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Advocacy Before the Eleventh Circuit: A Clerk's Perspective

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Appellate attorneys must tailor their advocacy to the court hearing their appeal. Each court of appeals has different jurisprudence, rules, traditions, and decision-making processes. Yet there are few articles on appellate advocacy tailored to a particular court. We wrote this article to help fill that gap. As former law clerks for the United States Court of Appeals for the Eleventh Circuit, we offer advice specifically for attorneys who practice before the Eleventh Circuit. Our advice is based on our experiences as clerks, as well as our analysis of the Eleventh Circuit's rules, procedures, and public statistics. We offer no inside information about the Court but rather our personal views on how to draft a compelling brief and present a persuasive oral argument.

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INTRODUCTION

Appellate attorneys must tailor their advocacy to the court hearing their appeal.[1] Each court of appeals has different jurisprudence, rules, traditions, and decision-making processes. Yet there are few articles on appellate advocacy tailored to a particular court. We wrote this Article to help fill that gap. As former law clerks for the United States Court of Appeals for the Eleventh Circuit, we offer advice specifically for attorneys who practice before the Eleventh Circuit.

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[1] TESSA L. DYSART & LESLIE H. SOUTHWICK, WINNING ON APPEAL 100 (3d ed., NITA 2017) (1992) ("What is important to the brief writer is to know the appellate court to which the brief is being directed.").

We aim to provide attorneys a broader understanding of appellate litigation in one of the nation's busiest circuit courts and assist them with drafting and presenting their arguments to the Court. Our advice is based on our experiences as clerks, as well as our analysis of the Eleventh Circuit's rules, procedures, and public statistics. We offer no inside information about the Court but rather our personal views on how to draft a compelling brief and present a persuasive oral argument to the Court.

This Article proceeds in three parts. We first introduce the Eleventh Circuit, exploring its history, caseload, and decision-making processes. Then, in Part II, we draw on our experiences as clerks to offer tips on drafting appellant, appellee, and reply briefs. In Part III, we offer advice on presenting oral arguments.

I. THE ELEVENTH CIRCUIT

Established in 1981, the Eleventh Circuit is the nation's second youngest federal court of appeals.[2] In 1980, the twenty-five active judges sitting on the United States Court of Appeals for the Fifth Circuit—who heard appeals arising from the federal district courts in Florida, Georgia, Alabama, Louisiana, Mississippi, and Texas—petitioned Congress to split the Fifth Circuit in half.[3] The next year, Congress did so, creating the Eleventh Circuit and the current Fifth Circuit.[4]

Congress authorized twelve judgeships for the Eleventh Circuit[5] and gave it jurisdiction over cases originating in Alabama, Florida,

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[2] *See Court Jurisdiction*, U.S. CT. APPEALS FED. CIR., http://www.cafc.uscourts.gov/the-court/court-jurisdiction (last visited Apr. 6, 2019) (noting that the United States Court of Appeals for the Federal Circuit was established in 1982).

[3] Thomas E. Baker, *Precedent Times Three: Stare Decisis in the Divided Fifth Circuit*, 35 SW. L.J. 687, 703 (1981).

[4] Fifth Circuit Court of Appeals Reorganization Act of 1980, Pub. L. No. 96-452, 94 Stat. 1994 (codified at 28 U.S.C. §§ 41, 44, 48 (2012)); *see* Charles R. Wilson, *How Opinions Are Developed in the United States Court of Appeals for the Eleventh Circuit*, 32 STETSON L. REV. 247, 248 (2003).

[5] *U.S. Court of Appeals Additional Authorized Judgeships*, U.S. CTS., http://www.uscourts.gov/sites/default/files/appealsauth.pdf (last visited Apr. 6, 2019); *see* Fifth Circuit Court of Appeals Reorganization Act of 1980 § 5.

and Georgia.[6] Today, all of the Court's judgeships are filled. Alabama judges occupy three seats (Judges Ed Carnes, William H. Pryor, Jr., and Kevin C. Newsom); Georgia judges occupy four seats (Judges Beverly B. Martin, Jill A. Pryor, Elizabeth L. Branch, and Britt C. Grant); and Florida judges occupy five seats (Judges Gerald Bard Tjoflat, Stanley Marcus, Charles R. Wilson, Adalberto Jordan, and Robin S. Rosenbaum).[7] The Court is headquartered in Atlanta, and the Chief Judge is Judge Ed Carnes, who is based in Montgomery.[8]

The Eleventh Circuit is one of the country's busiest circuit courts.[9] In 2017, it resolved more cases (nearly 6,400) than any other circuit, save the Fifth and Ninth Circuits.[10] And the Court did so with just eleven active judges and a large capital docket.[11] In

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[6] Fifth Circuit Court of Appeals Reorganization Act of 1980 § 2; *see About the Court,* U.S. CT. APPEALS ELEVENTH CIR., http://www.ca11.uscourts.gov/about-court (last visited Feb. 17, 2019).

[7] *See Eleventh Circuit Judges*, U.S. CT. APPEALS ELEVENTH CIR., http://www.ca11.uscourts.gov/eleventh-circuit-judges (last visited Apr. 6, 2019).

[8] *Hon. Ed Carnes*, U.S. CT. APPEALS ELEVENTH CIR., http://www.ca11.uscourts.gov/judges/hon-ed-carnes (last visited Apr. 6, 2019).

[9] *See* Andrew L. Adler, *Extended Vacancies, Crushing Caseloads, and Emergency Panels in the Federal Courts of Appeals*, 15 J. APP. PRAC. & PROCESS 163, 174 (2014).

[10] *U.S. Court of Appeals—Decisions in Cases Terminated on the Merits, by Nature of Proceeding, During the 12-Month Period Ending December 31, 2017*, U.S. CTS., https://www.uscourts.gov/statistics/table/b-5/statistical-tables-federal-judiciary/2017/12/31 (last visited Feb. 11, 2019) [hereinafter *Terminated on the Merits 2017*].

[11] *See Judicial Vacancy List for June 2017*, U.S. CTS., https://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2017/06/vacancies (last visited Apr. 6, 2019) (noting that as of June 2017, there was one vacancy on the Eleventh Circuit); *U.S. Courts of Appeals—Civil and Criminal Cases Commenced, by Circuit and Nature of Suit or Offense, During the 12-Month Period Ending June 30, 2017*, U.S. CTS., https://www.uscourts.gov/sites/default/files/data_tables/stfj_b7_630.2017.pdf (last visited Apr. 10, 2010) (noting that twenty-one habeas corpus death penalty appeals were commenced in the twelve months prior to June 30, 2017, more than any other circuit besides the Fifth Circuit). Capital cases are some of the most difficult, time-consuming cases for appeals courts. *See* Commonwealth v. Spotz, 18 A.3d 244, 336 (Pa. 2011) (Castille, C.J., concurring) (noting that capital cases

contrast, the Fifth Circuit had fourteen active judges,[12] and the Ninth Circuit had twenty-four.[13] More than 2,000 of the cases that the Eleventh Circuit resolved in 2017 were habeas corpus cases, about 1,400 were criminal cases, and the remainder were civil cases.[14]

The Eleventh Circuit's caseload has increased dramatically over the years, but the expediency with which it decides cases has not been compromised. In 1981, the Court resolved about 2,200 cases[15]—nearly 4,200 less than in 2017.[16] Because Congress has never authorized additional judgeships for the Court,[17] the number of cases per active judge has grown from about 183 cases in 1981 to 530 cases in 2017.[18] During 2017, active judges in the Fifth and Ninth Circuits each had roughly the same number of cases to resolve as those in the Eleventh Circuit.[19] Yet the median time between the filing of a notice of appeal and a decision in the Eleventh Circuit

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"are far and away the most time-consuming of the cases on our appeal docket"); State v. Marshall, 586 A.2d 85, 222 (N.J. 1991) (Handler, J., dissenting) ("[T]he Supreme Court itself has consumed untold hours and expended enormous effort in deciding capital cases on direct appeal. Those appeals are onerous.").

[12] LYLE W. CAYCE, UNITED STATES COURT OF APPEALS FIFTH CIRCUIT, JUDICIAL WORKLOAD STATISTICS: CLERK'S ANNUAL REPORT, JULY 2017 - JUNE 2018, at 19 n.5 (2018), http://www.ca5.uscourts.gov/docs/default-source/default-document-library/2018-annual-report-public.pdf?sfvrsn=2.

[13] OFFICE OF THE CIRCUIT EXEC., 2017 ANNUAL REPORT: UNITED STATES COURTS FOR THE NINTH CIRCUIT 46 (2018), https://www.ca9.uscourts.gov/judicial_council/publications/AnnualReport2017.pdf.

[14] *Terminated on the Merits 2017*, *supra* note 10.

[15] Thomas E. Baker, *The Eleventh Circuit's First Decade Contribution to the Law of the Nation, 1981–1991*, 19 NOVA L. REV. 323, 325–26 (1994).

[16] *Terminated on the Merits 2017*, *supra* note 10 (stating that 6,391 appeals were terminated in 2017).

[17] *U.S. Court of Appeals Additional Authorized Judgeships*, *supra* note 5.

[18] In 2017, the Eleventh Circuit resolved 6,371 appeals with eleven active judges on the Court. *Terminated on the Merits 2017*, *supra* note 10; *Judicial Vacancy List 2017*, *supra* note 11.

[19] In 2017, the Fifth Circuit had 540 cases per active judge, and the Ninth Circuit had 508. *See* CAYCE, *supra* note 12, at 19 n.5 (stating number of active judges in the Fifth Circuit in 2017); OFFICE OF THE CIRCUIT EXEC., *supra* note 13, at 46 (stating number of active judges in the Ninth Circuit in 2017); *Terminated on the Merits 2017*, *supra* note 10; *Judicial Vacancy List 2017*, *supra* note 11.

was just 9.5 months, compared to 10.8 months in the Fifth Circuit and 14.9 months in the Ninth Circuit.[20]

The Eleventh Circuit has achieved this efficiency by, among other things, utilizing a Staff Attorney's Office,[21] maintaining a non-argument calendar,[22] and inviting Circuit and District Court judges to sit on oral argument panels.[23] These case management techniques shape the Court's review process. Attorneys should therefore be attuned to them.

The Staff Attorney's Office commences the Court's review process. The Office not only conducts an "initial review of all appeals for the purpose of determining jurisdiction"[24] but also starts the process for determining whether an appeal should be placed on the non-argument calendar.[25] Once briefing is complete, staff attorneys review the briefs and analyze whether (1) "the appeal is frivolous[,]" (2) binding authority resolves the dispositive issues, or (3) the briefs and record adequately address the issues.[26] If the staff attorneys answer any of these questions in the affirmative, then they prepare a memorandum and send the appeal to a judge on the non-argument calendar.[27] That judge serves as the "initiating judge"—the first judge on the three-judge non-argument panel to review the appeal.[28]

The initiating judge is responsible in the first instance for determining whether oral argument is appropriate, but all three members of the panel have an opportunity to flag an appeal for argument. "If the initiating judge believes that the appeal warrants oral argument,"

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[20] *U.S. Court of Appeals—Median Time Intervals in Months for Civil and Criminal Appeals Terminated on the Merits, by Circuit, During the 12-Month Period Ending September 30, 2017*, U.S. CTS., https://www.uscourts.gov/sites/default/files/data_tables/jb_b4a_0930.2017.pdf (last visited Apr. 6, 2019).

