Forging an Effective Appellate Brief

Shaping your arguments around the relevant standard of review helps you mirror the analysis appellate judges will apply—and makes it easier for them to adopt your reasoning.

By || **Kevin J. Powers**

Many attorneys view the standard of review—the most powerful whetstone of legal writing—as mere dead weight.[1] But by allowing the standard of review to focus, sharpen, and shape an appellate brief, you can speak to a court in its own voice and present a legal argument with the same focus as a court decision. These principles also apply to trial memos, in which the legal standard fills the role of an appellate standard of review.

An effective appellate brief, unlike a strong trial argument, doesn't tell a story about a case in the abstract. Instead, these briefs—like appellate decisions—tell a story about the presence or absence of a reversible error.[2] How to determine a reversible error is controlled by the standard of review.[3] Therefore, your appellate brief must tell the story through the voice of the standard of review.

Among the most important reasons for using the standard of review to shape your argument[4] is that the standard of review is always "the lens through which the court views the issues presented," and thus, the lens that shapes the decision.[5] A brief is much more likely to persuade a reviewing court if it speaks in the structure, form, and tone in which the court itself speaks.[6]

Rules of appellate procedure generally require or strongly encourage an explicit statement of the standard of review.[7] However, countless briefs treat the standard of review as a burdensome speed bump on the road to an argument or, worse yet, as an annoying formal requirement to be paid hasty lip service and then disregarded.[8] This is a mistake and a wasted opportunity.[9] By disregarding the standard of review, you eschew the voice of a court for the voice of a lawyer, weakening your argument's effectiveness.[10]

Under the Federal Rules of Appellate Procedure, stating the standard of review is required in the appellant's brief but optional in the appellee's brief.[11] Nonetheless, any truly clear and persuasive brief—whether for the appellant, the appellee, or an amicus—will include an explicit statement of the standard of review.[12] After all, the court's decision will include one.

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Active Voice

To focus a brief through the standard of review, you must articulate the error or absence of an error in the active voice. The standard of review doesn't ask whether "there was error" in the passive voice. Instead, the standard of review asks whether a particular actor committed an error.

For example, a brief may argue that "the trial court abused its discretion by denying the motion for a new trial where [circumstances gave rise to abuse of discretion]." The legal standard applied to the motion may have been whether the trial judge was "satisfied that the jury failed to exercise an honest and reasonable judgment in accordance with the controlling principles of law."[13] For appellate purposes, however, the actor who did or did not err was the trial court—not the jury. The issue on appeal is not whether the jury failed to exercise an honest and reasonable judgment, but whether the judge abused his or her discretion when deciding the motion and determining whether the jurors failed in their role.[14]

Form and Structure

A brief should adhere closely to the form dictated by the standard of review. Using this structure will strengthen your argument in several ways.

Coherence. A brief in which the narrative—the story that the brief tells—does not connect directly to the argument is disjointed.[15] You want a filing in which all the separate

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components relate to each other—not a collection of unrelated thoughts.[16]

Focus. The facts and procedural history should provide readers with the information they need to understand the argument, not generic background information about the case in general. Wild tangents and deviations from the form, unless minor and carefully planned, are distracting and confusing to the court.

Purpose. Focusing on the standard of review gives the appeal purpose.[17] Readers shouldn't be left wondering how the facts and procedural history relate to the argument or why you spent time discussing those things. Long briefs do not necessarily say more than short briefs.

Relevance. By reasoning like the court must reason in its decision, you make the brief pleasurable to read and easy to mimic.[18] When a brief bases its form and structure on the standard of review, the court can draw language from the brief's arguments.[19] When a brief does not do this, the court is left attempting to reinvent the wheel. Appellate judges, law clerks, and staff attorneys work very hard to reach the right result, and you owe it to the court to demonstrate in the structure of the brief that that you put in your best effort.

You should use the standard of review to give form and direction to each of the four key sections in an appellate brief: the issues presented, the facts, the procedural history, and the argument.

Issues Presented Section

In the issues presented section, tell the reader who erred or did not err. An appellate brief asks the court to reverse an error—or refrain from doing so—and must therefore identify who did or did not err.

For example, if the dispute involves the closing argument and the standard of review is abuse of discretion, then the issue is whether the trial judge abused his or her discretion when regulating the closing argument.[20] The trial counsel's conduct becomes ammunition with which to demonstrate whether the trial judge abused his or her discretion, but the attorney's conduct is not itself the error. Thus, the brief's focus changes from merely "how bad were the things that counsel said or did" to "what did the judge do in response, and was that a sufficient remedy?"

As another example, if the appellant has appealed a successful motion for summary judgment, and the standard of review is de novo, then the issue is whether the moving party is entitled to judgment as a matter of law when viewing the evidence in the light most favorable to the nonmoving party.[21]

In this scenario, the summary judgment record and the law become most important for a party on appeal. By contrast, the trial counsel's arguments on the motion matter only if those arguments stand on their own merits on appeal. That is, neither the trial counsel's arguments nor their characterizations of evidence are error.

