ESSAY

How to Conclude a Brief

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I. Introduction

A while back, I observed a fleeting discussion among a few appellate-litigation mavens in the #appellatetwitter crowd about what should go in the "conclusion" section of an appellate brief. This essay explores that issue and its relationship to problems of argument ordering in multi-issue appellate briefs.

A colleague suggested that these two topics are unrelated. I disagree, and here's why. If, as I recommend and court rules prefer, the conclusion is short and does not summarize the arguments, the brief writer may be left with a problem: that the brief's last argument is the least powerful or least important argument, causing the brief to end on a down note. The brief writer wants to avoid that (of course). The essay discusses how to avoid or mitigate that problem when it arises.

II. Conclusions in briefs: the rules and beyond

If you want to know what to include in a conclusion in an appellate brief, as with all parts of briefs, start with the court rules. They are generally a useful starting point because they are issued by the audience: judges. The rule makers have told us what they want. The Federal Rules of Appellate Procedure, or FRAP, call for "a short conclusion stating the precise relief sought."[1] The Supreme Court rule doesn't expressly demand

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1 Fed. R. App. P. 28(a)(9).

brevity, but it similarly requires "[a] conclusion specifying with particularity the relief the party seeks."[2]

So, what should you do?

A. Prefer short, relief-based conclusions

All but one participant in the Twitter discussion thought that a brief's conclusion should be short and sweet. Yet, many briefs contain lengthy, repetitive, argumentative conclusions. I think those kinds of conclusions are a mistake and agree with the majority of the appellate Twitter folks. Here's why.

First, at least for federal appeals, the rule says so. True, FRAP 28(a)(9) doesn't expressly ban conclusions other than a statement of "the precise relief sought,"[3] but its demand for a "short" conclusion seems to spit on anything more. Typically, it's a good idea to follow rules that the court's judges have themselves issued (duh), unless there's an excellent case-specific reason to deviate and departures from the rule's express commands are at least tolerated (that is, you know that nonconformity won't cause the court clerk to bump the brief).

Second, the convention—particularly among first-rate brief writers—is to keep conclusions quite short. Top appellate advocates generally state only the relief sought (affirmance, reversal, and the like). For better or for worse (and I think better), keeping conclusions short will meet the judges' expectations and not seem out of place or inconsistent with high-quality brief writing. All other things equal, that's an important factor.

Third, as explained in more detail below, it is important to state precisely the relief your client desires, and if you lard up the conclusion with another summary of your arguments or an extended rhetorical flourish about the justice of your client's position, the request for relief could get lost in the sauce. That's taking quite a risk.

Finally, and relatedly, extended, argumentative conclusions are necessarily repetitive. By the time the judges (or law clerks) get to the conclusion, they may have already digested an (optional) introduction providing the gist of your positions. They would have already read your statement of the case, which likely will have included hints at your arguments. And the judges would, one would hope(!), already have read the summary of argument[4] and the argument[5] because the rules demand

2 Sup. Ct. R. 24.1(j).

3 Fed. R. App. P. 28(a)(9).

4 *See* Fed. R. App. P. 28(a)(7).

5 *See* Fed. R. App. P. 28(a)(8).

that they be there. Some brief writers also employ a variety of somewhat argumentative roadmaps and mini-introductions to sub-arguments. (I typically avoid those things out of concerns over repetition.) By the time the judges get to your conclusion, you should have made your points and made them well. You can't discuss appellate advocacy with a judge for more than a few minutes and not learn that judges think that briefs are too long and repetitive. Cut the judges a break at the end of the brief by telling them just what you want and nothing more.

B. Examples of no-muss, no-fuss conclusions

As indicated above, it's important that judges and law clerks know exactly what your clients want them to do. Put the other way around, it would be really bad if the only reason that your clients didn't get just what they wanted is that you did not ask for it with enough clarity or specificity. And remember that's just what's called for by the federal appellate rule ("precise relief sought") and the Supreme Court rule ("specifying with particularity the relief the party seeks").[6]

Sometimes stating the relief can be quite simple because the precise relief sought is no more than affirmance for the appellee or reversal and rendering of judgment for the appellant. Other times, it is sufficient (and adequately precise) to say that your client wants only a reversal and a remand for further proceedings.