[21] *See Staff Attorney's Office*, U.S. CT. APPEALS ELEVENTH CIR., http://www.ca11.uscourts.gov/staff-attorneys-office (last visited Feb. 17, 2019).

[22] *See* 11TH CIR. R. 34-3.

[23] *See* Adler, *supra* note 9, at 167–68, 179.

[24] *See Staff Attorney's Office*, *supra* note 21.

[25] Wilson, *supra* note 4, at 249.

[26] 11TH CIR. R. 34-3(b)(1)–(3).

[27] *See* Joel F. Dubina, *How to Litigate Successfully in the Eleventh Circuit*, 29 CUMB. L. REV. 1, 3 & n.10 (1999).

[28] Wilson, *supra* note 4, at 249.

then she returns the record to the clerk and the clerk will schedule oral argument.[29] "If, however, the initiating judge decides that oral argument is unnecessary," she prepares a draft opinion and forwards "the entire file, along with the draft opinion, . . . to the second member of the panel."[30] The second judge "can sign on to the opinion prepared by the initiating judge or send the file back so that the clerk can schedule it for oral argument,"[31] and "[t]he third member of the panel is vested with the same discretion."[32]

Thus, when an appeal is decided on the briefs, the panel unanimously determined that oral argument was not necessary. As we will explain in Part III, the Court resolves most appeals without oral argument. Only around 11% of appeals receive oral argument[33]—a steep decline from 1990, when 45.7% of appeals were argued.[34]

Since the composition of a panel can bear on the outcome of an appeal, attorneys should be aware of which judges participate in deciding Eleventh Circuit appeals. When an appeal is assigned to the argument calendar, its panel typically includes two active Eleventh Circuit judges and a visiting judge, or two active Eleventh Circuit judges and a senior Eleventh Circuit judge. In March 2018, for example, most of the opinions that the Court issued after hearing oral argument had panels with these compositions.[35] In contrast, non-argument panels generally include only active and senior Eleventh Circuit judges.[36]

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[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] DYSART & SOUTHWICK, *supra* note 1, at 12; *see infra* notes 196–98 and accompanying text.

[34] DYSART & SOUTHWICK, *supra* note 1, at 12.

[35] *Published Opinions Log*, U.S. CT. APPEALS ELEVENTH CIR., http://www.ca11.uscourts.gov/published-opinions-log (last visited Apr. 8, 2019) (click "Search Published Opinions," then "Search by Date of Issue" by entering "2018-03" and clicking "Search"); *Oral Argument Recordings*, U.S. CT. APPEALS ELEVENTH CIR., http://www.ca11.uscourts.gov/oral-argument-recordings (search by "Argument Date" by selecting "2018" and "March").

[36] Dubina, *supra* note 27, at 3.

Of course, the Eleventh Circuit's procedures are not the only feature of the Court that impacts appeals—the Court's substantive case law shapes the experience of litigating before the Court as well. As is true for every circuit court, the Eleventh Circuit's jurisprudence is more developed in some areas than others. For example, employment discrimination and 42 U.S.C. § 1983 cases are common in the Eleventh Circuit,[37] so its precedent on Title VII of the Civil Rights Act of 1964 and qualified immunity is robust. So, too, is the Court's precedent on criminal sentencing and the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA").[38] As law clerks, we reviewed sentencing and AEDPA appeals more than any other type of appeal. When litigating appeals like these, for which the Court's case law is well developed, attorneys must study the governing precedent, which sometimes differs from the precedent in other circuits. It is hard to imagine a quicker way to lose credibility than to submit a sentencing brief in the Eleventh Circuit advocating, based on only Sixth Circuit case law, that the defendant's sentence was or was not substantively unreasonable.

On the other hand, a number of areas of law are less developed in the Eleventh Circuit. While clerking, we rarely saw, for instance, antitrust and securities cases. For those areas of law, advocates should begin with Eleventh Circuit precedent, to the extent it exists, and incorporate persuasive authority from multiple circuits, rather than assuming that the Court will follow the approach of one particular circuit over another.[39]

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And so, like every court of appeals, the Eleventh Circuit has its own jurisprudence, rules, traditions, and decision-making processes.

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[37] *See* MICHAEL R MASINTER, SHEPARD BROAD COLL. OF LAW, NOVA SOUTHEASTERN UNIV., SUMMARY OF SIGNIFICANT ELEVENTH CIRCUIT DECISIONS AUGUST 1, 2017 THROUGH NOVEMBER 18, 2018, at 1, 13–15, 18–34 (2018), https://www.law.nova.edu/summary-of-significant-eleventh-circuit-decisions.pdf.

[38] *See id.* at 41.

[39] *See* DYSART & SOUTHWICK, *supra* note 1, at 87–88.

The Court, in other words, has features unique to it that shape how appeals before it unfold—features which advocates must take into account when litigating their appeals.

II. BRIEFING

An effective Eleventh Circuit brief is clear and credible. Every appeal presents a problem that the Court must solve, and the parties' briefs are competing guides on how to do so.[40] Each advocate should want the judges and clerks to go back to her brief, concluding that it is the better guide. With its heavy caseload, the Court has limited time to decode a confusing brief,[41] and no panel should be saddled with a brief that lacks credibility—an untrustworthy guide is no guide at all.

In this Part, we offer advice on drafting a clear and credible Eleventh Circuit brief. We first provide tips that apply to all briefs, then we specifically address appellant briefs, appellee briefs, and reply briefs.

A. *Advice Applicable to All Briefs*

The first step in drafting a clear and credible brief is knowing the Eleventh Circuit's norms and expectations. Only if an advocate understands the Court's norms and expectations can she avoid missteps that undermine the clarity and credibility of her briefs.[42] For example, because the Eleventh Circuit regularly reviews AEDPA appeals, a brief can omit a lengthy, generalized discussion of AEDPA's historical development without sacrificing clarity.[43] But if an appeal involves a statute about which the Court has no or little case law, then it may be helpful to the Court to read about the statute's background before taking a close look at the statute's text.[44]

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[40] *See In re* Witt, 481 B.R. 468, 473 (Bankr. N.D. Ind. 2012) (stating that the "ultimate purpose of any brief" is to serve "as an effective aid to help guide the court's decision").

[41] DYSART & SOUTHWICK, *supra* note 1, at 16.

[42] *See* ANTONIN SCALIA & BRYAN A. GARNER, MAKING YOUR CASE: THE ART OF PERSUADING JUDGES 64–66 (2008).

[43] BRYAN A. GARNER, THE WINNING BRIEF 129–30 (3d ed. 2014).

[44] *See* SCALIA & GARNER, *supra* note 42, 48–51.

There are two norms in the Eleventh Circuit that are essential to an effective brief: collegiality and candor. The Court expects collegiality among its judges, district court judges, and members of the bar.[45] Briefs must adhere to this expectation.[46] Disparaging the district court, an adversary, or a prior panel's decision will undermine a brief's credibility.[47] Advocates should identify the logical flaws in a district court opinion, their adversary's arguments, and prior panel decisions, but strike a civil, respectful tone.[48] Indeed, maintaining collegiality is not just important for the appeal at hand, it is important for future appeals. The Court remembers attorneys. If an advocate develops a poor reputation, then her credibility will suffer, casting a shadow over future briefs.[49]

The Eleventh Circuit also expects candor. It has thousands of cases to resolve each year—briefs must get to the point and be frank about the appeal's issues, facts, and applicable law. Flowery language lacks pertinence, and grand assertions about an appeal's legal significance, or attempts to spin the facts and the law, will backfire.[50] The judges and law clerks are experts at spotting exaggeration and, armed with online databases and a nationwide electronic docketing system, are quick to identify inaccurate record and case cites.[51] Former Chief Judge of the Eleventh Circuit Joel Dubina put it plainly: "A lawyer should not embellish and exaggerate in the Eleventh Circuit."[52]

Collegiality and candor alone, though, will not guarantee a clear and credible brief. The Eleventh Circuit has several other norms and expectations that should inform all briefs. For instance, the Court

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[45] DYSART & SOUTHWICK, *supra* note 1 at 132.

[46] *Id.*

[47] *Id.*; *see* Carroll v. Van Boxtel, 2009 WI App 174, ¶13 n.5, 322 Wis. 2d 574, 776 N.W.2d 288 ("It is also a cardinal rule of effective appellate advocacy to avoid disparaging the lower court.").

[48] SCALIA & GARNER, *supra* note 42, at 34–35, 52–53.

[49] *Id.* at 205–06.

[50] Brian K. Keller, *Whittling: Drafting Concise and Effective Appellate Briefs*, 14 J. APP. PRAC. & PROCESS 285, 292–93 (2013).

[51] *See id.*

[52] Dubina, *supra* note 27, at 5.

expects brevity.[53] Few briefs require the number of words permitted.[54] Concise briefs show respect for the Court because they demonstrate that the advocate took the time to hone her arguments.[55] Also, advocates should avoid relying on unpublished decisions in the Federal Appendix. Those decisions are not precedential,[56] and the Court will rarely, if ever, rely on them to resolve an appeal. Finally, style and presentation matter. The Court expects clean, professional briefs.[57] A brief should conform to the Bluebook and adhere to the Court's formatting rules.[58] Admittedly, one of us once believed that Bluebooking and formatting rules were unimportant. Clerking changed that. Commitment to the rules bolsters credibility, signaling to the Court that the brief is the product of a detailed and deliberate process.[59]

B. *Appellant Briefs*

Eleventh Circuit Rule 28-1 requires each appellant brief to include a statement regarding oral argument, a statement of subject matter and appellate jurisdiction, a statement of the issues, a

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[53] *See* Rachel Clark Hughey, *Effective Appellate Advocacy Before the Federal Circuit: A Former Law Clerk's Perspective*, 11 J. APP. PRAC. & PROCESS 401, 415 (2010) (stating, in relation to the Federal Circuit, that "[a] shorter brief is a more effective brief").

[54] *See id.* at 415–16.

[55] SCALIA & GARNER, *supra* note 42, at 24–25; *see* Hughey, *supra* note 53, at 415 (opining that "that attorneys sometimes forget that their case is not the only appeal before the court" and that "an overworked judge will appreciate and understand a concise brief . . . ."). *Cf.* Nancy Winkelman, *"Just a Brief Writer"?*, 29 LITIG., Summer 2003, at 50, 52 ("[G]ood, clear, persuasive writing takes skill, and it takes time.").

[56] *See* 11TH CIR. R. 36-2.

[57] *See* DYSART & SOUTHWICK, *supra* note 1, at 132–33.

[58] *See* Laurie A. Lewis, *Winning the Game of Appellate Musical Shoes: When the Appeals Band Plays, Jump from the Client's to the Judge's Shoes to Write the Statement of the Facts Ballad*, 46 WAKE FOREST L. REV. 983, 1001–02 (2011) ("In addition to correct citations to the record, you must also comply with Bluebook citation rules. . . . If your brief is replete with citation errors, its strength is diminished. Poor citations send a message that you did not spend the time needed to polish your brief or, worse, that you do not respect the court.").