The following issue presented is unclear because it fails to identify the standard of review as abuse of discretion, to identify the trial court as the actor committing the reversible error, and to identify the motion decision in which the reversible error occurred: "Where a party failed to disclose a witness's expert opinion pursuant to Fed. R. Civ. P. 26(a)(2)(B)(i), was it error to admit that witness's testimony regarding the undisclosed expert opinion?"

Contrast that with the following issue. It is presented clearly in all of the ways in which the preceding issue presented was unclear: "Where a party failed to disclose a witness's expert opinion pursuant to Fed. R. Civ. P. 26(a)(2)(B)(i), did the District Court abuse its discretion in denying a motion to strike that witness's testimony regarding the undisclosed expert opinion pursuant to Fed. R. Civ. P. 37(c)(1)?"

Facts Section

In the facts section, tell the reader which facts made a difference in the error or non-error. When drafting the facts, ask about every sentence:

- Does this information assist the court in determining whether reversible error occurred?

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- Does this information assist the court in understanding meaningful and necessary context surrounding the allegedly reversible error?

Background information is appropriate to the extent that it provides key context, but a brief should not leave the reader wondering why it includes information completely unrelated to the allegedly reversible error.[22]

For example, in an appeal in which the appellant claims that the trial court erred in allowing a motion for summary judgment based on a procedural defect, the underlying facts of the claim or damages may be almost entirely irrelevant. If the trial court—the actor that allegedly committed the error—based its ruling on an erroneous application of a statute, then the most relevant history is probably procedural rather than factual.[23]

Likewise, if the appellant claims that the trial court erred in denying a motion for a new trial due to an improper closing argument, the underlying facts will be far less important than the procedural history of the trial.[24] Comments by trial counsel, sidebars, and objections may all factor into the propriety of the closing argument, the sufficiency of curative actions by the trial court, and even whether the standard of review is abuse of discretion or plain error—but the facts may not impact any of these questions.[25]

By contrast, if the appellant claims that the trial court erred in denying a motion for a new trial due to insufficiency of the evidence, the underlying factual evidence will be very relevant.[26] The reviewing court must assess that evidence to determine whether the trial judge abused his or her discretion when evaluating whether the verdict was against the great weight of the evidence.[27]

Likewise, if the appellant claims that the trial court erred in excluding evidence of causation, the facts will be relevant to the extent that the excluded evidence would or would not have been sufficient to prove those facts, thereby rendering the exclusion—even if an abuse of discretion—harmful or harmless.[28]

Procedural History Section

In the procedural history section, tell the reader when the error occurred

or did not occur. When drafting the procedural history, ask about every sentence:

- Does this information assist the court in determining whether reversible error occurred?
- Does this information assist the court in understanding meaningful and necessary context surrounding the allegedly reversible error?

Just like the statement of facts, the emphasis in the procedural history should be on what produced the error or produced circumstances that did not amount to error.

For example, in a scenario in which the appellant claims that the trial court erred in allowing a motion for summary judgment based on a procedural defect, such as failure to provide a hearing before rendering a decision, the procedural history may be more relevant than the underlying facts.[29] Similarly, if the trial court—the actor that allegedly committed the error—based its ruling on an erroneous application of a statute to a procedural defect, then the most relevant history is probably procedural rather than factual.[30] When the appellant claims that the trial court abused its discretion in excluding evidence and then dismissing the case due to discovery violations, the procedural history of discovery, any case management orders, and the timing of any attempts at compliance will matter far more than the facts giving rise to the litigation.[31]

By contrast, if the appellant claims that the trial court erred in denying a motion for a new trial due to insufficiency of the evidence, the procedural history of the trial may be almost entirely irrelevant. In that case, the standard of review focuses on what the trier of fact could find from that evidence, not how the trial court admitted that evidence.[32]

Argument Section

In the argument section, tell the reader why the court should reverse or not reverse. The appellate argument must address the standard of review, which is not necessarily the legal standard the trial court applied. Sometimes, the standard of review and the legal standard will be the same; this is true when the standard of review is de novo. Other times, the standard of review will be somewhat or even vastly more deferential than the lower court's legal standard; the starkest example of this divergence may be the abuse of discretion standard.

Fundamentally, it is never enough for the appellant simply to demonstrate that the trial court "erred." An appellate brief must either demonstrate that the trial court committed or did not commit reversible error as reversible error is defined by the standard of review.[33]

In an appeal over a motion for summary judgment, for example, the appellant may allege that the trial court committed reversible error by making credibility determinations inappropriate at summary judgment. In that scenario, the appellate briefs should not spend time belaboring trial counsel arguments that the trial court did not accept as part of its reasoning when allowing the motion.