Here are some examples of no-muss, no-fuss conclusions taken from briefs recently filed by Georgetown Law's Appellate Courts Immersion Clinic.[7]

- "The district court's judgment should be affirmed."[8] (The district court had granted summary judgment to our client on all claims.)
- "The judgment of the district court should be reversed and remanded for a trial on the merits of Ziccarelli's interference and retaliation claims against Defendants."[9] (Summary judgment had been granted against our client on two claims, and we were specifying that reversal was required on both claims and that no further summary judgment proceedings were needed—that is, we were expressly indicating that, on remand, the case should simply go to trial.)

6 Fed. R. App. P. 28(a)(9); Sup. Ct. R. 24.1(j).

7 Appellate Courts Immersion Clinic (@ImmersionClinic), Twitter, https://twitter.com/ImmersionClinic.

8 Brief for Appellee at 38, *Sartori v. Schrodt*, 2021 WL 6060975, No. 19-15114-BB (11th Cir. Dec. 20, 2021), https://www.law.georgetown.edu/wp-content/uploads/2020/12/12.14.2020-Appellee-Schrodts-brief.pdf.

9 Opening Brief for Appellant at 29, *Ziccarelli v. Dart,* 35 F.4th 1079 (7th Cir.) ECF No. 26, https://www.law.georgetown.edu/wp-content/uploads/2020/10/26-Ziccarelli-Opening-Brief-public-filing-10.16.20201.pdf, *cert. denied*, 143 S. Ct. 309 (2022).

- "This Court should reverse the district court's judgment and remand the case for further proceedings."[10] (The district court had granted our opponent's motion to dismiss for failure to state a claim, so more pre-trial proceedings were necessary before any trial plausibly could occur.)
- "This petition for initial hearing en banc should be granted."[11] (Because all we wanted the court to do was grant our request for en banc review before a panel even heard the appeal!)
- "The petition for a writ of certiorari should be denied."[12] (Because all we wanted was for the Supremes to see the case our way and deny cert.)

C. More complex conclusions and a few examples

Sometimes more complex conclusions are needed to serve your clients and meet FRAP 28(a)(9)'s requirements. The situations demanding a complex conclusion are too numerous to list, and, besides, the specifics needed in any given conclusion generally will turn on the peculiarities of the case. But it's fair to say that more complexity and nuance tend to be called for when (1) the relief sought or opposed varies across multiple claims; (2) there's more than one party on one or both sides of the "v"; (3) relief is sought or opposed in the alternative; (4) threshold rulings will (or will not) make other relief necessary or sensible; (5) the standard of review is not the same across all issues; and (6) the issues decided below were not all decided at the same stage of the litigation (motion to dismiss, summary judgment, trial verdict, post-trial, etc.).

Below, I describe three appeals litigated by Georgetown Law's Appellate Courts Immersion Clinic involving varied relief, multiple parties, procedural nuances, and other complexities. We felt that these factors required us to go beyond the no-muss, no-fuss conclusion. Note that, in each case, we tried to obey FRAP 28(a)(9)'s insistence on specificity, while not running afoul of its demand for brevity. That is, we were as specific as the circumstances required, but tried to be economical. And, as in the no-muss, no-fuss context, we concluded without repetitive argument.

10 Opening Brief of Plaintiffs-Appellants at 15, *Hamilton v. Dallas Cnty.*, 42 F.4th 550 (5th Cir.) (No. 21-10133), ECF No. 00515862647, https://www.law.georgetown.edu/wp-content/uploads/2021/05/Opening-brief.pdf, reh'g en banc granted, opinion vacated, 50 F.4th 1216 (5th Cir. 2022).

11 Petition For Initial Hearing En Banc at 13, *Hamilton v. Dallas Cnty.*, 42 F.4th 550 (5th Cir.) (No. 21-10133), ECF No. 00515785411, https://www.law.georgetown.edu/wp-content/uploads/2021/03/Petition-for-hearing-en-banc.pdf, reh'g en banc granted, opinion vacated, 50 F.4th 1216 (5th Cir. 2022).

12 Respondent's Brief in Opposition at 37, *Bd. of Cnty. Comm'rs v. Exby-Stolley*, 141 S. Ct. 2858 (2021) (No. 20-1357), https://www.law.georgetown.edu/wp-content/uploads/2021/06/Exby-Stolley-opposition-5.26.2021-ready-to-print.pdf.