[59] *See id.*

statement of the case, a summary of the argument, an argument, and a conclusion.[60] We address each section in turn.

1. STATEMENT REGARDING ORAL ARGUMENT

The statement regarding oral argument must explain "whether or not oral argument is desired, and if so, the reasons why oral argument should be heard."[61] The task of persuading the Court begins with this statement. It is the first substantive section that judges and law clerks read in the appellant brief. Under Rule 28-1, the statement must come before even the table of contents.[62] It therefore "offer[s] [a] valuable opportunit[y] to influence the [Court]'s view of the case."[63] Advocates should approach it with the same meticulousness with which they approach their argument section.[64]

The statement should provide context about the appeal—a snapshot of the facts, the issues, and the relevant case law. A mere boilerplate statement that regurgitates the Eleventh Circuit's standard for oral argument is a missed opportunity. Rather than saying that oral argument is warranted because the dispositive issue is unsettled, tell the Court about the points the parties dispute on appeal and briefly explain the state of the case law.

Perhaps most importantly, make sure to apply the Eleventh Circuit's standard for oral argument with fidelity. Advocates should not oversell their position to try to get oral argument.[65] They should not, for example, assert that the appeal presents a novel issue if it does not actually do so, nor should they claim that there is an intra-circuit

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[60] 11TH CIR. R. 28-1. The Rule also requires a cover page, a certificate of interested persons, a table of contents, a table of citations, a statement regarding adoption of briefs of other parties, a certificate of compliance, and a certificate of service. *Id.*

[61] *Id.* at R. 28-1(c).

[62] *See id.* at R. 28-1(c), (d).

[63] *See* Kathryn M. Stanchi, *The Power of Priming in Legal Advocacy: Using the Science of First Impressions to Persuade the Reader*, 89 OR. L. REV. 305, 306 (2010) ("[F]irst impressions are critical in brief writing[,] and . . . the early parts of the brief, as well as headings and lead sentences, offer valuable opportunities to influence the decision maker's view of the case.").

[64] *See id.* at 306, 310, 314.

[65] *See* Keller, *supra* note 50, at 292–93.

split on an issue if different panels of Eleventh Circuit judges do not, in fact, disagree with one another. Advocates lose credibility when they make these claims.[66]

2. STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The statement of subject matter and appellate jurisdiction is where an advocate shows the Court that the appeal is properly before it.[67] Advocates must include "the basis for the district court's . . . subject-matter jurisdiction, . . . the basis for the [Eleventh Circuit]'s jurisdiction, . . . the filing dates establishing the timeliness of the appeal . . . [,] and an assertion that the appeal is from a final order or judgment."[68]

But advocates should not simply check these boxes and move to the next section of the brief. If there is a lingering jurisdictional question, acknowledge it and address it head-on.[69] The Eleventh Circuit Staff Attorney's Office has a group of attorneys who review all appeals specifically for jurisdiction.[70] If an appeal has a possible jurisdictional deficiency, then they will identify it, and if the appellant brief has not addressed it, then the Court may ask for supplemental briefing.[71] This slows down the appeal's resolution and burdens the Court with additional briefing to review. It is better to be thorough and address such issues at the outset.

3. STATEMENT OF THE ISSUES

The conventional wisdom about issue statements holds in the Eleventh Circuit. First, advocates should raise only three or four

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66 *See id.* at 292–93.

67 *See* 11TH CIR. R. 28-1(f) (requiring this statement to include "all information required by [FED. R. APP. P.] 28(a)(4)(A) through (D)").

68 FED. R. APP. P. 28(a)(4).

69 *But see* SCALIA & GARDNER, *supra* note 39, at 91 ("If there is serious dispute or even serious doubt about whether the suit or appeal comes within that provision, this is not the point to get into it. Discuss that in the Argument section of your brief.").

70 *See Staff Attorney's Office*, *supra* note 21.

71 11TH CIR. R. 31-1(d).

issues and avoid the shotgun approach.[72] A long list of issues not only compromises an advocate's ability to thoroughly analyze each issue, but also undermines her credibility and suggests weakness.[73] Advocates lose credibility when they claim that the district court committed seven or eight reversible errors—that is unrealistic.[74] Additionally, raising so many issues suggests that an advocate is not all that confident in any particular issue.[75] The immediate impression is that, because no issue is compelling, the advocate is hedging her bets by raising as many issues as possible.[76] Judge Ruggero J. Aldisert, Judge Leslie H. Southwick, and Associate Clinical Professor Tessa L. Dysart put it well in the Third Edition of *Winning on Appeal*[77]:

Litmus Test: Number of Issues in the Brief

Number of Issues	***Judge's Reaction***
Three	Presumably arguable points. The lawyer is primo.
Four	Probably arguable points. The lawyer is primo minus.
Five	Perhaps arguable points. The lawyer is no longer primo.
Six	Probably no arguable points. The lawyer has not made a favorable initial impression.
Seven	Presumably, no arguable points. The lawyer is at an extreme disadvantage, with an uphill battle all the way.
Eight or more	Strong presumption that no point is worthwhile.

[72] *See* Dubina, *supra* note 27, at 5 ("Most lawyers . . . try to convey too much information and cover too many issues.").

[73] *See* DYSART & SOUTHWICK, *supra* note 1, at 75.

[74] *Id.*

[75] *Id.*

[76] *See id.* at 5–6.

[77] *Id.* at 76 (stating that Judge Aldisert provided this table in a previous edition of the book, in which he noted that these are "purely subjective guidelines" that "do not apply in unusual and extraordinary circumstances").

Second, advocates should embrace Bryan A. Garner's approach to issue statements: the "deep issue" method.[78] A deep issue is "a multisentence issue statement that begins with a legal premise, then states a factual premise or miniature story demonstrating the applicability or inapplicability of that legal premise, and ends in a short question devoid of new information."[79] Here is an example:

> The Individual with Disabilities Education Act (IDEA) requires school districts to educate each child with disabilities in the "least restrictive environment" (LRE)—the least segregated educational setting in which the child can receive an appropriate education. 20 U.S.C. § 1412(a)(5). [The School District] warehoused R.F., a first grader with disabilities, in a class by herself even though she could have received an appropriate education in a class with peers. . . .
>
> Did [the School District] violate R.F.'s right to be educated in the LRE?[80]

Thus, rather than stating an issue with a single question, such as "whether the School District violated R.F.'s right to be educated in the LRE by placing her in a class by herself," advocates using the deep-issue method state the issue using "a syllogism ending in a question mark."[81]

The deep-issue method improves clarity.[82] Because a deep issue identifies the governing legal rule and the operative facts, it provides sufficient context to understand the precise legal question

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[78] Bryan A. Garner, *Going Deep: The Key to Effective Pleadings Is a Clear and Succinct Statement of the Issues—and Here's How to Do It*, A.B.A. J., Mar. 2017, at 26, 26.

[79] *Id.*

[80] Opening Brief of Appellants at 2, R.F. v. Cecil Cty. Pub. Sch., 919 F.3d 237 (4th Cir. 2019) (No. 18-01780).

[81] Garner*, supra* note 78, at 26.

[82] *Id.*

presented.[83] The traditional one-sentence issue, on the other hand, often omits such context, leaving the court with only a general sense of the question presented.[84] Further, by summarizing the governing law and facts, a deep-issue statement gives the Court a roadmap for navigating the brief's statement of the case.[85]

4. STATEMENT OF THE CASE

The Eleventh Circuit demands candor in the statement of the case, the part of the brief that sets forth the appeal's procedural history, a summary of the facts, and the standard of review.[86] The statement, according to the Court's rules, must "reflect[] a high standard of professionalism. It must state the facts accurately, including those favorable and those unfavorable to the party."[87]

An advocate should therefore approach the statement like a reporter, providing the Court an objective summary of the case.[88] Approaching the statement like a pundit, spinning facts and injecting argument, can ruin a brief's credibility before the judge or clerk even reaches the argument section.[89] All too often during our clerkships we reviewed briefs that took this approach, leaving us skeptical of the advocate's description of the case and her ensuing legal arguments.

To that end, advocates in the Eleventh Circuit should avoid these common pitfalls:

- **Irrelevant details and facts.** Advocates sometimes load their briefs with irrelevant details and facts. This not only undermines brevity—an important virtue in the Eleventh

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[83] *See id.* at 25–26.
[84] *See id.* at 25.
[85] *See id.*
[86] 11TH CIR. R. 28-1(i).
[87] *See id.* at R. 28-1(ii).
[88] *See* Keller, *supra* note 50, at 292–93.
[89] *See id.* ("By spinning the facts or the law even once, you discount the value of your brief to the judge, and risk the judge's presuming spin in every factual sentence and every legal statement. . . . Lack of candor is, in short, the simplest route to a loss of credibility in an appellate judge's eyes.").

Circuit—but also undercuts the advocate's authority.[90] Irrelevant details and facts suggest that the advocate may not understand the standard of review or be able to pinpoint which facts are germane to the legal issues presented.[91] Further, irrelevant details and facts are off-putting when part of an obvious attempt to appeal to the Court's emotions.[92]

- **Ignoring bad facts.** We both remember cases where the appellant avoided bad facts in her brief. Reading the appellee brief, we came across an important fact that we had not yet encountered. Worried that we overlooked that fact in the appellant brief, we grabbed the brief and shuffled through it. Then we realized that the appellant never mentioned the fact—and we wondered what else she failed to mention.[93]

- **Argumentative language.** Many of the briefs we reviewed included adverbs and retorts to the district court's findings. Such language signals that the statement of the case is not merely reporting the facts—instead, the statement is editorializing.[94]

- **Imprecise record cites.** Record cites should be both accurate and precise.[95] They should direct the Court to not only the applicable docket entry, but also the specific page and line number for the evidence.[96] When a brief includes only

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[90] *See* Ruggero J. Aldisert, *The Appellate Bar: Professional Responsibility and Professional Competence—A View from the Jaundiced Eye of One Appellate Judge*, 11 CAP. U. L. REV. 445, 472 (1982).

[91] *See id.* at 472–73.

[92] *See* SCALIA & GARNER, *supra* note 42, at 94–95.

[93] *See* DYSART & SOUTHWICK, *supra* note 1, at 191–92. While omitting material bad facts is not a productive choice, addressing them is an artform. For examples of renown appellate advocates doing just that, see ROSS GUBERMAN, POINT MADE: HOW TO WRITE LIKE THE NATION'S TOP ADVOCATES 81–85 (2d ed. 2014).

[94] *See* Keller, *supra* note 50, at 292.

[95] DYSART & SOUTHWICK, *supra* note 1, 198–99.

[96] 11TH CIR. R. 28-1(i) (requiring "reference[s] to the volume number (if available), document number, and page number of the original record").

the docket entry, clerks must parse through the entry to confirm the accuracy of the cite. And if a clerk inadvertently overlooks the relevant part of the entry, then she might conclude that the cite is misleading.

