correct, Terse, Just, and Entertaining

1. The Formal Requirements of the Brief

It may be useful to begin with a description, in the form of a checklist, of the parts of an appellant’s brief as prescribed by the Federal Rules of Appellate Procedure and modified by the Eighth Circuit’s rules. Practices vary greatly from circuit to circuit and the identical configuration would not be appropriate in any other jurisdiction.

The Cover of the Brief

The cover of the appellant’s brief should be blue; the cover of the appellee’s brief, red; and the cover of the reply brief,
The cover should indicate the name of the appellate court and that court's number of the case; the title of the case as styled by the court below; the identity of the appellant; the nature of the proceeding (such as appeal); the name of the court below; the title of the document (such as "Brief for Appellant"); and the name and address of counsel submitting the brief. Although not required by the rules, the name of the judge below may be indicated.

The Table of Contents

The table of contents should have references to the pages in the brief where each part is located. It is helpful to include the argument headings to give the court an immediate reference to the issues. The table should be detailed enough to serve as an index to the brief.

The Table of Authorities

This table refers to the location in the brief where each authority is cited. Cases, statutes, and other authorities should be listed separately, and alphabetically arranged.

The Statement of Issues

In the Eighth Circuit the statement of issues presented for review must be followed by a citation of all authorities relied on in the argument on the point. The cases considered most apposite, but not more than four, must be underscored. This requirement obviously makes it desirable to have the issues correspond to the arguments, although the issues and argument headings need not be identical.

182. See id.
183. See id. 28(a)(1).
184. Id.
185. The statement of issues is required by Fed. R. App. P. 28(a)(2). For a discussion on the selection of issues most likely to result in reversal, see notes 105-74 supra and accompanying text.
186. Stating the issues on appeal is the one aspect of appellate practice "most usually botched by counsel." Prettyman, supra note 16, at 287.
187. 8th Cir. R. 12(d).
The Preliminary Statement

A preliminary statement is required in the Eighth Circuit.\(^1\) It must include the name of the judge from whom the appeal is taken, citation of any reported decisions or memoranda by the judge pertinent to the appeal, and the grounds on which jurisdiction below and in the court of appeals was invoked, together with a citation to the statutory provisions and time factors upon which jurisdiction rests.\(^1\) For example, a preliminary statement in a criminal appeal by the defendant might state that jurisdiction of the district court was invoked by indictment; that jurisdiction of the court of appeals is invoked under 28 U.S.C. § 1291 and Rule 3 of the Federal Rules of Appellate Procedure; and that jurisdiction depends upon the filing of the notice of appeal within ten days after judgment under Rule 4(b) of the Federal Rules of Appellate Procedure.

The Statement of the Case

The statement of the case should indicate briefly the nature of the case, the course of the proceedings, and the disposition below.\(^2\) For example, it might state that the appeal is from a conviction for a conspiracy in violation of 18 U.S.C. § 371, after a trial by jury, for which appellant was sentenced to five years imprisonment.

The Statement of Facts\(^3\)

The statement of the facts should include the facts relevant to the issues. Appropriate references to the record should be given to support each fact stated.\(^4\) Because no appendix is required in the Eighth Circuit,\(^5\) references must be to the original record and should adequately identify the part, such as the particular motion, document, or the specific page of the transcript.\(^6\) Cited documents and

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188. See id. 12(b).
189. Id.
191. For a discussion on preparing the statement of facts, see notes 216-25 infra and accompanying text.
193. See 8th Cir. R. 11A(1). See also notes 103-04 supra and accompanying text.
194. When several transcripts of different proceedings are involved, be certain to iden-
transcripts must, of course, have been included in the designation of the record. If there are multiple volumes of transcript, it will be helpful to list volume and page, and even more helpful to refer to folio numbers for specific references. When the admissibility of evidence is challenged, reference must be made to the pages of the transcript at which the evidence was identified, offered, and received or rejected.195

The Argument196

The argument, of course, contains the legal contentions of appellant, with citations of authorities and parts of the record relied upon.197 It may be preceded by a summary of the argument.198

The Conclusion

The conclusion should be stated separately and must include the precise relief sought,199 such as a new trial or remand for judgment of acquittal. The relief demanded should be appropriate to the errors.200 It may be desirable to summarize the argument in the conclusion, particularly where the case is complex and it is necessary to tie loose ends together. The conclusion is the final written word in your presentation and it should be designed to leave a lasting and convincing impression of the rightness and the inescapability of the result prayed for.

The Reproduction of Statutes, Rules, and Regulations

Statutes, rules, and regulations which are required for a determination of the issues should be included either in the brief, an addendum to the brief, or a separate pamphlet.201

196. For a discussion on preparing the arguments, see notes 226-40 infra and accompanying text.
198. Id.
199. Id. 28(a)(5).
200. For a discussion on the selection of appropriate relief, see notes 241-46 infra and accompanying text.
Compliance with these formal requirements is presupposed in an effective brief. The finer points of brief-writing, to some of which we now turn, will be of little use if you have alienated the judge by inattention to formal detail.

2. **Be Terse, Just, and Entertaining**

We lawyers tend to overestimate the relative magnitude of our own cases. Perhaps it must be so to command the full attention each case deserves. It may help to comprehend the role of a brief, however, to reflect that for the appellate judge it is only one of several he must consider on a given day, one of many in a week. When, for example, five cases are set for argument, ten briefs will be involved, as well as five records. So a brief faces the twin dangers of being so slight and unmemorable that it is lost in the crowd, or so long and tedious that it remains in memory only as an imposition upon the harried judge's time. An acute sense of a rapidly approaching point of diminishing returns should constantly terrorize the brief writer.