Case 1. In this appeal, all our clients' claims—employment discrimination claims under Title VII of the Civil Rights Act of 1964 and an analogous state statute, a federal equal protection claim, and a couple of different retaliation claims under the same federal and state statutes—had each been thrown out by the district court on pre-trial motions. Our clients had sued two defendants—a city and an individual—but only the equal protection claim and the state statutory claims ran against the individual. Moreover, on the statutory discrimination and equal protection claims (but not on the retaliation claims), our clients argued below (and maintained on appeal) that they were entitled to partial summary judgment as to liability but not as to relief. So, in this appeal, our conclusion needed to be quite particularized:

> This Court should reverse the district court's judgment in favor of Defendants on Plaintiffs' Title VII, Ohio Civil Rights Act, and Equal Protection Clause claims. It should also reverse the district court's denial of Plaintiffs' motion for partial summary judgment on their Title VII discrimination claims against the City and their Ohio Civil Rights Act and Equal Protection Clause claims against both Defendants and instruct the district court to grant judgment in Plaintiffs' favor as to liability on those claims. Finally, the Court should remand the retaliation claims for trial.[13]

Case 2. Here our client was seeking alternative remedies. So, we couldn't simply say that we wanted reversal or affirmance; we needed to spell out the alternatives. Our client was ordered removed from the U.S. in absentia without an inquiry into the merits of her asylum claim, and she wanted the Board of Immigration Appeals to rescind the removal order or, at the least, the Board to remand to give an Immigration Judge the opportunity to consider the case on its merits.[14] Here's how we put it: "This Court should grant the petition for review, reverse the Board's order, and remand to the Board for rescission of the removal order. Alternatively, the Court should remand the case to the Board with instructions to return the case to the Immigration Judge for a ruling on the merits."

Case 3. Finally, in a cross-appeal brief, we argued that the district court properly vacated our client's sentence, but improperly re-imposed his supervised-release term, without providing any reasoning. On the former issue, we sought affirmance (of course). On the latter issue, we weren't certain that we could get outright reversal, so, alternatively,

13 Opening Brief of Plaintiffs-Appellants at 53, *Threat v. City of Cleveland*, 6 F.4th 672 (6th Cir. 2021) (No. 20-4165), ECF. No. 19, https://www.law.georgetown.edu/wp-content/uploads/2021/01/Opening-Brief.pdf.

14 The brief described is not publicly available (copy on file with author).

we sought remand with directions to the district court to justify any supervised release:

> This Court should affirm the district court's grant of Mitchell's habeas motion and vacatur of Mitchell's sentence. But this Court should reverse the district court's imposition of three years of supervised release. Alternatively, this Court should remand and direct the district court to consider, with explanation, the supervised release term, if any, that is appropriate.[15]

III. The connection between conclusions and argument ordering in complex, multi-issue appeals

If you're litigating a simple, one-issue appeal, try to end your argument with a bang, and then move right into your simple, one-or-two-sentence conclusion (as just discussed in section II).

But there's a problem in many (if not all) complex, multi-issue appeals. Often, the writer is forced to end a brief with an argument that is weaker or less important than their other arguments or with an argument for which the relief is not optimal.

How should you order the arguments in, say, a three-issue appeal? The answer may be as simple as putting the strongest claim first, the next-strongest claim second, and the weakest claim last—with all arguments judged in terms of legal strength.

But there are often confounders. What if the client's strongest claims, legally, are the ones that get the client the least cash or the least desirable injunction? What if your client is a repeat player or ideological litigant who wants to lead with a particular argument because they care more about their long-term strategic interests than winning "big" in the particular case? And then, there may be a perceived need to lead with an argument that is relatively weak legally but that appears to be logically antecedent. That antecedent question may be something as deeply ingrained in our legal culture as a prerequisite to suit (such as standing or the statute of limitations) or something as quirky as a three-part doctrinal analysis that the case law happens to set forth in a particular order, such that any deviation would appear naïve, defensive, or suspicious.