- **Exaggeration.** The most common pitfall that we encountered as clerks was exaggeration. If an appellee violated three contractual terms, then the appellant would say that the appellee breached *several* terms. If an appellee's product harmed eighty-five people, then the appellant would say that the product harmed *nearly 100* people. Although one or two exaggerations like this will not undermine a brief's credibility, a pattern of them will.[97]

- **Failure to clarify the standards of review.** The threshold question when resolving any issue on appeal is, "What's the standard of review?"[98] Yet advocates sometimes fail to clarify the applicable standard of review for the Court. If an appeal presents multiple issues, then the statement of the case should either set forth the standard of review for each issue or specify that the same standard governs all of the issues.[99]

This is not to say, however, that advocates should abstain from advocacy in the statement of the case. An advocate can advance her framing of the case while exhibiting candor and professionalism.[100] With the right organization, word choice, paragraph structure, and

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[97] *See* Dubina, *supra* note 27, at 5.

[98] *See* Aldisert, *supra* note 90, at 472 ("I am convinced that if federal appellate briefs . . . set forth the precise scope of review for each point asserted on appeal, . . . briefs would be more effective, producing, in turn, better judicial decisions.").

[99] *See id.* at 456, 467, 469 ("My main complaints [about] brief writing: the failure to justify the jurisdiction of both district and appellate courts; *failure to perceive the precise scope of review of the particular issues raised*; undue verbosity; and, most important, an inability to identify the competing social interests implicated in the truly difficult cases before the courts." (emphasis added)).

[100] *See* DYSART & SOUTHWICK, *supra* note 1, at 190–91.

detail, the advocate can both tell her client's story and accurately represent the record.[101]

Merritt McAlister, one of the Eleventh Circuit's top advocates and a former clerk for Eleventh Circuit Judge R. Lanier Anderson III, struck this balance in *United States v. Hickson*.[102] Ms. McAlister represented Mr. Hickson, who tossed drugs from his car while fleeing from an illegal traffic stop.[103] The police found the drugs, and the government brought federal drug charges.[104] In district court, Mr. Hickson moved to suppress the drugs, arguing that they were the fruits of an unconstitutional seizure because the illegal stop caused him to toss them from his car.[105] The district court denied the motion.[106] Mr. Hickson then pleaded guilty to drug possession but preserved his right to appeal the district court's decision not to suppress the drugs.[107] To prevail on appeal, Mr. Hickson had to show that the illegal stop caused him to abandon the drugs.[108]

Ms. McAlister used several effective techniques in her statement of the case. First, she began the statement with a brief summary of the traffic stop, immediately highlighting the facts favorable to Mr. Hickson:

> This case involves a routine traffic stop . . . that Harris County, Georgia deputy sheriffs unconstitutionally prolonged. After the time needed to complete the stop, a sheriff's deputy summoned a canine officer to the scene, further questioned Mr. Hickson, and initiated an open-air drug-sniff test. At the time the deputy began the drug-investigation phase of the stop, he admitted he had nothing more than a "'hunch'" on which to

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101 *Id.*; SCALIA & GARNER, *supra* note 42, at 94–95.

102 632 F. App'x 584 (11th Cir. 2016).

103 Brief of Appellant at c-i, 2, United States v. Hickson, 632 F. App'x 584 (11th Cir. 2016) (per curiam) (No. 14-12365-E); *Hickson*, 632 F. App'x at 584.

104 *See Hickson*, 632 F. App'x at 584.

105 *Id.*

106 *Id.*

107 *Id.*

108 Brief of Appellant, *supra* note 103, at 1–2.

> detain Mr. Hickson and no "specific facts to tell [him] that there was illegal contraband in the car." Doc. 36, at 72:25–73:6. As the district court held, Doc. 51, at 12–13, the stop was unconstitutionally prolonged, and Mr. Hickson should have been free to leave.
>
> After the canine alerted to the presence of drugs, Mr. Hickson attempted to leave in his car. Doc. 34-1, at 2, at 15:00:42 (DVD Video of dashboard camera footage of entire stop). A sheriff's deputy leapt head-first through the passenger window to stop Mr. Hickson, knocking Mr. Hickson and causing the car to swerve on the road. *Id.* at 15:00:42 to 15:00:54. Inside the car, the deputy held Mr. Hickson at gunpoint, Doc. 36, at 108:7–8; another deputy shot a Taser at Mr. Hickson, Doc. 34-1 at 3. The entire flight lasted approximately 25 seconds. Doc. 34-1, at 2, at 15:00:41 to 15:01:16. At the end of a slow-rolling "flight" of 100 yards, drugs were allegedly thrown from the vehicle through the passenger window.[109]

By including this summary at the start of the statement of the case, Ms. McAlister not only emphasized the facts favorable to Mr. Hickson but also primed the Court to focus on them.[110] She did not *tell* the Court that the facts were important—rather, like a good reporter, she *showed* that they were important by making them her lede.

Second, Ms. McAlister established a theme in the statement of the case without resorting to overt emotional appeal. In the introductory summary, she used record cites and savvy word choice to frame Mr. Hickson as a victim of overzealous policing. For example, after stating that the deputies pulled Mr. Hickson over as part of "a *routine* traffic stop," Ms. McAlister noted that the deputies "*summoned* a canine officer to the scene . . . and initiated an *open-air drug-sniff test*."[111] Juxtaposing "routine" with "summoned" and "open-air

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[109] *Id.* at 1–2 (citation omitted).

[110] *See id.*; Stanchi, *supra* note 63, at 314.

[111] *See* Brief of Appellant, *supra* note 103, at 1–2 (emphasis added).

drug-sniff test," Ms. McAlister suggested that the deputies unnecessarily escalated the encounter with Mr. Hickson.[112] Then, citing the record, Ms. McAlister solidified this framing by stating that one deputy admitted that "he had nothing more than a 'hunch'" about Mr. Hickson possessing contraband.[113]

Third, Ms. McAlister was specific and objective in presenting the statement of the case. She described the deputies' and Mr. Hickson's actions without injecting commentary. Detailed record cites are abundant while adjectives, adverbs, and inference are sparse. Ms. McAlister never stated that the deputies acted aggressively. She never stated that the deputies' actions spurred Mr. Hickson to abandon drugs. But she made both points by (1) detailing the deputies' actions and (2) underscoring the temporal proximity between the deputies' actions and Mr. Hickson abandoning the drugs:

> To stop Mr. Hickson's "flight," Deputy Harmon "put a gun to his head and told him if he didn't stop the car, I was going to kill him." Doc. 36, at 108:6–8. Mr. Hickson complied with the gun-point demand to stop the car. *Id.* at 108:6–13. The entire "flight" lasted a mere 25 seconds. Doc. 34-1, at 2, at 15:00:41 to 15:01:16. As the vehicle came to a slow stop "approximately 100 yards down the interstate," Deputy Carroll observed a brown paper bag exit the passenger side window of the vehicle. Doc. 34-1, at 3.[114]

Starting this paragraph with the deputy's death threat, Ms. McAlister showed that the deputies acted aggressively. And by indicating that Mr. Hickson tossed the drugs just twenty-five seconds after the threat, she implicitly presented a causal link between the deputies' actions and Mr. Hickson tossing the drugs.

Certainly, the elements of Ms. McAlister's statement of the case that make it effective took time and effort to hone. When an advocate starts the brief-writing process, she should set aside

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112 *See id.*
113 *Id.* at 2.
114 *Id.* at 6–7.

considerable time for the statement of the case. Striking a balance between reporting and advocacy is difficult but essential.[115] "[A]ppellate judges may form their first, and probably their most lasting, impression of [the advocate's] side of the case from reading [her] statement . . . ."[116] Consequently, it is worth the time to craft an accurate and effective statement of the case.

5. SUMMARY OF THE ARGUMENT

The summary of the argument is a roadmap for the Court. After reading it, a judge should understand the appellant's arguments and the logical relationship between them.[117] The summary should make clear, for example, whether the arguments are independent of each other, whether one argument relies on another, and whether one or more arguments are being made in the alternative.

The most effective summaries, in our view, introduce the arguments in an opening paragraph and then outline each argument using a simple technique like CRuPAC[118] or IRAC.[119] Advocates might prefer to use more complex techniques in the argument section, but CRuPAC and IRAC are effective in the summary, where brevity is paramount.[120]

6. ARGUMENT

The most important principle in the argument section is simplicity. Simple arguments win reversals.[121] A simple argument is one that starts with a precise legal premise and reaches a conclusion in

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115 DYSART & SOUTHWICK, *supra* note 1, at 190.

116 *Id.*

117 Hughey, *supra* note 53, at 410–11.

118 CRuPAC is an acronym for "Conclusion, Rule, Proof, Application, Conclusion." Andrea McArdle, *Teaching Writing in Clinical, Lawyering, and Legal Writing Courses: Negotiating Professional and Personal Voice*, 12 CLINICAL L. REV. 501, 510 n.43 (2006).

119 IRAC is an acronym for "Issue, Rule, Application, Conclusion." *Id.*

120 *See* 11TH CIR. R. 28-1(j) ("[The summary] should seldom exceed two and never five pages.").

121 GARNER, *supra* note 43, at 149.

just a few logical steps.[122] Reversal usually requires an obvious error, and a logically tight, straightforward argument signals obvious error.[123] It suggests that the district court made a ruling that existing precedents plainly deem unacceptable. No creative interpretation is necessary because logic dictates reversal. A long, complicated argument, on the other hand, suggests that there is no readily apparent error and, perhaps, that identifying an error requires stretching existing precedents.[124]

Advocates should therefore consider simplicity at each step of the brief-writing process. First, in outlining the argument section, an advocate should identify her simplest arguments and put them at the beginning of the section. Simple arguments are the strongest arguments,[125] and a brief's strongest arguments should come first to avoid a judge or clerk concluding that the appeal is weak before even reaching and considering the second half of the brief.[126] Second, when drafting the argument section, an advocate should concentrate on simplifying her arguments. Pare down each argument, eliminating unnecessary logical steps and asides.[127] Finally, at the editing stage, an advocate should reassess the simplicity of each argument. For example, the advocate should have a colleague read the brief specifically to assess simplicity.[128] If the colleague believes that an argument is complicated, then the advocate should identify why and re-work the argument. If the colleague believes that the brief's

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[122] *See* SCALIA & GARNER, *supra* note 42, at 41 (recommending that lawyers argue syllogistically and noting that "the clearer the syllogistic progression, the better").

[123] *See* Andrea Ambrose, *Making the Best of Being an Appellee*, 38 LITIG., Spring 2012, at 26, 27.

[124] *See* GARNER, *supra* note 43, at 148.

[125] *See* DYSART & SOUTHWICK, *supra* note 1, at 126.

[126] *See* Laurence H. Silberman, *Plain Talk on Appellate Advocacy*, 11 APP. ADVOC., Feb. 1998, at 3, 4 ("The argument that I now think was a winner was presented at the very end of a prolix brief, almost as an after-thought. By the time I reached it, I fear I had virtually concluded that that party's position was flawed.").

[127] Dubina, *supra* note 27, at 5; *see* DYSART & SOUTHWICK, *supra* note 1, at 159–60.

[128] GARNER, *supra* note 43, at 149.

simplest argument is buried at the end of the argument section, then the advocate should consider reorganizing the section.

Another important principle in the Eleventh Circuit is argument diversity. An advocate must convince two judges to reverse, and different judges might find different lines of argument persuasive.[129] Therefore, a brief should include different types of arguments for each issue. In a statutory interpretation case, for instance, one judge on the panel might find textualist arguments persuasive, while another might be more focused on statutory purpose.[130] An advocate should anticipate this and brief both arguments.