Prose style cannot, of course, be taught or learned quickly. To a considerable extent it is subjective, and to be effective it must be either natural or extremely well-practiced. There are a few suggestions, however, which can be briefly stated and can have prompt and lasting benefits.

Mr. Justice Jackson wrote that an effective advocate

will master the short Saxon word that pierces the mind like a spear and the simple figure that lights the understanding. He will never drive the judge to his dictionary. He will rejoice in the strength of the mother tongue as found in the King James version of the Bible, and in the power of the terse and flashing phrase of a Kipling or a Churchill.

Unfortunately, we are tempted by the sesquipedalian word, perhaps as a badge of the extent of our learning or the solemnity of our mission. We end often enough by trading in jargon and hackneyed elaborate expressions which are stripped of force by over-

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202. Judge Bright again: "If you don't keep constantly in mind the notion that your case is just one of hundreds of others on the court's crowded docket and if you don't tailor your briefs to take into account this crucial fact of appellate life, you will be wasting your time and your client's money." Bright, supra note 14, at 501.

A simple and familiar word or phrase is not always better than a more arcane expression, but it usually is. The word that appears to have come from a Thesaurus should probably have been left there.

Yet I would not be understood to promote simplemindedness. The fresh word or phrase that rings precisely true will attract the reader's respect and appreciation if he values good writing. The words “sesquipedalian” and “arcane” above were, for example, chosen with care; although neither is common, both will be known to most literate readers, and I do not believe any simpler or more familiar terms would convey as directly and completely the meaning I want. The proper use and true value of a Thesaurus, used in conjunction with a dictionary, is to find the most specifically correct word among near-synonyms. This section of this article asserts that a brief must be *terse*, *just*, and *entertaining*. Those terms, too, were chosen carefully to convey very specific meanings.

“Terse” means “neatly or effectively concise . . . .” Thus it means something more than such apparent synonyms as “concise,” “brief,” “short,” “condensed” and so on. “Succinct” is perhaps the next best word, but it is rather less familiar, lacks the specific element of effectiveness, and has one more syllable than “terse.” “Terse,” in a word, is terse. (Perhaps I should concede that “sesquipedalian” is sesquipedalian.) For the brief as a whole to be terse, each part of it must be: the issues, facts, and arguments. And for these to be terse, each part of them must be: each paragraph, each sentence, each word. But I repeat: Mere brevity and simplicity of language is not enough; it must be *effectively* brief. The Gettysburg Address, that perennial model of terse expression, is short, but it is not simple; it attains force in part from uncommon expressions and the cadences of multisyllabic words which would not be improved by shorter or simpler diction: “Four score and seven (eighty-seven?) . . . conceived in liberty (born in freedom?) . . . dedicated to the proposition (de-

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207. See note 5 *supra*.
voted to the idea?) . . . we cannot dedicate, we cannot consecrate, we cannot hallow (any one of the foregoing?) . . . the brave men, living and dead (what other kinds are there?) . . . .''

Among other things, Lincoln deliberately used repetition effectively and without conveying a sense of redundancy: the words "dedicate" or "dedicated" appear five times; "we cannot," and "the people" three times; "conceived," "consecrate," "devotion" and "we are met" twice each; all in a speech of less than three hundred words.

I mention this not to encourage imitation of Lincoln's repetitive structure and purposely archaic phrases, but to emphasize that brevity and simplicity, though virtues, are not always most effective in themselves. But when in doubt, use the simpler, more familiar word or phrase.

I say next that a brief must be "just," a word defined as "guided by truth, reason, justice, fairness . . . ."

Although "fair" is given as a synonym, it is defined somewhat differently to include: "free from bias . . . ." Since a brief is an advocate's document it will not be free from bias. Therefore "just" is a slightly more precise word in our context than "fair." Of course if a brief is unreasonably biased, its persuasive force will be quickly undone by adverse counsel's rebuttal, if not by the judge's own insight and view of the record. The statement of issues, the statement of facts, and the argument headings, it is true, may be designed to persuade to their point of view, but they must also be balanced to accommodate damaging facts and authority.

Finally, a brief should entertain. This word was chosen not to suggest such synonymous verbs as "amuse," "divert," or "regale," but precisely its preferred meaning: "to hold the attention of agreeably . . . ." That definition splendidly conveys what I have been insisting upon: the readability of the brief, the quality of seizing the judge's attention and holding it agreeably; that is, by being pleasant, without producing annoyance, boredom, anger.

208. Lincoln had used the phrase "eighty-odd years since" in a speech a few months earlier. 2 C. SANDBURG, ABRAHAM LINCOLN 469 (1939).
210. Id. at 511.
211. See ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 7-106 (B)(1) (duty to disclose adverse legal authority); id. EC 7-23.
As Justice Cardozo wrote: "The search is for the just word, the happy phrase, that will give expression to the thought, but somehow the thought itself is transfigured by the phrase when found."214 It has been my experience that a helpful preparation for writing good prose is to read some.215

B. The Statement of Facts Should Be Persuasive But Accurate

Meticulous attention should be given to the statement of facts. It is probably the most important part of the brief,216 and certainly the part where you can be most creative. The law comes as written by the legislatures and judges; it is not for us to rewrite, modify, or generally even to paraphrase the law.217 But the facts come raw, often in the form of inarticulate and unsequential testimony and exhibits. Here you can and should be creative, not in distorting or misrepresenting the evidence, of course, but in marshalling it in the manner that most effectively describes the issues and their context, and supports the legal positions taken in the arguments to follow. The statement of facts should convey to the judge the events that gave rise to the prosecution, what took place at the trial, and in that context, what went wrong to require a new trial. It should not contain a recitation of the legal issues as such, but from it the issues should emerge in a manner leaving little doubt as to how they should be resolved.