The conundrum is that application of one ordering criterion (say, legal strength) may conflict with another (say, that prevailing on the strongest argument will give your client almost no bucks). There's no

15 Brief of Appellee/Cross-Appellant at 49, *United States v. Mitchell*, 905 F.3d 991 (6th Cir. 2018) (Nos. 17-5904/17-5905/17-5906), ECF No. 34, https://www.law.georgetown.edu/wp-content/uploads/2018/07/Mitchell-v.-USA-opening.pdf.

easy answer for how to order arguments when the considerations I've just discussed point in different directions, and I'm not attempting to resolve the problem in this essay. Suffice it to say for now that, like most knotty appellate-writing problems, the key is not to wing it. Don't just throw up on the paper. Be conscious about the argument ordering problems just described, trying to ensure that you've properly balanced the competing considerations.

My principal concern in this essay, however, is different: the relationship between argument ordering and conclusions. As indicated, many times ordering conventions will require the advocate to end the brief with an argument that is less powerful or less important than their earlier arguments. In many cases, just the fact that the argument appears last will convey a message of weakness or lack of importance (often a reason, by the way, to keep back-end arguments as short as possible).

So, what's a brief writer to do? One always wants to end with a (relative) bang, not a whimper. But for the reasons already given in my discussion of conclusions, and as underscored by the rule makers' preferences for brevity and specificity, and their focus on stating the relief sought, the answer is not to lard up your conclusion with a summary of your earlier, favorite arguments or with some rant about why you're right. Judges won't go for that.

Here's what I suggest instead. Whenever possible, before the conclusion, come up with some effective way to end your secondary or tertiary arguments by drawing on the themes or substance of your earlier arguments. To make this technique work well, you need to make plausible connections, and sometimes that can't be done well. But often it is possible to conclude your last argument by creating a tie to an earlier one. Here are four examples, the first hypothetical and the latter three based on real briefs.

Case 1. You are handling a civil rights appeal for a plaintiff who claims, first, that the police conducted a warrantless search of her home in violation of the Fourth Amendment, and second, that after arresting her, the police obtained a coerced (and false) confession in violation of her due-process rights. Assume that your appellate brief pursues both claims, but sensibly argues the Fourth Amendment claim first because it is legally stronger and so ends with the weaker due-process claim. As noted, a good appellate advocate generally seeks a way to end with a bang, so tethering the due-process claim back to the Fourth Amendment claim through a theme of pervasive government intrusion and misconduct may be the way to go—after all, the same police department that conducted the warrantless search also allegedly coerced the confession. Perhaps there's even something that an officer said in conducting the search that

presaged the later misconduct at the police station. If so, you may want to use that as you end the brief.

Case 2. Those of you who've litigated Freedom of Information Act cases know that plaintiffs will argue, first, that they are entitled to government records because the government has not sustained its claim of a statutory exemption from disclosure, such as the exemptions protecting trade secrets, certain privileges, or personal privacy.[16] But plaintiffs will often argue, as a fallback, that if they're not entitled to the records in their original, pristine form, the government must redact only the exempt parts and release the rest, as the statute requires when a record is "reasonably segregable."[17] The latter argument is often important to unearthing at least some important government information, and the possible alternative—leaving empty handed—is worse. Your brief will of course start by arguing that you are entitled to everything, and it's a bummer to end a brief with the segregability argument because it presupposes that the government is right on the key legal issue—that the records are (at least in part) exempt from disclosure.

But the plaintiff's lawyer may be able to finesse this problem. The theme is government secrecy, including perhaps a government cover-up or avoidance of embarrassment, and you should be able to press that theme as to both arguments. That is, even though the government's right to an exemption and its ability to avoid segregation are legally and logically distinct, it should be possible to counter the government's argument that it is unable to "reasonably" segregate by pointing out its misguided interest in secrecy. In doing so, you may be able to briefly remind the reader of the government's earlier impermissible exemption claims, thus ending on a relatively high note.[18]

Case 3. We recently briefed an employment-discrimination appeal involving three legally distinct, but related issues: allegations of discrete, serious acts of discrimination, a hostile work environment, and the employer's retaliation against our client's workplace opposition to the alleged discrimination. We viewed each argument as quite strong and important. It made sense in our judgment to begin with the discrimination arguments and to end with the retaliation argument. After all, allegations of retaliation for someone's opposition to discrimination will be fully appreciated only after the allegations of the discrimination are

16 *See* 5 U.S.C. § 552(b)(4)–(6).

17 5 U.S.C. § 552(b).