Including diverse arguments is particularly important in the Eleventh Circuit because panels often have visiting judges, who bring different backgrounds and views to the Court.[131] Visiting judges hail from different parts of the country, come from both district and circuit courts, and have different levels of familiarity with the Eleventh Circuit. Some have never sat on an Eleventh Circuit panel, and some regularly sit with the Court.

Finally, we offer a few more general dos and don'ts for the argument section, which are informed by the Eleventh Circuit's emphasis on candor and collegiality:

Dos

- **Confront adverse authority.** Just like bad facts, advocates should address bad law. The appellee will identify adverse authority, and if she does not, the judges and clerks will.[132] By identifying and addressing that authority in the opening brief, an appellant takes advantage of the opportunity to

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[129] *See* SCALIA & GARNER, *supra* note 42, at 99.

[130] *Id.* at 46–51.

[131] *See supra* notes 34–36 and accompanying text.

[132] *See* Raymond M. Kethledge, *A Judge Lays Down the Law on Writing Appellate Briefs*, GPSOLO, Sept./Oct. 2015, at 25, 25 ("If your position has a weakness, the chances that three or more judges, and each of their law clerks, will all overlook that weakness are exceedingly slim.").

shape the appellee's discussion and the Court's consideration of that case law.[133]

- **Rely mainly on Supreme Court and Eleventh Circuit cases.** According to former Chief Judge Dubina, "One should cite only cases from the United States Supreme Court and the Eleventh Circuit, unless no authority from either of those courts exists, and then one may refer to cases in other circuits."[134]

- **Use headings and strong topic sentences.** As law clerks, we reviewed briefs that meandered without informative headings or strong topic sentences. Without those guideposts, following the brief's arguments was difficult. Headings and topic sentences provide an important roadmap for the reader.[135]

Don'ts

- **Dodge the standard of review.** Advocates sometimes state the standard of review only to then ignore it in their argument section. That is a mistake. An appellant can secure a reversal only if she demonstrates reversible error under the standard of review.[136] Therefore, advocates must confront the standard, explaining throughout their argument why it is satisfied.[137]

- **Reference the district court judge by name.** Referencing a district court judge by name when discussing the judge's

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133 *See id.*

134 Dubina, *supra* note 27, at 6.

135 *See* SCALIA & GARNER, *supra* note 42, at 108 ("Since clarity is the all-important objective, it helps to let the reader know in advance what topic you're about to discuss.").

136 *See* Leonard I. Garth, *How to Appeal to an Appellate Judge*, 21 LITIG., Fall 1994, at 20, 23.

137 *Id.*

reasoning breaches collegiality.[138] The district court is always "the district court."

- **Use long block quotes.** Rather than using long block quotes, succinctly explain why a prior precedent is helpful.[139]

- **Use string cites.** String cites take up valuable briefing space, and they do not add much value.[140] If a cite does not lend support in a way different than its fellow cites, then cut it.

7. CONCLUSION

An effective conclusion reiterates the most powerful reasons why the Court should rule for the appellant, and it articulates the precise relief sought. The conclusion should highlight the strongest legal arguments for reversal and any important policy considerations at stake.[141] Then, it should state whether the appellant wants the Court to reverse the district's court ruling, vacate and remand for further proceedings, or afford some other relief.[142]

C. *Appellee Briefs*

The appellee brief is an opening brief, no more or less than the appellant brief, but it is also a reactionary piece of writing with both offensive and defensive components. At the most basic level, the appellee brief tells the other side of the story in response to the appellant brief.[143] But the appellee's job is to do more than simply engage spar-for-spar with the appellant. The appellee must affirmatively advance arguments and case law that support her position while simultaneously defending the work of the district court.[144] She

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[138] *See* Hughey, *supra* note 53, at 410.

[139] *See* Kethledge, *supra* note 132, at 26 ("Avoid block quotes. Judges usually don't read block quotes.").

[140] *See* SCALIA & GARNER, *supra* note 42, at 99 ("Brevity means abandoning string cites with more than three cases.").

[141] *Id.* at 100–01.

[142] Garth, *supra* note 136, at 67.

[143] *See* SCALIA & GARNER, *supra* note 42, at 71.

[144] *See id.*

should craft her brief so that it exists as a standalone piece of writing—an independent guide for resolving the appeal.[145]

In our experience, the most successful appellee briefs are those that (1) pinpoint the crux of the appeal, streamlining the issues and the facts; (2) have an independent structure; and (3) use the standard of review as the lodestar of their argument. Here, rather than restate the different components of the brief from the appellee's perspective, we expand on these three principles.

1. STREAMLINING

Whether offensively combating the appellant's framing of the facts and issues presented or defending the district court's reasoning and conclusions, an appellee brief should hone in on the issue the Court must resolve.[146] Streamlining the brief to focus attention on the narrow questions presented and the facts and law relevant to those questions is important in any appellate court, but it is particularly important when the appellee is before a court as busy as the Eleventh Circuit.[147] An Eleventh Circuit panel does not have time to wade through repetitious statements of immaterial facts or every possible legal and policy argument that supports affirmance.

One appropriate technique to shorten an appellee brief is to acknowledge areas of agreement with the appellant. The appellee is under no obligation to rehash aspects of the case on which the parties agree. Indeed, the Eleventh Circuit's Rules expressly account for this: under Rule 28-2, the appellee need not include a jurisdictional statement, statement of the issues, statement of the case, or statement of the standard of review if the appellee agrees with those statements in the appellant brief.[148]

Agreeing with the appellant can be used to proactively direct the Court's attention to certain aspects of the case. As an offensive piece of writing, submitted to rebut the appellant's challenge, the appellee brief is most effective when it highlights the discrepancies in the

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145 *See id.* at 71–72, 96.

146 DYSART & SOUTHWICK, *supra* note 1, at 244.

147 *See supra* notes 9–14 and accompanying text.

148 11TH CIR. R. 28-2.

parties' versions of events and identifies the law that supports affirmance.[149] Agreement lays the foundation for this strategy. Identifying points on which the parties agree allows the appellee to draw out and refine the few points of disagreement and explain why the district court's opinion is legally correct, despite the disagreement. Within that framework, the appellee can reference without regurgitating the points made in the appellant brief and direct the judges' and clerks' attention to the substantive legal question on appeal (or point out that none exists).

Acknowledging areas of agreement not only allows an appellee to focus on the crux of the appeal but also builds credibility. When an advocate agrees with her adversary, she displays candor—and confidence.[150] Agreement signals to the Court that the advocate is fair in her presentation of the issues and confident enough in her legal arguments to recognize facts or case law that may cut against her.[151]

2. INDEPENDENT STRUCTURE

For an appellee brief to exist independent of its counterpart, the appellee must be intentional in her presentation of the issues, facts, and order of arguments. Although an appellee brief must meet the substantive requirements of the Eleventh Circuit Rules,[152] the appellee has no obligation to parrot the appellant's sections or the sequence of the sections.[153] An appellee brief exists as an alternate guide to the case, and the appellee can take advantage of this freedom to direct the Court's consideration of the facts and issues in a manner that is both accurate and persuasive.[154]

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[149] *See* DYSART & SOUTHWICK, *supra* note 1, at 245.

[150] SCALIA & GARNER, *supra* note 42, at 21.

[151] *Id.*; Hughey, *supra* note 53, at 441 ("Concede your own weakest points, then explain their insignificance. Your credibility will increase." (internal quotation marks omitted)).

[152] 11TH CIR. R. 32-2.

[153] *See* Andrew H. Baida, *Writing a Better Brief: The Civil Appeals Style Manual of the Office of the Maryland Attorney General*, 3 J. APP. PRAC. & PROCESS 685, 698–99 (2001).

[154] *See* DYSART & SOUTHWICK, *supra* note 1, at 244–45.

First, there is no rule that requires the appellee to conform to the appellant's presentation of the issues to be decided on appeal.[155] The appellee's statement regarding oral argument and statement of the issues presented are no less important than the substantive argument section. The appellee can shape the Court's view of the appeal by insisting in these statements that the issues to be resolved are different from the ones the appellant claims are before the Court. An effective counterstatement of the issues can reframe the issues and the facts, priming the Court to analyze the case from a different perspective than the one advocated by the appellant.[156] For this reason, Garner's deep-issue method is a tactic that appellees should employ with equal vigor.[157]

Reframing the statement of issues can prove particularly fruitful when the Court's finding in favor of the appellee on one issue would resolve the entire appeal in the appellee's favor.[158] The appellee can change the character of the case by bringing that issue to the forefront. For example, if the appellant sets forth a statement of issues that does not acknowledge a procedural hurdle that might prevent review, then the appellee would be wise to highlight the issue first in her statement of issues.[159] The Court will appreciate an appellee brief that calls attention to threshold issues that must be resolved before other aspects of the case are appropriately reached.

Second, the appellee's presentation of material facts need not replicate the order in which the appellant introduced them.[160] The appellee can explain the factual and procedural history of the case without mimicking the order of events in the appellant brief or

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155 Baida, *supra* note 153, at 699.

156 *See id.* at 695–96.

157 Garner, *supra* note 78, at 26. Importantly, even though the appellee brief reaches the Court second, it may be the first brief that the judge or clerk chooses to read. Some judges, for example, begin their review of a case with the reply brief. *See* Paul R. Michel, *Effective Appellate Advocacy*, 24 LITIG., Summer 1998, at 19, 21 (1998). Consequently, appellees should write their briefs under the assumption that they are providing the Court with its first impression of the case.

158 *See* Ambrose, *supra* note 123, at 29–30.

159 *See* SCALIA & GARNER, *supra* note 42, at 18.

160 Baida, *supra* note 153, at 703.

reciting every fact mentioned by the appellant. In the same way that reordering or rewording the issues presented can have persuasive effect, so too can reordering and rewording the way in which the facts unfold.

And, third, the same principle applies to the appellee's argument section, which can take a form and order distinct from the arguments set forth in the appellant brief.[161] It is here that the appellee bears the most responsibility for writing independent of the appellant. Rather than engage in a call-and-response tactic, the appellee can make the most of her argument section by allowing her reframing of the issues and facts to guide the order of her arguments.[162] If an appellee brings a threshold issue to the forefront of her statement of issues, then she should discuss the threshold issue at the beginning of her argument. Then, in presenting her argument, the appellee can account for and dismiss the substance of the appellant's contrary argument. Thus, the appellee's presentation of her argument should map onto her statement of the issues, irrespective of the appellant brief.

3. STANDARD OF REVIEW

As mentioned above, the standard of review is the lens through which the Court examines each question presented. For this reason, the standard is the first part of the appeal that advocates should identify when researching the case, and it should guide how advocates present the issues in their briefs and offer arguments to the Court.[163] A brief that fails to frame the issue in terms of the standard of review quickly becomes unhelpful.

In most cases, appellees should rely heavily on the standard of review. Unless an issue is being reviewed de novo, the appellee and appellant are not on a level playing field.[164] Issues reviewed for

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[161] Ambrose, *supra* note 123, at 27.

[162] SCALIA & GARNER, *supra* note 42, at 71–72.

[163] *See* Garth, *supra* note 136, at 23 ("For an effective appeal, both the brief and the oral argument should be structured around the appropriate standard of review.").