The mission of the statement of facts has been well stated by Professor Llewellyn:218

It is . . . a question of making the facts talk. For of course it is the facts, not the advocate's expressed opinions, which must do the talking. The court is interested not in listening to a lawyer rant, but in seeing, or discovering, from and in the facts, where sense and justice lie.

. . . It is trite that it is in the statement of the facts that the advocate has his first, best and most precious access to the

216. E. RE, supra note 18, at 126-28; F. WIEIMER, supra note 18, § 23, at 44.
court's attention. The court does not know the facts, and it wants to. It is trite, among good advocates, that the statement of facts can, and should, in the very process of statement, frame the legal issue, and can, and should, simultaneously produce the conviction that there is only one sound result. It is as yet less generally perceived as a conscious matter that the pattern of the facts as stated must be a simple pattern, with its lines of simplicity never lost under detail; else attention wanders, or (which is as bad) the effect is submerged in the court's effort to follow the presentation or to organize the material for itself.

Although the structure and sequence of the statement of facts will be dictated by the circumstances of the case, some general principles might be noted. The chronology of the criminal episode and its aftermath should usually be followed rather than the chronology in which witnesses testified and exhibits were received. The order of proof at trial is frequently disjointed and confusing. One of the appellate counsel's chief services to the court is to impose order and clarity on this chaos. The facts should be stated so far as practicable to correspond to the order of the arguments, to simplify cross reference.

The parties should be identified by name and not merely as appellant or appellee, particularly when several appellants are involved, so that it is immediately apparent on whose behalf a point is being made. The principal actors in the drama should be humanized, by including descriptive characteristics when they are available and helpful. This is especially true of the accused, unless he emerges as an unmitigated scoundrel. Tell the court of his youth or age; his illness or sobriety; his blameless life if he had one; his family, employment, schooling, or whatever the record contains to remind the judges that they are dealing with a real, feeling, human being capable of suffering and, being human, capable of error, and deserving of forgiveness. Government counsel,

220. See Fed. R. App. P. 28(d) (specifically discouraging use of "appellant" and "appellee" to describe parties on appeal). The confusion in criminal cases, however, is less likely than in complex, multiligant cases, because criminal cases typically involve only one appellant. See also M. Pittoni, Brief Writing and Argumentation 30-31 (3d ed. 1967) (suggesting methods of designating the parties on appeal).

It is strongly recommended in Doherty, A Few Suggestions for Handling Criminal Appeals, 27 Legal Aid Briefcase 124, 126 (1969), that an appellant not identify a complaining witness as the "victim" because of the sympathy the word invites.

221. This should be done with great economy, however, for the relevance of it is usually slight.
of course, may do the same for any victim. Relevant conflicts in evidence and missing items of proof should be clearly identified. Do not leave the court with the task of comparing a recital of one witness' testimony with that of another, or of searching for faults in the proof. Undisputed or unimportant matters should be eliminated or treated briefly. If, for example, a chemist, pathologist, or fingerprint expert testified at length, but his findings are not challenged on appeal, do not review the testimony, simply state the uncontroverted fact established.

Interesting and individualizing aspects of the case may be useful even if they are not directly pertinent. Widespread publicity,\(^{222}\) lengthy jury deliberations,\(^{223}\) requests for additional instructions,\(^{224}\) and other things may reflect a tenor of the trial favorable to the appeal, by showing that the case was close and the errors harmful.\(^{225}\) The facts and law in a criminal case are usually inherently interesting and often fascinating, involving as they do murder, narcotics, fraud, robbery, rape, escape, infidelity, gambling—the very stuff that thrillers, tabloids, motion pictures, and much literature are made of. There is no need to drain these exciting events of all dramatic appeal simply because they are being treated in a legal document. In a sordid case, of course, it may be in the appellant's interest to de-emphasize the more egregious evidence and give an antiseptic treatment of the facts. This should be attainable without dull or turgid prose.

C. The Arguments Should Be Forceful and to the Point

If the facts and issues have been properly stated, the court will know precisely what questions must be resolved. The argument's

\(^{222}\) See notes 114-15, 132 supra and accompanying text.

\(^{223}\) See, e.g., United States v. Brotherton, 427 F.2d 1286, 1289 (8th Cir. 1970) (in holding that jury deliberation for roughly five to seven minutes was not a denial of due process, the court said: "There would be more reason to suspect something was wrong if the jury had taken an inordinate length of time in a case such as this, as . . . one might surmise that the individual will of one or more members might have yielded to the pressure of the other jurors.").

\(^{224}\) See, e.g., Batsell v. United States, 403 F.2d 395, 396-400 (8th Cir. 1968), cert. denied, 393 U.S. 1094 (1969). See also Allen v. United States, 164 U.S. 492, 501-02 (1896) (not error for judge to instruct potentially hung jury that if the majority of them are of one opinion, the minority "ought to ask themselves whether they might not reasonably doubt the correctness of a judgment which was not concurred in by the majority"); Hodges v. United States, 408 F.2d 543, 552-54 (8th Cir. 1969) (Allen-type instruction not coercive).

