

**Atlanta Consumer Bankruptcy  
Skills Training  
Written and Oral Advocacy  
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**Writing Skills – Part II**

**How to Write a Brief or Memorandum of Law**

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**I.**  
**THE PURPOSE AND BENEFIT OF BRIEF WRITING**

The purpose of a brief is to persuade the court that your client is entitled to a judgment in its favor. An important by-product of brief writing is that it results in your better understanding of your client's case. If you understand your client's case well, you are going to be a better and more successful lawyer.

**II.**  
**WHAT PERSUADES A JUDGE**

**A. A Judge wants to do the right thing.**

You should be sensitive to the justice of your cause. When a judge looks at himself in the mirror in the morning, he wants to be able to say that yesterday he did justice, and for most trial judges, such as bankruptcy judges, merely calling balls and strikes is not justice.

**B. What a judge will decide is the right thing is not always predictable.**

People, including bankruptcy judges, have a natural sympathy for the weak and downtrodden. In bankruptcy parlance these are the poor but honest debtors. A major purpose of bankruptcy legislation is the discharge of poor but honest debtors. Where the bankruptcy judge has discretion, he will often exercise it in favor of the poor but honest debtor. But a judge will often conclude that it is more just to apply the law as it is clearly meant to be applied than to bend the law to help the weak or downtrodden. This is partially expressed in the concept of applying a statute according to its "plain meaning," even if that results in an inequitable result. Indeed, as much as judges may have sympathy for the weak or downtrodden, the judge is much more comfortable working within a framework of laws than merely having a roving commission to do equity. A judge would feel very uncomfortable adjudicating case unguided by the law.

But judges want to ameliorate harsh laws. This is often done by finding facts that distinguish a case from the case before him from the case to which the harsh law would apply.

**C. The judge is not deciding which lawyer is better or which brief is better.**

You should disabuse yourself of the notion that you are the most important part of the case. You can thoroughly out-lawyer your opposing counsel and still lose. The court focuses almost exclusively on the parties. The judge believes that whatever the outcome of the particular case that you are arguing, you will appear again and again in other cases. The judge is keenly aware that the brunt of his judgment will be borne by the parties.

**D. Thus, the lawyer needs to be aware of the justness of his case.**

When you consider seeking a judgment from the court, you should never neglect those facts that put your client in a sympathetic light. If your client is the large consumer creditor who seemingly has the law on its side, you should still not rely on the law alone, but should seek to put your client in a sympathetic light, as, say, by showing that your creditor is an upright lender which is being put upon by a debtor who is less than poor and honest.

**III.**

**THE THREE STAGES OF WRITING A BRIEF**

**A. The Memorandum to Yourself**

The first stage is to write a memorandum to yourself, for purpose of informing yourself of the facts and the law and thus of the merits of your case. When you finish this draft, you should have a very good idea how the issue will be decided.

**B. The Enhanced Memorandum**

The second stage is for you to enhance this memorandum by converting it into a clear and cogent exposition for a reader other than yourself. The difference between this draft and the first draft is that in preparing the first draft, you were merely writing for yourself. In this draft, you

are undertaking to convey what you have learned to someone else. This is the hardest part of the brief-writing process.

**C. The Brief**

The third stage is converting the enhanced memorandum into a brief. This is not difficult. The enhanced memorandum should set forth the case dispassionately. The brief sets forth much the same facts and law as the enhanced memorandum, but the brief seeks to persuade.

**IV.**

**THE FIRST DRAFT: A MEMORANDUM TO YOURSELF**

**A. The Facts**

The most important significant part of any case is the facts. In most cases, judges focus much more on the fine points of the facts than on the fine points of the law. You should be painstaking in your review of the facts. You must start by writing out a rather complete statement of the facts. At this stage, you should be over-inclusive, rather than under-inclusive. You should also check the accuracy of your facts as you write them out. Thus, you might have an idea of what a contract provides, but if you review the contract to confirm your impression, you may find, to your surprise, that the contract provides something different, something significantly different.