[164] SCALIA & GARNER, *supra* note 42, at 11 ("When the standard of decision favors your side of the case, emphasize that point at the outset of your discussion of the issue—and keep it before the court throughout. Don't let the discussion

abuse of discretion and plain error, for example, involve a level of deference to the district court that places the appellant at a significant disadvantage.[165] Even on de novo review, however, the Court does not encounter the parties' dispute on a blank slate. The Court reviews the issues presented with the district court's opinion in the backdrop.[166] Although the Eleventh Circuit does not owe deference to the district court on de novo review, the district court's opinion remains a valuable resource to which the appellee can point for support when asking the Court to reach the same result.

The appellee need not wait to invoke the standard of review until the argument section of her brief. Instead, she can undercut the credibility and usefulness of the appellant brief by making the standard of review the foundation of her own brief, incorporating it into her statement of the issues presented and summary of argument, as well as referencing it throughout her argument.[167] When the advocates agree on the standard of review, an appellee brief framed this way provides the Court with a path to affirmance. And even when the advocates disagree on the standard, an appellee brief that focuses on the standard not only provides a path to affirmance but also adds to the appellant's burden by creating a threshold issue for the appellant to discuss in her reply brief.[168]

Using the deep-issue method of framing each issue leaves the appellee with breathing room to frame the case to her benefit in the terms of the standard of review. Even if the appellee agrees with the appellant's statement of the standard of review and chooses not to repeat it in her brief, she will still want to incorporate the standard

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slide into the assumption that you and your adversary are on a level playing field when in fact the standard of review favors you.").

[165] Ambrose, *supra* note 123, at 27–28; *see* United States v. McPherson, 587 F. App'x 556, 566 (11th Cir. 2014) ("[T]he plain-error standard is a 'daunting obstacle' for an appellant to overcome."); *In re* Teltronics, Inc., 904 F.3d 1303, 1310 (11th Cir. 2018) (recognizing that the abuse-of-discretion standard requires significant deference).

[166] *See* DYSART & SOUTHWICK, *supra* note 1, at 52.

[167] *See* SCALIA & GARNER, *supra* note 42, at 12. This not only results in a more persuasive argument but also saves the Court time and energy flipping back and forth between sections of the brief. *See* GARNER, *supra* note 43, at 675.

[168] *See infra* Section II.D.2.

of review into her statement of the issue. Consider the difference between the following two issue statements:

Option 1

> Whether the defendant's 240-month sentence is substantively unreasonable.

Option 2

> A district court can impose a sentence above the range calculated under the Sentencing Guidelines as long as the court first considers the factors set forth in 18 U.S.C. § 3553(a). After correctly calculating the sentencing range for Defendant Smith's conviction for conspiracy to possess with intent to distribute 50 grams or more of cocaine base, in violation of 21 U.S.C. § 846, and considering each factor in Section 3553(a), the court varied upward to impose a sentence that exceeded the Guidelines range. Did the district court abuse its discretion in sentencing Defendant Smith to 240-months' imprisonment?

Although both issue statements convey that the Court must consider the substantive reasonableness of the sentence that the district court imposed, the second statement places the concept of "reasonableness" in context by highlighting the abuse-of-discretion standard that the concept triggers. That framing identifies for the Court at the outset of the brief the level of deference owed to the district court. Further, the second statement benefits the Court—and the appellee's case—by previewing the salient facts and offering keywords and statutes as points of reference for any needed research. Although the first statement does not lead a law clerk or judge astray, it does not help the clerk or judge, either.

After framing the questions on appeal through the lens of the applicable standard, the next place to incorporate the standard of review is in the summary of the argument. Under the Eleventh Circuit Rules, both the appellant brief and appellee brief must contain a

summary of the argument.[169] The summary is the easiest place to (1) notify the Court if the appellant is using the wrong standard of review, and (2) concisely answer the question presented using the appellee's own framing of the issue. Consider, for example, the briefs filed in *Bester v. Leavitt*, an employment discrimination case.[170] The appellant brief stated that the Eleventh Circuit was required to review jury instructions de novo.[171] In response, the appellee stated in his summary of the argument:

> Plaintiff did not object to the challenged charge in the trial court and her appeal should be barred pursuant to Fed. R. Civ. P. 51.
>
> Even if plaintiff's appeal is considered on the merits, it is subject to a plain error standard of review. *Farley v. Nationwide Mutual Insurance Co.*, 197 F.3d 1322, 1329 (11th Cir. 1999). Bester is unable to show plain error, as she can show neither that the supplemental charge was erroneous, nor that it was plain error. Bester concedes that this circuit has used both challenged terms interchangeably, and the *Farley* court held that both terms are correct statements of the law. *Farley*, 197 F.3d at 1334–35. Thus, plaintiff has failed to show error, much less plain error.[172]

This summary of the argument calls the Court's attention to the governing standard and submits that the Court is more constrained in its review of the dispute than it may have thought after reading the appellant brief. Thus, in just a few sentences, the appellee calls into question the usefulness of the appellant brief, which appears to have proceeded on a faulty premise.

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169 11TH CIR. R. 28-1(j), 28-2.

170 226 F. App'x 872 (11th Cir. 2007).

171 Brief of the Plaintiff-Appellant at 5, *Bester*, 226 F. App'x 872 (No. 06-12251-BB).

172 Brief for Appellee at 10, *Bester*, 226 F. App'x 872 (No. 06-12251-BB).

After contextualizing the standard of review in the preliminary sections of the brief, the appellee can frame her argument around the standard, wielding it offensively. The appellee can and should continue to reference the standard throughout her argument.[173]

D. *Reply Briefs*

Reply briefs are shortened opening briefs, written with the benefit of hindsight. They are not a place to introduce new arguments, but they do allow the appellant to combat the weaknesses in her case that the appellee (hopefully) identified.[174] Many principles already discussed also apply to reply briefs, including elements of presentation, incorporation of the standard of review, confrontation of adverse authority, streamlining, and principles of candor and collegiality.[175] Partially in reprise and partially in addition to the foregoing discussion, we offer three aspects of effective reply briefs that stand out to us: (1) reorganization of key points and themes; (2) direct, but respectful, confrontation of the appellee's position; and (3) repetition of arguments that the appellee either failed to discredit or did not address. In short: reorganize, rinse, repeat.

1. REORGANIZE

Just as the appellee has no obligation to organize her brief in the same order as the appellant brief, the appellant has no obligation to organize her reply brief just as she did her opening brief.[176] There may be value in keeping the same structure, but an appellant should not favor consistency over persuasiveness.[177] Consider, for example, a situation in which the governing law requires the parties to address a four-factor test, and the appellant brief addressed each factor in order, but the appellee brief identified a potentially dispositive flaw

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[173] GARNER, *supra* note 43, at 675.

[174] *See* Hughey, *supra* note 53, at 414; *see, e.g.*, United States v. Levy, 379 F.3d 1241, 1244 (11th Cir. 2004) (per curiam) ("As for reply briefs, this Court . . . repeatedly has refused to consider issues raised for the first time in an appellant's reply brief.").

[175] *See supra* Sections II.B, II.C.

[176] *See* SCALIA & GARNER, *supra* note 42, at 73.

[177] *See id.* at 73–74.

in the appellant's argument concerning the third factor. In her reply brief, the appellant could walk through each of the factors again, in the same order, and address the third factor in due course. Or, she could reorganize the factors to address and dismiss the perceived weakness at the outset.

We vote for the latter approach for two reasons. First, as noted above, it is a mistake to assume that judges and their clerks always read the briefs in the order in which they are filed.[178] If a judge happens to start with the reply brief, the appellant puts herself in the best position by addressing the appellee's points of attack head-on and explaining why the Court should still reach a result contrary to that of the district court.[179] By the time the judge reaches the appellee brief, the appellee's argument has lost the element of surprise and, likely, its force.[180] Second, if the briefs are read in order, then the first question that the judge or clerk likely will have when opening up the reply brief is whether and how the appellant can still win.[181] If the appellant does not answer that question decisively in her reply brief, then reversal is less likely.

2. RINSE

Reorganizing to address an appellee's attacks is not enough; an appellant must rebut each point that is an obstacle to reversal. Justice Scalia and Bryan Garner refer to this as "'clearing the underbrush'—responding to your opponent's seemingly persuasive points that would entirely bypass your principal point."[182] The reply brief must wash from the Court's mind any procedural or substantive stain the appellee tried to set.

Take again, for example, *Bester v. Leavitt*, in which the appellee argued that the appellant had not preserved the dispositive issue for appeal and that a different standard of review governed than the one

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178 *Id.*

179 *Id.* at 74; *accord* Damon Thayer, *The Ten Commandments of Writing an Effective Reply Brief*, 32 PRETRIAL PRAC. & DISCOVERY, Winter 2012, at 8, 8–10.

180 *Cf.* SCALIA & GARNER, *supra* note 42, at 16.

181 *See id.* at 17.

182 *Id.* at 71.

the appellant identified.[183] In response, the reply brief needed to explain why the Court could and should reach the merits of the case and why the standard of review was not a barrier to reversal.

Clearing the underbrush is important for both issues of procedural default, like in *Bester*, and substantive points of disagreement.[184] The appellant should scour the record for contradictory factual points and perform supplemental research to identify case law that rebuts the appellee's legal arguments. When the governing law is not in dispute and the appeal involves a topic on which the Eleventh Circuit has developed substantial precedent—for example, the review of criminal sentences for reasonableness, ineffective assistance of counsel habeas petitions, Title VII employment discrimination cases, etc.—there is almost always a case worth bringing to the Court's attention to rebut the appellee's argument.

3. REPEAT

Finally, while a reply brief is not the place to regurgitate every detail of the opening brief, appellants should drive home their key points and themes.[185] The appellant should make sure that when the judges and clerks put down the reply brief, her strongest arguments are fresh in their minds.[186] Further, the appellant should ensure that there is no ambiguity about the relief she is seeking, and, to the extent that the appellee has called that relief into question, the appellant should repeat why the relief is appropriate.[187]

A reply brief, however, is not always necessary. If the brief would be mere repetition, then the appellant can forgo it.[188] If the appellee, for example, does not challenge the points raised in the appellant brief, then the reply brief has little value to the Court.[189] Indeed, it merely adds to the Court's workload. The Eleventh Circuit Rules account for this situation by allowing a party to waive her

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183 Brief for Appellee, *supra* note 173, at 10.
184 *See* SCALIA & GARNER, *supra* note 42, at 71.
185 Thayer, *supra* note 179, at 9.
186 *See id.*
187 *Id.* at 11.
188 SCALIA & GARNER, *supra* note 42, at 74–75.
189 *Id.*

right to file a reply brief.[190] The Rules encourage the party to notify the clerk of the decision "immediate[ly]" so that the appeal can be submitted to the Court without delay.[191]

III. ORAL ARGUMENT

Understanding the Eleventh Circuit's pragmatic approach to oral argument is important. Pragmatism informs not only the number of cases that the Court schedules for argument but also the way in which cases are discussed at an argument. This Part provides advocates an overview of pertinent Eleventh Circuit rules on how and why cases are set for argument, as well as—from a clerk's perspective—what is most helpful to hear at oral argument and how best to convey it.