\(^{225}\) See note 143 supra and accompanying text.
function is simply to identify the controlling authorities (statutes, rules, decisions, policy reasons), and demonstrate why they compel the relief prayed for. The argument must be forceful without hyperbole; concise without being cryptic; and complete without superfluity. As Judge Bright puts it: "Go for the Jugular." An argument must argue. It must persuade the court to adopt a position which is ordinarily directly contrary to that taken by the trial judge. This will require not only the identification of error, but the demonstration of its prejudice. Overstatement should be avoided; it simply creates an obstacle to credibility. Rarely will a court perceive the imminent crumbling of the entire edifice of western jurisprudence in the overruling of an objection or the denial of a motion. The effect of the error in its context should be identified, and related to the specific relief sought. The court must be persuaded why and how a new trial will be a better one and do substantially more justice than the challenged trial did.

The argument should begin with an argument heading, preferably in capitals or underscored, which summarizes the argument and forcefully asserts the brief’s position. Usually a single

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226. In Couch, Writing the Appellate Brief, 17 PRAC. LAW. 27, 29 (Dec. 1971), a practical reason for getting to the point is offered: "While the judge who writes the opinion may carefully study your brief, the other judges read it rather hurriedly. So your brief must catch their attention and invade their thought processes. A rambling, disjointed brief cannot accomplish this."

227. Bright, supra note 14, at 504 (emphasis in original).

228. Justice Cardozo reminds counsel that appellate judges are "hardened sinners, not easily redeemed." B. CARDOZO, Law and Literature, in LAW AND LITERATURE 37-38 (1931). Another writer points the way to redemption:

The successful argument must be one which makes the reader want to believe. Something warmer than the cold science of logic is needed to achieve this purpose. Logic may be a means of showing the reader that his preconceived ideas may have been wrong; but this is not enough. A man convinced against his will is of the same opinion still. Persuasion must create a desire to believe.

F. COOPER, WRITING IN LAW PRACTICE 24 (1963) (emphasis in original).

229. See notes 241-46 infra and accompanying text.

230. See F. WIENER, supra note 18, at § 30. But see Godbold, supra note 5, at 810 n.23 ("[Argumentative headings] do nothing for me. Rather I resist the notion that I can be affected to any meaningful degree by the semantics of a heading. Argumentative headings generate counter-arguments, and then the judge must settle this side controversy in his own mind in order to identify the real controversy.").

231. Justice Cardozo has written:

Often clarity is gained by a brief and almost sententious statement at the outset of the problem to be attacked. Then may come a fuller statement of the facts, rigidly pared down, however, in almost every case, to those that are truly essential as opposed to those that are decorative and adventitious. If these are pre-
sentence will serve this purpose best. It should be an argumenta-
tive restatement of the issue presented, the latter being a more
neutral statement of a general principle of law. If there are subis-
sues, arguments should also be subdivided.

The argument is not a treatise, a law review article, or a judicial
opinion and therefore it should not be a discursive review broader
than necessary for resolution of the issues.\textsuperscript{232} It should be to the
point, bearing in mind that the readers are a group of judges who
have a sound background in the major principles of law, but who
are not clairvoyant, and are not immersed as you are in the de-
tails of your case. Avoid dwelling on the obvious, but do not
neglect to identify the pertinent facts, the precise issues, the ap-
posite authority, and the relations among them.

Authorities should be selected carefully and cited sparingly.\textsuperscript{233}
If there is a controlling decision, a decision nearly in point, or a
dispositive statute or rule, the focus should be there. The Eighth
Circuit's requirement that four or fewer of the most pertinent
authorities be underscored\textsuperscript{234} may be seen as a benchmark for the
maximum number of decisions which will ordinarily deserve close
scrutiny for any argument. But do not rely on four if three, two,
or one will do. One genuinely apposite case is always more per-
-suasive than two or more cases slightly on point.\textsuperscript{235}

The most pertinent cases should be discussed, not merely cited.
A properly discussed case should not have to be read by the court,
even though it will be read. The facts which make cases similar
to or distinct from the case on appeal should be identified and the
precise holding stated. Cases should not be quoted at length or
frequently, but a brief quotation of decisive language is often
forceful and preferable to paraphrase. Quotation also adds vari-
exty to the appearance of a page.\textsuperscript{236}

\textsuperscript{232} Hart, \textit{The Supreme Court}, 1958 Term — Foreword: The Time Chart of the

\textsuperscript{233} Marshall, \textit{The Federal Appeal}, in \textit{COUNSEL ON APPEAL} 151 (A. Charpentier ed.
1968).

\textsuperscript{234} \textit{See 8th Cir. R.} 12(d) (1977).

\textsuperscript{235} If several citations are legitimately needed, for example to show authority for a
point in several jurisdictions, place them in a footnote so the flow of the argument is not
halted and the reader does not have to search for the resumption of the text.

\textsuperscript{236} Jean Appleman devotes an entire chapter in her book, \textit{Persuasion in Brief
Writing} 90-118 (1968), to quotations suitable for inclusion in any brief.
The relative weight of judicial opinions depends upon the tribunals in which they were decided. As a general rule, the following order of preference in federal criminal appeals is probably correct: United States Supreme Court decisions; decisions from the circuit in which the appeal is brought; other federal circuits' decisions; decisions from federal district courts, state courts, and foreign tribunals; and finally the observations of commentators and secondary authorities. More recent authority, of course, is stronger than older decisions. The force of secondary authorities will depend very heavily upon the stature of the author and the persuasiveness of his reasoning. Always search out the most pertinent and recent decisions of the court in which you are appearing, even when there is a Supreme Court decision on point. *Shepard's Citations* should be consulted in addition to the slip opinions. The Eighth Circuit Clerk has available a most helpful quarterly index of that court's decisions.