18 That's what we tried to do at the end of a summary judgment reply brief in a Freedom of Information Act case. *See* Plaintiff's Reply Memo in Support of His Motion for Summary Judgment at 11, *Benavides v. Bureau of Prisons*, 774 F. Supp. 2d 141 (D.D.C. 2011) (No. 09-2026), ECF No. 19, https://perma.cc/X8NZ-EBYW.

themselves understood. Some of the components of a retaliation claim can come across as dry and technical, which is not the ideal way to end a brief. But the doctrine also demands a connection between the employee's opposition and the employer's discriminatory acts, and by stressing the latter toward the end of the brief, we could end in a way that was legally germane to the retaliation claim while bringing the reader back to the alleged discrimination at the heart of the case.[19]

Case 4. We recently handled an appeal that presented unusual argument-ordering challenges. The case—arising under Title VI of the Civil Rights Act of 1964—involved allegations of serious racial harassment against our client by a coach and teammates on a university athletic team and the university's alleged failures to end or curtail the harassment. The university sought summary judgment, arguing both that our client's claim was barred by the applicable statute of limitations and that, even if the claim was timely, the harassment committed by its coach and students was not attributable to the university under Title VI. To oversimplify a bit, on the former issue, if a three-year limitations period applied, our client's claim was indisputably timely, but if a one-year period applied, our client's claim was timely only if we could show that the persistent racial harassment constituted a "continuing violation" that reached into the one-year limitations period.[20] The district court had tossed the case on the ground that a one-year (rather than a three-year) statute of limitations applied and that our client had not shown a continuing violation that extended into the one-year period.

On appeal, we pursued three arguments: (1) that the three-year limitations period applied; (2) that, even if it didn't, our client was the victim of a continuing violation that was timely pursued under the one-year limitations period; and (3) that, on the merits, the university had violated Title VI. The traditional way of briefing these issues would be to argue the two timeliness points first because statute-of-limitations questions are typically viewed as logically antecedent or "threshold" issues that must be addressed before the merits.

But we didn't want the case to be seen from this traditional perspective. That would require us to address the principal threshold issue first, and that question—whether a three-year or one-year limitations period applied—demanded a quite abstract, technical, and lengthy analysis of federal common law divorced from the gruesome allegations

19 Opening Brief of Plaintiff-Appellant, *Wallace v. Performance Contractors, Inc.*, 57 F.4th 209 (5th Cir. 2023) (No. 21-30482), ECF No. 00516074239, https://perma.cc/HMA9-3694.

20 *See Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 115–18 (2002) (discussing the continuing violation doctrine and its relationship to claim accrual for limitations purposes).

of racial harassment and institutional indifference at the heart of the case. Moreover, we felt that the reader could not, as a legal matter, fully appreciate our back-up statute-of-limitations argument—based on a continuing violation—without understanding the full breadth of the racial harassment over a multi-year period.[21]

So, we took the non-traditional approach—one that might, at first, confound or even disturb the reader. We began with the merits of the Title VI claim[22] and then dealt with the supposed "threshold" issues—first arguing that the three-year limitations applied and then arguing that, in any event, our client's claim was timely under the continuing-violation doctrine, under which the limitations period in a harassment suit starts with the first occurrence in a series of related harassing events.[23] This allowed us both to start with what mattered to the client—hitting the reader between the eyes at the outset with the allegations of egregious harassment—and end with a summary of the same harassment because, as just noted, an understanding of the entire pattern of harassment was critical to our continuing-violation argument. With this approach, we avoided any concern of ending with a whimper. If you take this tack in a brief—bucking conventional argument ordering—you should first explain why you are doing it.[24]

In all events, to counter the endemic problem of ending a multi-issue brief with a relatively weak or seemingly less-important argument, try to end on a high note by adjusting the order of the arguments, as we did in our Title VI case, or with the thematic approach I've described. And then glide right into your punchy, precise, relief-based conclusion, shorn of repetitive argument, as the federal rule makers prefer.

21 *See* Opening Brief for Plaintiff-Appellant at 4–13, *Stafford v. George Washington Univ.*, 56 F.4th 50 (D.C. Cir. 2022) (No. 22-7012), ECF No. 1949269, https://perma.cc/F6GD-5VGV.

22 *Id.* at 19–32.

23 *Id.* at 32–49.

24 *Id.* at 19.