A. *Assignment of Cases for Oral Argument*

As noted above, the Eleventh Circuit maintains a two-calendar system for appeals—a non-argument calendar and an argument calendar—with few cases making their way onto the argument calendar.[192] Oral argument is generally reserved for cases in which there is no precedent that readily resolves the case and cases in which discussion with counsel will "significantly aid" the Court's resolution of the appeal.[193] Even cases placed on the argument calendar may be decided on the briefs if the assigned panel unanimously determines that oral argument is unnecessary.[194] Capital cases are set for oral argument by default, but these too can be moved to the non-argument calendar if the panel unanimously agrees to do so.[195]

The small number of cases in which the Eleventh Circuit hears oral argument evidences the Court's functional approach to oral advocacy. For example, between September 2016 and September

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[190] 11TH CIR. R. 28-1, I.O.P. 4 ("A party may waive the right to file a reply brief. Immediate notice of such waiver to the clerk will expedite submission of the appeal to the court.").

[191] *Id.*

[192] *See id.* at R. 34-3(a); DYSART & SOUTHWICK, *supra* note 1, at 12.

[193] *See* 11TH CIR. R. 34-3(b).

[194] *See id.* at R. 34-3(f).

[195] *See id.* at R. 22-4 I.O.P. 2.

2017, only 10.4% of cases were decided on the merits after oral argument, compared to the 89.6% of cases decided on the briefs.[196] In the year prior, the Court held oral arguments for only 7.7% of the cases it decided on the merits.[197] And this is not a recent phenomenon. On average, the Eleventh Circuit has held oral arguments in just 13.2% of its cases for the last ten years, and over the last five years, that number has dropped to 10.6%.[198] To be sure, the Eleventh

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[196] *U.S. Courts of Appeals—Cases Terminated on the Merits After Oral Arguments or Submission on Briefs, by Circuit, During the 12-Month Period Ending September 30, 2017*, U.S. CTS., http://www.uscourts.gov/sites/default/files/data_tables/jb_b10_0930.2017.pdf (last visited Apr. 10, 2019) [hereinafter *Cases Terminated After Oral Argument or Submission on the Briefs, 2017*].

[197] *U.S. Courts of Appeals—Cases Terminated on the Merits After Oral Arguments or Submission on Briefs, by Circuit, During the 12-Month Period Ending September 30, 2016*, U.S. CTS., http://www.uscourts.gov/sites/default/files/data_tables/jb_b10_0930.2016.pdf (last visited Apr. 10, 2019) [hereinafter *Cases Terminated on the Merits, 2016*].

[198] *See Cases Terminated After Oral Argument or Submission on the Briefs, 2017*, *supra* note 196*; Cases Terminated on the Merits, 2016*, *supra* note 197; *U.S. Courts of Appeals—Cases Terminated on the Merits After Oral Arguments or Submission on Briefs, by Circuit, During the 12-Month Period Ending September 30, 2015*, U.S. CTS., http://www.uscourts.gov/sites/default/files/data_tables/B10Sep15.pdf (last visited Apr. 10, 2019) (identifying 11.8% of cases decided on the merits as having had oral argument); *U.S. Courts of Appeals—Cases Terminated on the Merits After Oral Arguments or Submission on Briefs, by Circuit, During the 12-Month Period Ending September 30, 2014*, U.S. CTS., http://www.uscourts.gov/sites/default/files/statistics_import_dir/B10Sep14.pdf (last visited Apr. 10, 2019) (identifying 11.7% of cases decided on the merits as having had oral argument); *U.S. Courts of Appeals—Cases Terminated on the Merits After Oral Arguments or Submission on Briefs, by Circuit, During the 12-Month Period Ending September 30, 2013*, U.S. CTS., http://www.uscourts.gov/sites/default/files/statistics_import_dir/S01Sep13.pdf (last visited Apr. 10, 2019) [hereinafter *Cases Terminated on the Merits, 2013*] (identifying 11.3% of cases decided on the merits as having had oral argument); *U.S. Courts of Appeals—Cases Terminated on the Merits After Oral Arguments or Submission on Briefs, by Circuit, During the 12-Month Period Ending September 30, 2012*, U.S. CTS., http://www.uscourts.gov/sites/default/files/statistics_import_dir/S01Sep12.pdf (last visited Apr. 10, 2019) [hereinafter *Cases Terminated on the Merits, 2012*] (identifying 11.6% of cases decided on the merits as having had oral argument); *U.S. Courts of Appeals—Cases Terminated on the Merits After Oral Arguments or Submission on Briefs, by Circuit, During the 12-Month*

Circuit is not alone in limiting the number of cases for which it holds oral argument.[199] But in any given year in the last decade, the percentage of cases in which the Eleventh Circuit heard argument was lower than the percentage for at least nine other federal courts of appeals.[200]

Thus, when a case is set for oral argument in the Eleventh Circuit, the panel wants to talk to counsel for a reason. Oral argument provides an opportunity for the Court to pinpoint dispositive issues

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Period Ending September 30, 2011, U.S. CTS., http://www.uscourts.gov/sites/default/files/statistics_import_dir/S01Sep11.pdf (last visited Apr. 10, 2019) (identifying 15.8% of cases decided on the merits as having had oral argument); *U.S. Courts of Appeals—Cases Terminated on the Merits After Oral Arguments or Submission on Briefs, by Circuit, During the 12-Month Period Ending September 30, 2010*, U.S. CTS., http://www.uscourts.gov/sites/default/files/statistics_import_dir/S01Sep10.pdf (last visited Apr. 10, 2019) (identifying 16.2% of cases decided on the merits as having had oral argument); *U.S. Courts of Appeals—Cases Terminated on the Merits After Oral Arguments or Submission on Briefs, by Circuit, During the 12-Month Period Ending September 30, 2009*, U.S. CTS., http://www.uscourts.gov/sites/default/files/statistics_import_dir/S01Sep09.pdf (last visited Apr. 10, 2019) [hereinafter *Cases Terminated on the Merits, 2009*] (identifying 14.4% of cases decided on the merits as having had oral argument); *U.S. Courts of Appeals—Cases Terminated on the Merits After Oral Arguments or Submission on Briefs, by Circuit, During the 12-Month Period Ending September 30, 2008*, U.S. CTS., http://www.uscourts.gov/sites/default/files/statistics_import_dir/S01Sep08.pdf (last visited Apr. 10, 2019) (identifying 20.8% of cases decided on the merits as having had oral argument).

[199] The Third and Fourth Circuits also have a history of deciding the vast majority of their cases on the briefs. *See supra* notes 196–98.

[200] For each of the years listed above, the Eleventh Circuit held fewer oral arguments on cases decided on the merits than the First, Second, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and D.C. Circuits. *See supra* notes 196–98. In the 2008–2009, 2011–2012, and 2015–2016 Terms, the Eleventh Circuit also held a lower percentage of arguments in its cases than did the Third Circuit. *See Cases Terminated on the Merits, 2016*, *supra* note 197; *Cases Terminated on the Merits, 2012*, *supra* note 198; *Cases Terminated on the Merits, 2009*, *supra* note 198. And the Fourth and Eleventh Circuits heard oral argument for the same percentage of cases—just 11.3%—in the 2012–2013 Term. *See Cases Terminated on the Merits, 2013*, *supra* note 198. In the 2016–2017 Term, the Eleventh Circuit had the lowest percentage of cases with oral argument in the country. *See Cases Terminated on the Merits, 2017*, *supra* note 192. Statistics from the Federal Circuit are not included here.

and have a productive dialogue with the advocates about their respective positions. Indeed, the entire purpose of expending judicial resources on oral argument is to assist the panel in teasing apart those areas of the case for which the briefs left the panel wanting answers or analysis.

B. *Effective Oral Advocacy*

From the law clerks' perspective, there are three elements that allow an advocate to gain credibility before the Court and best present her client's position: demeanor, preparedness, and organization.

1. DEMEANOR

The substance of an argument matters, but the manner in which an advocate conveys her argument matters nearly, if not equally, as much. Advocates cannot control the facts of the case, the composition of the panel,[201] or the state of the existing law. But there are many things over which they have complete control: body language, tone, and clarity of speech, to name a few. All these elements profoundly affect the way the judges and their clerks hear, remember, and understand the argument presented.

Body language is an effective communicative tool, and clerks are attuned to the way an advocate appears when presenting her argument. During our time as clerks, two aspects of an advocate's presentation stood out: first, whether the advocate's body language detracted from her argument, and second, whether the advocate gauged and appropriately responded to the panel's body language.

Body language can detract from an advocate's argument and hurt her credibility—or it can bolster both. Wild gesticulations, seasick swaying, and hair flips can detract from legal argument.[202] Further, the court may view such body language as breaching its norm of collegiality. Advocates should avoid any body language that could be interpreted as suggesting disdain for the other side.[203] Pointing at opposing counsel, for example, is never a good idea. On

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201 *See* 11TH CIR. R. 34-4, I.O.P. 2(b).

202 *See* SCALIA & GARNER, *supra* note 42, at 183.

203 *See* DYSART & SOUTHWICK, *supra* note 1, at 347.

the other hand, eye contact and intentional gestures can enhance an argument by drawing attention to a particular point, and calm, steady body language can establish an advocate as an even-keeled and trustworthy counsel.[204]

An advocate should be equally aware of the judges' body language to see how any portion of an argument is being received.[205] For example, if an advocate references a case and a judge begins actively looking through a binder of materials, then it is probably not time to move on to the next point. On the other hand, if all three judges are leaned back in their chairs, not asking any questions, then the advocate may consider moving on. And when a judge leans forward and begins to ask a question, the advocate should stop talking and allow the judge to interrupt. Speaking over a judge, or failing to recognize when the panel needs more or less argument, are potholes that advocates can easily avoid simply by paying attention to the judges' body language.

The tone that an advocate takes when making her argument also has influential weight.[206] Formality, respect, and civility are important in every courtroom and are held in particularly high esteem in the Eleventh Circuit.[207] Advocates must strike a respectful tone, which requires them to take into account, among other things, the subject matter of their appeal. Sometimes humor is appropriate at oral argument and other times, such as during argument in a death penalty case, it is callous and unwelcome.[208]

From the perspective of the law clerk—whose role is to take notes in a way that captures not only all the questions asked during the argument but also all the details of the responses (or non-responses) given—effective advocates are those who speak slowly and deliberately. Harried or exasperated advocates who become

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[204] SCALIA & GARNER, *supra* note 42, at 178–79.

[205] Joseph W. Hatchett & Robert J. Telfer, III, *The Importance of Appellate Oral Argument*, 33 STETSON L. REV. 139, 144 (2003).

[206] *Id.* at 143.

[207] *See supra* Section II.A.

[208] *But see* SCALIA & GARNER, *supra* note 42, at 186–87 (stating that while humor may be done right, few advocates are actually funny, and few judges appreciate the jokes, so "[a]ll in all, the benefit is not worth the risk").

defensive or act dismissively present arguments that are difficult to follow, let alone memorialize.[209] The quality of an argument increases dramatically when an advocate speaks with intention, and the likelihood of the law clerk noting the advocate's answer, too, increases. In turn, the judges benefit—they not only hear well-spoken argument and obtain answers to their questions, but also have better informed clerks.