Because one function of a brief is to assist the court in its own research, it may be helpful to point out secondary research aids such as annotations, key numbers, law review articles, treatises, and other basic tools, though these will rarely if ever be relied upon as authorities. Usually they are most appropriately placed in a footnote and identified as aids to research rather than authorities.

Adverse cases must be dealt with, not ignored. A brief which

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237. The benefit to be derived from using *Shepard's Citations* can best be illustrated by a story told in L. Stryker, *supra* note 16, at 222-24. Mr. Stryker was arguing an appeal on behalf of a doctor who had had his license suspended after having hired an individual not licensed to practice medicine in New York. Opposing counsel had cited a case in his brief which went directly against Stryker's client. By using *Shepard's*, Stryker discovered that the unfavorable decision had been reversed on appeal to a higher court. In oral argument, Stryker equated the opposing counsel's error in failing to check *Shepard's* with his own client's failure to check the credentials of the man he had hired, and won the appeal.

238. Do not, however, use footnotes excessively, because "[y]ou are not writing a scholarly law review article that is expected to be filled with long, tortuous footnotes." Couch, *supra* note 226, at 30.

fails to cite a case against its position will appear to lack candor, a more damaging characteristic than the adverse case itself. Indeed, there is an ethical obligation to cite contrary authority.\(^{239}\) If the contrary case is altogether decisive, it may well mean the issue should be abandoned. Only with extreme rarity should a court be expected to consider overruling its own decisions, and then only for very good reasons such as a wealth of later authority from other jurisdictions, amendment of legislation, or a manifest change in circumstances.\(^{240}\) More often the task is to distinguish the harmful case, and most cases are distinguishable from one another.

Do not be intimidated into immediate surrender by adverse authority or lack of any authority. If the pertinent statutes or decisions seem to be against you, but seem to lead to injustice in your case, your client may deserve to have you take a pioneering step toward change, especially if the previous authorities are old. You will be fortunate if your case promises to be a good precedent for the future. Do not be concerned with "making bad law." You have one client at a time; to be less than complete in your zeal for his cause because you foresee ill-effects on others in the future would be to have a conflict of interest. But bear in mind that the court will be concerned with the future consequences of its decision, and will not readily fashion a decision that promises absurd ramifications. Which is only to say, in another way, that the relief sought should be tailored precisely to the case.

It bears repeating that the argument must above all demonstrate why the error requires reversal of the case at hand. Do not

\(^{239}\) See ABA Code of Professional Responsibility DR 7-106(B)(1) (failure to disclose to tribunal contrary authority may be grounds for disciplinary action); id. EC 7-23.

\(^{240}\) See, e.g., Gideon v. Wainwright, 372 U.S. 335, 345 (1963) (court noted that 22 states joined as amici curiae to support overruling); Mapp v. Ohio, 367 U.S. 643 (1961) (overruling Wolf v. Colorado, 338 U.S. 25 (1949)); Patterson v. United States, 359 U.S. 495, 496-97 (1958) (per curiam) (reversal of prior decision not warranted when Congress could change effect of decision by legislation); Erie R.R. v. Tompkins, 304 U.S. 64, 74-78 (1938) (court notes that prior rule had placed an intolerable burden on litigants which "rendered impossible equal protection of the law"). See generally Blaustein & Field, "Overruling" Opinions in the Supreme Court, 57 Mich. L. Rev. 151 (1958); Douglas, Stare Decisis, 49 Colum. L. Rev. 735 (1949). See also Henslee v. Union Planters Nat'l Bank & Trust Co., 335 U.S. 595, 600 (1949) (Frankfurter, J., dissenting) ("Wisdom too often never comes, and so one ought not to reject it merely because it comes late. Since I now realize that I should have joined the dissenters in [an earlier case], I shall not compound error by pushing that decision still farther."); Massachusetts v. United States, 333 U.S. 611, 639-40 (1948) (Jackson, J., dissenting) ("I see no reason why I should be consciously wrong today because I was unconsciously wrong yesterday.").
beg the crucial question, which must cross appellate judges’ minds with frustrating frequency as they read and hear of alleged violations of broad principles, and which I suspect only courtesy prevents them from voicing in so many words: “So what?”

D. The Relief Sought Should Be Appropriate

The relief sought should be appropriate to the errors alleged.241 A new trial is most common, a new trial without the error that tainted the previous one.242 When the evidence is insufficient as a matter of law, or where the statute of limitations has run, a dismissal or judgment of acquittal might be ordered.243 If the reviewing court vacates a conviction of one offense but affirms as to another, particularly if the latter carries a lighter sentence, or if an illegal or excessive sentence was imposed, the relief may be remand for resentencing.244 If the record on an issue is inadequate, the prayer might be to remand for further proceedings in the trial court.245 If new and apposite decisional or statutory law has been promulgated since the conviction, the case may be remanded for reconsideration in light of that authority.246

Whatever the situation, the proper relief should be requested, and the fairness of the relief should be shown. An order for a new trial, for example, would not require that the defendant be set free, and would ordinarily be a small price to pay for correction of an injustice. Remember that reversal is the first prerequisite, but appellate counsel must think beyond to the next step as well; if the court agrees to reverse, what then?