You should write out your facts chronologically. By doing so, you will see relationships that you did not imagine. How or why the parties acted as they did will become startlingly clear to you.

Dale Carnegie discusses the importance of gathering facts in his book, "How to Stop Worrying and Start Living." In one chapter he writes of the importance of analyzing problems. He advises, "1. Get the facts. 2. Analyze the facts. 3. Arrive at a decision and then act on that

decision. He asks, “Why is so important to get the facts?” He answers that unless we have the facts we can’t possibly even attempt to solve our problems intelligently.

**B. The General Propositions of Law**

You should now apply the major principles of law. We are not talking about researching in depth. We are talking about identifying the most relevant statutory sections and the most relevant cases. But we are talking about reading these major authorities with care and setting them forth in detail to make sure that you understand exactly what they say. Thus, it is not good merely to select a favorable quotation from the case without setting forth the procedural context of the case and its holding. You may be led by such a quotation to think erroneously that the case is favorable to you when it is not.

**C. The Answer is Now Popping Out**

At this point, you are like a scientist, or like Sherlock Holmes, applying some chemical reagent to the stains to determine whether or not they are blood stains. When you have been very careful with the facts and understand well the major authorities, the correct conclusion should be popping out.

**V.**

**THE SECOND DRAFT: THE ENHANCED MEMORANDUM**

**A. Clarity**

The memorandum that you have written for yourself is not what you would write for others. When you wrote for yourself, you did not know exactly what you would find in the way of facts and law and exactly what your conclusion would be. Now, as you write this second draft, you know, and you are going to share what you have learned with the reader. Your goal should be to make it as easy as possible for the reader to understanding what he is reading and why he is reading it. The hardest part of writing is to present a complex subject simply and

clearly. But that should be what you strive to do. In short, the reader should feel that understanding what you are saying is as easy as eating ice cream.

### **B. Introduction.**

You should tell the reader at the beginning why he is reading the memorandum. Do not begin by launching into the facts that you laid out in detail in chronological order in your first draft. The reader wants to know why he is reading this memorandum and what he should be looking for. Thus, you should write an introduction that sets forth the issue, the conclusion and a brief explanation of why you reached the conclusion.

### **C. Setting out the facts.**

Because of your introduction to the memorandum, the reader now knows, as he reads the facts, what facts are likely to be material. In the fact section of your memorandum, you can cut down on the facts, so as to eliminate those that are not material or do not provide helpful background. You can also reorganize the factual presentation so as to make it easier to understand them. But you should be careful in eliminating facts. A thorough statement of facts is of great importance.

### **D. Setting Out the law.**

In setting out the law, you should put each issue in each separate section and for each section have a heading that tells the reader what the discussion will be about. Again, set forth the in the opening paragraph or two of each section what the major legal principle is and how that principle applies to the facts of this case.

In setting out the law, you need to deal fairly and forthrightly with adverse authority. Do not dodge, duck, or ignore it. In writing this memorandum, you are still a scientist searching for truth. Dealing with the major authorities, pro and con, is more important than dealing with fine points of the law.

**E. Conclusion.**

Your conclusion should be a repetition of what you already said. If the reader does not know your conclusion until the final paragraphs of your brief, your memorandum is not well structured. As we discussed earlier, the introduction of the enhanced memorandum should set forth the conclusion and a brief statement of the basis for the conclusion. The correctness of the conclusion should be demonstrated in each section discussing the law. Thus, the final conclusion of the memorandum merely restates what you have already said.

**VI.**  
**THE BRIEF**

**A. Evaluating your Case**

At this point, you should know whether you can expect to prevail on the issues that you have been preparing to brief. If you have a good case or an arguably good case, you can turn your enhanced memorandum into a brief. If the facts or law are decidedly against you, perhaps it is time to settle.