Lastly, whether through tone or body language, it is important that advocates direct their argument to the entire panel.[210] It is a mistake to assume, either before or during argument, that a certain judge will not agree with a particular position.[211] Focusing attention on one or two members of the panel is not only disrespectful, but also a lost opportunity to convince one of the decision makers, or her law clerks, of the "correct" outcome.[212] Instead, each advocate should address her arguments to each member of the panel and make no assumptions about who will side in her favor.

2. PREPAREDNESS

In light of the pragmatic purpose for holding oral argument, the parties should assume that the judges and their law clerks have both read the briefs and come to oral argument with questions aimed to suss out, better define, or otherwise draw out the issues dispositive to the appeal.[213] Advocates have an obligation to complement the judges' and clerks' time and efforts by investing equal time and effort in their preparation.

Being prepared means being able to meaningfully discuss the law and the ways in which it does or does not support a particular position.[214] Indeed, advocates should be able to spend their time at oral argument talking exclusively about opposing counsel's position, if needed.[215] To that end, any time an advocate cites an opinion,

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209 DYSART & SOUTHWICK, *supra* note 1, at 352.
210 SCALIA & GARNER, *supra* note 42, at 178–79.
211 *Id.*
212 *Id.*
213 *See* Hughey, *supra* note 53, at 427.
214 *See id.* at 440.
215 *See* SCALIA & GARNER, *supra* note 42, at 10.

she should know not only who wrote the majority opinion but also who concurred, who dissented, and the reasons why the decision was not unanimous. Any position in tension with the one for which the advocate cited the opinion might inform a question posed at oral argument.[216]

Preparation also means knowing when there is Eleventh Circuit law on point and, if not, determining whether any other circuit has decided a case involving the same issue.[217] This principle should guide research not only when writing briefs but also when preparing for oral argument. When there is Eleventh Circuit precedent on point or Eleventh Circuit precedent that bears closely, but indirectly, on the issue, focusing an argument on out-of-circuit case law is of little help.[218] The better approach is to explain why the Eleventh Circuit precedent does not control and provide reasons why the panel should adopt a sister circuit's approach. When there is no Eleventh Circuit precedent on point, it is also helpful for advocates to address at oral argument whether there are any cases in which a sister circuit panel or district court judge faces the same issue but has not yet issued an opinion. An advocate who can articulate in what way the other case is similar to or different from the one before the Court also significantly assists the law clerks and panel, because doing so provides an example of how the advocate's position would direct a result on other fact patterns or, perhaps, procedural postures.

Submitting supplemental authority before oral argument should be done with a great deal of pause and consideration. Although recently-decided on-point authority may be helpful to send to the Court and opposing counsel for discussion at oral argument, authority that is only tangentially related should not be sent.[219] Timing

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[216] DYSART & SOUTHWICK, *supra* note 1, at 350. Relatedly, acknowledging tension or conceding a point at oral argument does not always correlate with a loss. *See id.* Oftentimes the most convincing advocate is the one who explains how the panel can and should reach a position in her client's favor even if the rule of law initially appears to dictate a ruling aligned with opposing counsel's position. *See id.*

[217] *See id.* at 87–88.

[218] *See id.*

[219] *See id.* at 289–90.

matters, too: unless a recently decided case is dispositive, it is unlikely to receive a warm welcome in chambers during the week of oral argument.[220] Waiting so long to submit supplemental authority, unless newly issued, burdens both the Court and opposing counsel and undermines the advocate's credibility.[221] Such a late submission suggests that the advocate is disorganized or lacks confidence in her position.[222] Further, advocates should not attempt to use a submission of supplemental authority as an opportunity to shore up points in their briefs. To this end, the Eleventh Circuit limits the letter accompanying supplemental authority to just 350 words, including footnotes.[223]

Finally, in preparing for oral argument, advocates should consider the perspectives of not only the Eleventh Circuit's active judges but also senior judges, judges from other circuit courts, and district court judges. Since visiting and senior judges participate on most argument panels, advocates must be prepared to answer questions from them.[224]

3. ORGANIZATION

An advocate's ability to distill the answer to a question is often the difference between a productive oral argument and a fireside chat about the law. Questions posed at oral argument are aimed to elicit answers that will help the judges decide the case.[225] Whether questions are presented to the advocates in advance or in the middle of argument, directly answering every question in a way that keeps the discussion moving is the hallmark of a helpful presentation.[226] Organization, both in the overall presentation of the argument and within each answer, is the key that unlocks that principle.

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220 *Id.*

221 *Id.*; SCALIA & GARNER, *supra* note 42, at 101–02.

222 *See* SCALIA & GARNER, *supra* note 42, at 101–02.

223 11TH CIR. R. 28, I.O.P. 6 (citing FED. R. APP. P. 28(j)).

224 *See supra* notes 34–36, 131 and accompanying text.

225 Hughey, *supra* note 53, at 428.

226 *See* Emily R. Bodtke, *Arguing at the Appellate Level: A Judicial Clerk's Perspective*, 74 BENCH & B. MINN., Mar. 2017, at 34, 35.

Roadmaps are a useful way to organize an oral argument from the outset. Given the time constraints placed on oral argument, it is essential that each advocate whittle down her presentation to the most important issues.[227] Though advocates should be prepared to discuss any aspect of the case, having in hand an outline with two or three points will ensure the argument has an underlying structure.[228] Stating those two or three points at the beginning of the argument has the added benefit of allowing a law clerk to outline the argument before the judges begin asking questions. Even if the argument moves around, the advocate's points are already in the clerk's notes, and the clerk can fill in those portions of the argument that pertain to each point as they come up, even if out of the intended order.

For some oral arguments, advocates will know in advance that the panel has certain questions it needs answered, and the beginning of the argument is an appropriate place to address those questions.[229] It is not uncommon for the panel to submit questions to the advocates, through the Clerk of the Court, that they wish to have addressed at oral argument. Any number of considerations might prompt advance-notice questions: recently decided persuasive authority, a lack of clarity in the briefs, concerns about jurisdiction, intervening Supreme Court precedent, or binding precedent that an advocate forgot to cite. The questions may pertain to a discrete issue or broader questions raised on appeal. Regardless, advocates should shape their answers ahead of time and be prepared to answer those advance-notice questions at the beginning of the argument.

Organization at the outset of an argument only lasts to the first interruption, though, and advocates have to be prepared to provide structured, coherent answers to unanticipated questions for the remainder of their time at the podium.[230] Providing an organized answer requires listening to the question in full before answering.[231]

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227 DYSART & SOUTHWICK, *supra* note 1, at 296.
228 *See* Hatchett & Telfer, *supra* note 205, at 149.
229 *Cf.* DYSART & SOUTHWICK, *supra* note 1, at 352.
230 *See id.* at 333–34.
231 *Id.* at 333.

From the law clerk's perspective, an answer that begins with a simple "yes" or "no" is always welcome because that response provides immediate context and framing for the discussion that follows.[232] Meandering answers are difficult to track and write down. Relatedly, it is rude to interrupt or tell a judge, "I'll get back to your question in a minute" and provide an answer on another topic.[233] It is a mistake for an advocate to be so focused on the two or three points in her outline that she forgets or ignores a question being posed.[234]

Appellate attorney Jack Metzler's "circular argument" structure provides a useful way for advocates to convey their argument while addressing the panel's questions.[235] Under the circular-argument approach, the advocate makes her three most important points in the course of answering the panel's questions.[236] Rather than attempting to make an argument and getting sidetracked by the judges' questions, the judges' questions become the vehicle by which to make the most important points in the argument.

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[232] Hughey, *supra* note 53, at 434.

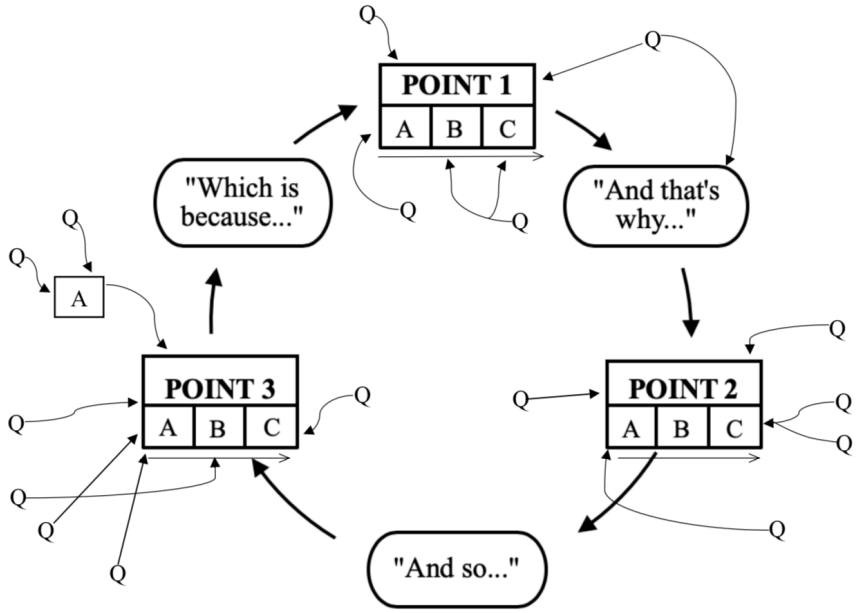
[233] *Id.*

[234] *See id.* at 429 ("[B]e flexible in your argument—if the court wants to talk about other issues, you must be able to move away from your plan."); Hatchet & Telfer, *supra* note 205, at 148–49 (explaining that an attorney's outline should be "a flexible presentation to the court").

[235] *See* Jack Metzler (@SCOTUSPlaces), TWITTER (Oct. 31, 2017, 12:52 PM), https://twitter.com/SCOTUSPlaces/status/925450393823432704.

[236] *Id.*

The Circular Outline Argument



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1. Which point answers the question?
2. Practice moving onto the next point.
3. The point after your last point is your first point.

This circular structure requires advocates to think proactively about answering the panel's questions in a way that will provide a forthright answer while still making one of the three points most important to the client's position.[237] Follow-up questions from the panel then become a way to further flesh out the point.[238] Additionally, the advocate should frame the answer in a way that leads into the second or third point in the argument.[239] The effect is an organic flow of question and answer, rather than lines of questioning

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237 *Id.*
238 *Id.*
239 *Id.*

punctuated by periods of silence while the advocate tries to transition or reorganize.

* * *

In sum, the Eleventh Circuit grants oral argument for the pragmatic purpose of helping the panel decide the case. Advocates should approach argument with that background in mind and try to make their time with the panel as productive as possible. From the law clerks' perspective, an advocate's demeanor, preparedness, and organization can be the difference between a strong argument and an ineffective one.

CONCLUSION

We have offered here strategies that we believe are effective in practicing before the Eleventh Circuit, but we recognize that appellate advocacy is an art. There is no sure-fire formula for success. Our opinions on advocacy before the Court are just that—our opinions. In our view, an effective Eleventh Circuit advocate is frank, collegial, and diligent; familiar with the Court's jurisprudence, rules, traditions, and decision-making processes; and above all, clear and credible.

There remains substantial room in the literature for others to weigh-in on the broad principles of advocacy before the Eleventh Circuit, as well as to provide greater insight into how the Court has developed and shaped certain areas of the law. We welcome those perspectives and look forward to that discourse.