VI. The Oral Argument

It is widely agreed by appellate judges and lawyers that oral

243. See, e.g., United States v. Frol, 518 F.2d 1134, 1137-38 (8th Cir. 1975); Drennon v. United States, 393 F.2d 342, 344 (8th Cir. 1968) (court saw no purpose in remanding for further proceedings and thus reversed “outright”). See also Strunk v. United States, 412 U.S. 437 (1973) (dismissal is the only remedy for denial of a speedy trial).
244. See, e.g., Gentry v. United States, 533 F.2d 998, 1000-01 (6th Cir. 1976); United States v. Maples, 501 F.2d 985 (4th Cir. 1974). See also Robinson v. United States, 333 F.2d 323, 326 (8th Cir. 1964) (court of appeals itself reduced the sentence).
argument is an important, and sometimes the most important, part of an appeal. Yet many oral presentations lose much of their force from improper design and poor presentation, because counsel has not understood his true role at this juncture. Just as an appeal is not a retrial of the case below, an oral argument should not be a mere recitation of the briefs. The oral argument is a chance to underscore the most significant aspects of the parties' positions, and, much more importantly, to answer questions which remain after the briefs have been read.

247. See, e.g., Bright, supra note 14, at 507 ("I would say that, in about 25 percent of the cases, the oral argument makes a personal difference to me in the way I view the case."); Clark, Foreword to M. Pittoni, BRIEF WRITING and ARGUMENTATION vii-viii (3d ed. 1967); Cutler, Appellate Cases: The Value of Oral Argument, 44 A.B.A.J. 831 (1958); cf. Sup. Ct. R. 45(1) (court "looks with disfavor on the submission of cases on briefs, without oral argument").

If the recommendations proposed in P. Carrington, D. Meador, & M. Rosenberg, JUSTICE ON APPEAL 17 (1976) were adopted, oral argument would play an ever-increasing role in appellate practice. The authors regret the current tendency of the courts to de-emphasize oral argument by reducing the time allotted to it and by eliminating it in some cases. They state:

Oral argument is important as a means of giving judges a continuing awareness of their relationship and dependence on others; without it, the judge is isolated from all but a limited group of subordinates. It is an important assurance, both in fact and in appearance, that decisions are made collectively, because it is the occasion when all judges responsible for the decision address themselves together and in the public view. Oral argument gives to litigants the assurance that the judges themselves are making the decisions. And it also gives litigants the sense of participation which is an essential of the adversary tradition.

Id. at 17-18.

It is the brief which those authors feel is taking too much of the courts' time. See id. at 27. In simple appeals, the authors urge that oral argument be the sole method of communication to the court, other than a short written statement of the issues and a sparse selection of authority. Id. at 28.

The Eighth Circuit, like other courts, screens cases for those not requiring oral argument. This does not reflect the court's opinion of the merits of the case, but merely a belief that oral argument will not assist their decision. For a description of the screening process, see Bright, supra note 14, at 500.

248. Justice Marshall writes:

All the lawyers I know, especially those who have written on advocacy, stress the importance of oral argument. Most judges do, too. I suspect that those who don't have become so inured to the poor arguments that are often made that they do not appreciate the value of oral arguments in general. During a few arguments in the Second Circuit, I've recalled with approval the remark in King Henry VI, Part II, "The first thing we do, let's kill all the lawyers."

Marshall, supra note 233, at 144.

249. Judge Bright writes:

Oral argument serves two purposes: it gives the lawyers a chance to present their theory of the case in a nutshell, and it allows the judges to ask questions to clear up any doubts that the court might have about the case or the lawyer's approach to it.

Bright, supra note 14, at 506.
The oral argument is transitory and its impact often ephemeral. Unlike the brief, it does not remain in tangible form as the judge ponders the case. Because it is a live, personal confrontation designed to explore the most difficult questions in the appeal, however, the oral argument can and should create a lasting impression upon the court. If you can convey an image of informed conviction in the rightness of your position, and satisfy any voiced reservations about your arguments, you can cement the structure which the brief has erected. If you are disorganized, disrespectful, or indifferent, you will certainly undo whatever the brief may have accomplished. Because the oral argument requires compression into a very short time of all the important issues of the case, and often involves unpredictable questions by the court, it is in some respects a lawyer's highest challenge. It can give occasion for his finest moments, or his worst. The culmination of a long series of serious events, it should be viewed as nothing less than the last word which can be spoken on behalf of a client for whom very much is at stake.

A. Preparation of the Oral Argument

Wiener lists nine essentials of an effective oral argument:

(a) Appreciation of the purpose of advocacy.
(b) Not reading the argument.
(c) Application of the fundamentals of good public speaking.
(d) An effective opening.
(e) Clear statement of facts.
(f) Complete knowledge of the record.
(g) Thorough preparation.
(h) Attitude of respectful intellectual equality.
(i) Flexibility.

In many respects the last of these, flexibility, is the most important. In federal appeals, the court will almost always have numer-

250. Both the United States Supreme Court and the Eighth Circuit tape record the argument to enable a replay by the judges if they wish. See E. Re, supra note 18, at 174.
251. Some judges even prefer to hear oral argument before reading the briefs to obtain their first impression of the case. In federal courts, however, this is probably the exception rather than the rule. See Godbold, supra note 5, at 817 n.40; Marshall, supra note 233, at 145-46. See generally Gates, Hot Bench or Cold Bench: When the Court Has or Has Not Read the Brief Before Oral Argument, in COUNSEL ON APPEAL 107-34 (A. Charpentier ed. 1968).
252. F. WIENER, supra note 18, § 92, at 280. See generally id. §§ 93-102 (detailed examination into each of the nine essentials of effective oral argument).
ous questions directed incisively toward the decisive issues and the weak points in the briefs. Thus it is best to prepare the oral argument from a devil’s advocate’s point of view, searching out one’s own weaknesses and anticipating the most probing questions in order to prepare the most effective answers.

Frequently time limitations will prevent argument of all the issues. Select those on which you believe oral comment will be most effective and prepare a presentation that will fill the allotted time. Mark distinctively the points you want to be certain to make even if questioning prevents your full presentation. Prepare thorough notes on all other issues in anticipation of any questions likely to arise.

