

# How We Write, Or Why Having a Buddy Helps

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Over the course of our professional lives, we have written hundreds (by now, maybe thousands) of appellate briefs. With the rarest of exceptions, our brief-writing has been a collaborative enterprise. From initial brainstorming of arguments to the final scramble of incorporating late-breaking client edits while making word count, two heads are better than one. Sometimes we divide up first drafting and edit each other's parts after one of us integrates; sometimes one of us does the entire first draft while the other does a hard edit. Often at the end of the day it is hard to tell who wrote what after so many rounds of passing the baton. Always, the final brief has been stress-tested by an informed and critical editor who knows not quite as much about the record and the cases as the initial drafter but understands the theory of the case and the route to success.

Here we offer some insights on how having a trusted collaborator can inform and improve all the (nonlinear) stages of the writing process. We don't purport to offer a comprehensive guide, but rather provide a glimpse of how we write, and why we write together.

## **I. Initial Framing**

When we take on a new case, each of us reads key parts of the record and the governing cases. And then, together, before setting pen to paper (or fingers to keyboard), we develop our theory of the case. What is our story? Why would a nonlawyer think our client should win? What is the only fair way for the case to come

out, and why is that in our client’s favor? This story is the lifeline of the brief and needs to stay top of mind throughout the drafting and editing process. If the rules allow, we always include an introduction that sets this stage before moving on to the rest of the brief. Though we often write this introduction last, we have a sense of what it needs to say from the start.

## **II. Researching**

The primary drafter (of the whole or part of the brief) must commit to commanding the record, understanding the relevant legal rules, and then looking again and again. This is an iterative process, since a new fact may point to additional law, while legal research (or remembrance of an earlier case) may reveal how critical seemingly insignificant facts can be. A second set of eyes on an early draft (or an early brainstorming call) can help discover new lines of cases or weed out facts that are no longer relevant as arguments develop.

## **III. Drafting**

There is no single right way to get words down on a page. Sometimes it is making point headings (that you have brainstormed together in a thumbnail outline) and dumping in research notes. Sometimes clients request a detailed outline. Sometimes entire sections write themselves in a “flow.” But one thing is certain: knowing that a trusted editor has your back makes first drafting so much easier. Whether you are flummoxed about which argument should go first, are wondering whether you’ve succeeded in unpacking a complex thought, or just plain can’t stand thinking about something anymore, there is nothing better than getting something down on paper with a comment bubble explaining your frustrations in the margin, knowing that your partner stands

ready to see what you've done, kick the tires, and help point you in the right direction.

#### **IV. Revising**

Being able to take a hard look at your own writing is an important skill. We typically don't swap drafts until we have each edited our own work first. But oh, what a relief to have someone else weigh in, if even to simply say, "This doesn't make sense," or "What about this other argument that also works?" That second pair of eyes is key for readability, tone, and persuasiveness. And it helps approximate the reaction of a busy, overworked reader, who will get impatient with a brief that doesn't do its job of crystallizing the message into clear, concise, digestible prose. Having an editor who knows enough about your case, but not everything, is key. They won't get lost in the weeds and will help winnow out the unnecessary material. The primary drafter's job, in turn, is to push back and ensure that key details are not simplified away. Revising and rewriting is always easier after someone else has gone through a draft to tell you what works and what doesn't.

#### **V. Polishing**

In this last phase, the content and order of arguments is pretty much locked in, cite-checking is done, and you have dealt with comments from clients and cocounsel (itself the subject of a whole other article). Now is the time to work on transitions, get rid of your favorite phrases that are just too cute to keep (if others haven't already done so), and cut as many words as possible. Even if you are under word count, there is always more to cut, especially because we have never met a judge who isn't grateful for a shorter brief. Because there are two editors, one of you always gets away from the brief while the other has the pen. Time, distance, and persistence are key because it is often not until a third

or fourth pass that you realize which paragraph can go, or exactly why that one sentence just wasn't working. As we all know, a brief is never done; it is just filed. But having two lawyers work to perfect the brief helps get you closer to a powerful brief that does its job as crisply as possible.

Ultimately, there's a reason that publishing houses match authors with editors: involving someone other than the drafter helps create a more readable and persuasive final product, a principle that applies with special force in the appellate arena. Why? The audience — multiple law clerks and judges — is both highly discerning and pressed for time. Because so many people read and rely on your brief, there are countless ways to inadvertently irritate your busy readers. Teamwork in appellate drafting and editing allows for an interactive and iterative process that, over time, hones the brief to what really matters while preserving the details that give judges all the ammunition needed to rule in your client's favor.