**B. Turning the Enhanced memorandum into a Brief.**

You are now ready to turn the enhanced memorandum into a brief. As a writer of the enhanced memorandum, you were like a scientist, seeking to discover the truth. In writing a brief, you are an advocate.

Turning the enhanced memorandum into a brief is relatively easy. As with the enhanced memorandum, the brief should set for the issue and conclusion at the beginning, along with a brief explanation of the reasoning. A client who was sent a draft of a post-hearing brief that his lawyer proposed to file had this suggestion to the lawyer:

“It looks good to me. My only thought after seeing this judge in action is I wonder if it would be helpful to include right at the beginning of the document a very brief and straight forward summary of why the non-competes are unenforceable and a

summary judgment should be issued ASAP. He might get tired after reading a couple of pages and decide not to decide again.

**C. Ethical standards in Advocacy.**

Generally, the minimum ethical standards in advocacy are set rather low. The ethical duty of candor to the court allows a lawyer to omit from his brief material facts that are harmful to his case. Similarly, the ethical duty of candor to the court allows a lawyer not to bring to the court's attention adverse precedent unless it is a precedent of the controlling jurisdiction, is directly adverse to the precise position that the lawyer is advocating, and is not disclosed by opposing counsel. Rule 3.3 Georgia Rules of Professional Conduct.

**D. Effective advocacy requires more than the minimum ethical standards.**

Lawyers who write briefs that do not deal with adverse material facts or adverse authorities are not good advocates. The purpose of a brief is to persuade the judge. The opposing party will set forth, or the bankruptcy judge and his law clerk will independently discover, the adverse facts and precedents. To be persuasive, you must show why the adverse facts or precedents are not fatal to your case. There may be circumstances that ameliorate the adverse facts, or there may be grounds to distinguish or criticize the adverse precedents. If you set forth only the favorable half of your case, you have written only half a brief, and the judge will not find it very persuasive.

**E. Attacking the opposing counsel does not persuade a judge in your favor.**

Judges do not like lawyers to call each other names, nor does such name-calling persuade them for one side or the other. Often in briefing issues, a lawyer will be responding to a brief in which the opposing lawyer seems to have made outrageous statements. Enraged, the responding lawyer will be tempted to call the opposing lawyer names. The responding lawyer will be tempted to say, "Opposing counsel has cynically and purposely misled this Honorable Court,"

or “opposing counsel’s meretricious misstatement of this case is contemptible, unprofessional, and almost a fraud on this Court.”

Judge reading the briefs will react to this as you would react if you were at home reading a newspaper and your children begin to fight in front of you. Your children’s fight is an unwelcome distraction. Remember, the judge is concerned about the parties, not about the lawyers. He will find Name-calling to be an unwelcome distraction.

The most effective way to handle such an egregious misstatement by an opposing lawyer is to tone down the attack on the opposing lawyer and attack instead the opposing lawyer’s misleading statement. The best way to attack the statement is to demonstrate why it is outrageous, by citing to the record as to factual inaccuracies or by citing to the misstated case to show what it truly held. Such a demonstration is awesomely effective, while uncomplimentary adjectives as to the character of the opposing counsel are not. When you demonstrate why the opposing counsel is wrong, the judge will then draw his own conclusions about the competency and integrity of the opposing counsel.

## **VII.** **CONCLUDING OBSERVATIONS**

We have discussed how to present a case so that it will be as well received as possible. One of a lawyer’s greatest services is advising how the client’s case is likely to be received by the judge. This takes experience, maturity, and judgment. This comes only with years of living, of practicing law, and of enduring hard knocks (of which there is no shortage). But those hard knocks pay off in making you a better lawyer, if you learn from them. A successful trial lawyer once told me his secret of amassing a record of winning cases at trial. He said, “I try only the good cases.” The less than good cases, he settles. When you learn to separate the good cases from the bad, you are on your way to becoming a better and more successful lawyer.