A written narrative argument should usually not be prepared and certainly not read. Questioning ordinarily prevents this in any case. The most effective method of notation is probably an outline of the facts and arguments as set out in the brief. Sub-notes should include citations to important cases and places in the record so you do not have to search the briefs or the transcript for references. The record itself should be tabbed so that all important references are readily at hand if the court asks about them. A thorough knowledge of the record together with a method for ready access to it will save time, accent the argument, and favorably impress the court with your preparedness. Lack of these things will be correspondingly conspicuous and harmful.

Besides digesting, annotating, and tabbing the record, you should have copies of decisive opinions. The judges who wrote, 253. The local rule provides for the appointment by the Chief Judge of a panel of judges to screen cases for classification into one of three categories: (1) cases requiring a full 30-minute argument per side; (2) cases requiring an abbreviated 20-minute argument per side; and (3) cases requiring no oral argument. See 8TH CIR. R. 6 (1977). Counsel may request the court to reclasify the case. The large majority of cases in the Eighth Circuit are presently being accorded 20-minute arguments. For a description of the Eighth Circuit’s screening method, see Bright, supra note 14, at 500.

254. FED. R. APP. P. 34(c) ("Counsel will not be permitted to read at length from briefs, records or authorities."); cf. Sup. Ct. R. 44(1) ("The court looks with disfavor on any oral argument that is read from a prepared text.").

Lawyers who read from a prepared text have probably forgotten that oral argument is a method of communication to the court. "One would hardly attempt to persuade a traffic officer not to write a ticket or his next door neighbor to give up his Super Bowl seats by reading a prepared speech to him." Lascher, Oral Argument for Fun and Profit, 48 CAL. STR. B.J. 398, 400 (1973). See also Gates, supra note 251, at 111-12 (same analogy to the persuasion of a "pretty young thing").

joined in, or dissented in the important cases should be noted; you may be arguing before one or more of the same judges. Unlike the practice in some courts, the Clerk of the Eighth Circuit will disclose in advance of argument which judges are sitting, thus occasionally giving you the opportunity to focus on the views on specific issues of the judges before whom you argue. 256

256. But the composition of the panel will be disclosed no earlier than the first day of the month in which the argument is to be heard. See note 29 supra.

Judges, of course, express themselves other than in written opinions. Below is a bibliography of publications by the present members of the Eighth Circuit Court, alphabetically arranged by title for each member:


Published by Mitchell Hamline Open Access, 1978
Just before argument, the authorities cited should be brought to date, including a perusal of the court's most recent slip opinions at the courthouse the morning of argument. At least several weeks will elapse between the submission of the briefs and the argument; pertinent decisions may well have come down in the interim. To avoid reading citations during argument, it is good practice to prepare a list of later decisions in writing and provide them to the clerk either before or after argument. This should not, however, be an additional brief, but merely citations to truly applicable intervening decisions.

B. Presentation of the Oral Argument

It scarcely need be said that you must show respect and deference to the judges and opposing counsel at oral argument. Strive for Wiener's "attitude of respectful intellectual equality." Humor is not necessarily out of place, but it probably has to be spontaneous to be effective, and little is to be profited from an attempt to program humor into your presentation. Be cautious to avoid sarcasm or the appearance of sarcasm, which is incompatible with respectfulness.

Remembering that overstatement will be its own undoing, it does not follow that the argument need be emotionless. And simply because you must respect the judges does not mean that you must agree with their comments. Questions from the bench are usually designed either to test a weakness or underscore a strength, as the judge may see it. Do not assume that a judge asking difficult questions is predisposed against you; just as often he will be testing the validity of his agreement with you.


257. This can be overdone. "Be respectful, of course, but also be self-respectful, and neither disparage yourself nor flatter the Justices. We think well enough of ourselves already." Jackson, Advocacy Before the Supreme Court: Suggestions for Effective Case Preparation, 37 A.B.A.J. 801, 802 (1951).

258. F. Wiener, supra note 18, § 92, at 280. Counsel should seek intellectual equality with the judges during the argument and not be "so terrified of the tribunal and so in awe of its individual members that their questions . . . [throw counsel] completely off balance . . . ." Id. § 101(a), at 299.

259. E. Re, supra note 18, at 195. The same has been said about humor in the written brief. See H. Weihofen, Legal Writing Style 198 (1961).
Questions should be answered \textit{when they are asked}. Do not respond to a question by saying you will come to that later, even though the judge has interrupted your chain of thought and the flow of your presentation. This is an important aspect of the flexibility of which Wiener writes, and the ability to respond precisely to questions and to react to the flow of discussion is perhaps the most important single skill for oral advocates.\footnote{260. Accord, E. Re, supra note 18, at 196.} Be grateful for the questions,\footnote{261. Davis, \textit{The Argument of an Appeal}, 26 A.B.A.J. 895, 897 (1940) ("Rejoice when the Court asks questions.").} disrupting though they seem,\footnote{262. Judge Godbold of the Fifth Circuit has called for moderation from the bench in asking questions. Godbold, supra note 5, at 818-19.} for they tell you what concerns the judges and give you an opportunity to emphasize strengths and repair weaknesses in your case. Opinions often turn upon those aspects of a case which were dwelt upon by the judges in oral argument.

Because questioning is likely to consume the bulk of the argument, you can be confident only of being able to make brief opening and closing statements. These should be planned with care so that no matter how little else of your prepared remarks you are able to deliver, you will be at least able to emphasize the importance of the case and focus the most significant questions.\footnote{263. Recall what Mark Twain said: "The speaker who does not strike oil in ten minutes should stop boring." E. Re, supra note 18, at 194.} Advise the court that you do not intend to waive or even to minimize the importance of issues by excluding them from the oral argument.

Most federal arguments are limited to twenty minutes per side.\footnote{264. See note 253 supra.} Appellant's counsel may reserve part of his time for rebuttal, and it is usually wise to do so because the argument and questioning of appellee's counsel may point to important matters which appellant's counsel did not address. A caveat, however: Do not use reserved rebuttal time to restate points already made. If nothing new arose during appellee's presentation, simply inform the court that you have no rebuttal. The court will appreciate being saved a few minutes of its overburdened time, and your belief that your opponent said nothing requiring rebuttal will show confidence in your cause.\footnote{265. See notes 267-69 infra and accompanying text.}
alert counsel to time limitations. A white or green light on the
podium indicates that five minutes remain, and a red light that
time is up. The time limit is quite strictly enforced. Once the red
light is displayed, you will be permitted a final sentence or two,
but usually no more, even though the court’s questions have pre-
vented you from covering many things you thought important.

Your preparation should equip you to answer any question rea-
sonably likely to arise, but if you do not know an answer, do not
be afraid to say so. Offer to obtain the answer after the argument
and provide it to the court and opposite counsel in writing. The
question may be as apparently inconsequential as whether the
appellant is in prison, and if so where, or as crucial as whether a
new statute affects the case. Though one hopes to have all the
answers, an admission of ignorance is better than a bluff, a lack
of candor, or an uninformed answer.

VII. REPLY BRIEFS, REBUTTAL ARGUMENTS, AND PETITIONS FOR
REHEARING: A DISSUASIVE WORD

There is a natural but often unfortunate impulse, exaggerated
no doubt in the garrulous personalities of people who become
lawyers, to have the last word. A penultimate word of my own,
therefore, on reply briefs, rebuttal arguments, and petitions for
rehearing. (The re-prefixes are significant; they signify the asso-
ciation of those devices with words such as repetitious and redund-
ant.) The rules provide for them, and very occasionally they
will repay the effort. Usually not. Do not file a reply brief unless
the appellee has raised facts or issues or arguments not treated
in your appellant’s brief, and then only if you cannot reply ade-
quately at the oral argument. Do not give a rebuttal argument
unless appellee’s counsel has argued something new or inaccu-
rerate. Do not petition for rehearing unless the court’s opinion
actually suffers from one of the specific defects for which rehear-
ing is provided.

266. The Eighth Circuit courtroom in St. Louis uses a white light and the Eighth
Circuit courtroom in St. Paul uses a green light.
267. The prefix “re-” means “again” or “again and again.” RANDOM HOUSE DICTIONARY
268. An example justifying a reply brief would be where the appellee contends an order
is nonappealable and you have not discussed appealability in the opening brief.
269. The petition must raise “points of law or fact which . . . the court has overlooked
or misapprehended . . . .” FED. R. APP. P. 40(a). Do not file a petition simply because
you disagree with the result, unless, of course, the jurisdiction’s rules require a petition

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VIII. CONCLUSION: JUDGING JUDGES

I have resisted the temptation to call the criminal appeal an art, and called it a craft instead. Everyone is inclined to label his own calling an art, and the word thereby becomes trite as well as presumptuous. Yet I hope I have communicated my belief that something transcending mere workmanship is involved, something expressed in the idea that the appellate advocate is not only a lawyer, but a writer, in the literary sense. For after the rules have been mastered, the factual material absorbed, and the legal research done, it is the meticulous, the inventive and occasionally inspired use of language that lifts mere draftsmanship into craftsman and beyond.

I have tried, too, to emphasize the importance of a sense of perspective, derived from an intimate knowledge of the facts and law in the case at hand, and from an appreciation of the case's relative position among others in the overburdened appellate court. Appellate advocacy requires equal attention to the competing demands of completeness and brevity.

Finally, I have sought to go beyond the formal and stylistic aspects of the appeal and touch upon some of the important and elusive psychological currents generated by the relationships between the individual appeal and other cases past and future.

Judge Bright writes explicitly about the intrusive and censo- rious nature of the appellate process:°

You must never forget that as appellate judges we are judges of judges and our job is to make sure that the judicial system works properly. . . . If you are to be successful advocates, you must understand why and how appellate judges review the cases before them. You must understand the rationale behind our rules of review . . . . These rules exist as an essential part of the system, and if you wish to prevail on appeal, your briefs must make perfectly plain that some prejudicial error occurred that will justify our interference in the trial process.

Here more straightforwardly is the notion suggested in Mr. Dooley's aphorism at the beginning of this Article.

Chief Judge Gibson, taking a rather broader view, speaks as follows of counsel's rôle in the appellate process: 271

for rehearing as a prerequisite to a further procedure such as certiorari. The filing of a timely petition for rehearing stays the mandate. Fed. R. App. P. 41(a).

270. Bright, supra note 14, at 502 (emphasis added)

271. Gibson, supra note 29, at 261.

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The bench, to excel, must have the full backing and precisioned advocacy of a knowledgeable bar. Your talents must be used not only to represent clients in adversary hearings but also to enhance the general administration of justice by objectively pointing out to the courts where they might have erred.

These passages provide an appropriate coda because they contain in short space and more authoritatively much of what I have sought to say. If I may borrow an arresting phrase from each, and combine them, we have a statement excellently suggesting the difficulties and goal of appellate counsel: To reach a fair judgment of judges by precisioned advocacy.