Tell the story of the error at issue as seen through the standard of review rather than a story of the case in the abstract. This is the same task facing the reviewing court, and a brief that speaks in the voice of the standard of review will sound to the court like a ready-made draft opinion. T

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Notes

1. One New York judge has satirically urged lawyers intent on losing to omit, or at least confuse, standards of review. Gerald Lebovits, *Writing Bad Briefs: How to Lose a Case in 100 Pages or More*, 82 N.Y. St. B. Ass' n J. 4, 56, 64 (2010), https://tinyurl.com/3xm5zcjn. In fairness, some legal scholars have accused courts of treating standards of review with similarly short shrift. *See, e.g.*, Kelly Kunsch, *Standard of Review (State and Federal): A Primer*, 18 Seattle U. L. Rev. 11, 12 (1994), https://tinyurl.com/ybncvta9.
2. "[An appellate court] can't substitute [its] judgment for the trial judge's, even if something that happened at the trial was very important to the outcome. . . . A terrific brief is one that is straight to the point. It tells us what happened, why there was error, and what law supports the claim that the judgment below is reversible. The appellee, of course, does just the opposite, explaining why the judgment below should be upheld." Robert R. Baldock et al., *What Appellate Advocates Seek From Appellate Judges and What Appellate Judges Seek From Appellate Advocates, Panel Two*, 31 N.M. L. Rev. 265, 266 (2001), https://digitalrepository.unm.edu/nmlr/vol31/iss1/19/.
3. "The brief needs to identify what the alleged reversible error is, taking into consideration the standards of review that [the reviewing court must] apply, because that standard in many instances determines the outcome." *Id.*
4. "The [1993] amendment require[d] an appellant's brief to state the standard of review applicable to each issue on appeal. Five circuits [then] require[d] these statements. Experience in those circuits indicate[d] that requiring a statement of the standard of review generally results in arguments that are properly shaped in light of the standard." Advisory Comm. Notes to Fed. R. App. P. 28(a)(5) (1993).
5. *Reporter's Notes to the 2019 Amendments to the Massachusetts Rules of Appellate Procedure*, at 36 (2019) (characterizing standard of review as the guiding "lens" in explaining why Massachusetts adopted an explicit standard of review statement requirement), https://tinyurl.com/5n9as43b.
6. *See* Collyn A. Peddie, *The Ten Commandments of Legal Writing*, 32 Houston Lawyer 36, 37 (1994) (the standard of review helps judicial law clerks "lift whole portions from your brief and insert them into a draft opinion or order"); Andrey Spektor & Michael A.

Zuckerman, *Legal Writing as Good Writing: Tips From the Trenches*, 14 J. App. Prac. & Process 303, 308 (2013) (connecting argument to standard of review "encourages the judge to incorporate your brief into a judicial opinion, moving you one step closer to victory").

7. *See, e.g.*, Fed. R. App. P. 28(a)(8)(B); Fed. R. App. P. 28(b)(4).
8. Following the adoption of the formal statement of the standard of review requirement, one Massachusetts state appellate justice "noted that not all briefs include the statement, and expressed hope that more briefs will include it in the future, while another Justice commented that although more briefs are including a standard of review, it is not always the correct standard." Joseph Stanton & Julie Goldman, *Appellate Electronic Filing Tips for the 2020's*, Bos. Bar Ass'n, Feb. 19, 2020, https://bostonbar.org/journal/appellate-electronic-filing-tips-for-the-2020s-2/; *see also* Harry Pregerson, *The Seven Sins of Appellate Brief Writing and Other Transgressions*, 34 UCLA L. Rev. 431, 437 (1986).
9. *See* Jonathan K. Van Patten, *Twenty-Five Propositions on Writing and Persuasion*, 49 S.D. L. Rev. 250, 264–66 (2004) (the standard of review is the most frequent tiebreaker on appeal and "defines who will be working uphill and who will be coasting downhill").
10. *See* Harry Pregerson & Suzianne D. Painter-Thorne, *The Seven Virtues of Appellate Brief-Writing: An Update From the Bench*, 38 Sw. U. L. Rev. 221, 230 (2008) (virtuous briefs follow court rules "to the letter and to the spirit," thereby "mak[ing] the busy court's job easier").
11. Fed. R. App. P. 28(a)(8)(B) ("The appellant's brief must contain . . . the argument, which must contain . . . for each issue, a concise statement of the applicable standard of review (which may appear in the discussion of the issue or under a separate heading placed before the discussion of the issues)."); Fed. R. App. P. 28(b)(4) ("The appellee's brief must conform to the requirements of Rule 28(a)(1)–(8) and (10), except that none of the following [including the statement of the standard of review] need appear unless the appellee is dissatisfied with the appellant's statement.").
12. *See* Sarah B. Duncan, *Pursuing Quality: Writing a Helpful Brief*, 30 St. Mary's L.J. 1093, 1103 (1999).
13. *See, e.g.*, *Carvalho v. Fitzgerald*, 188 F. Supp. 2d 132, 134 (D. Mass. 2002), quoting *Turnpike Motors, Inc. v. Newbury Group, Inc.*, 596 N.E.2d 989, 994 (Mass. 1992).
14. *See, e.g.*, *Correia v. Fitzgerald*, 354 F.3d 47, 54 (1st Cir. 2003).
15. *See* Pregerson, *supra* note 10, at 226.
16. *See* John C. Godbold, *Twenty Pages and Twenty Minutes—Effective Advocacy on Appeal*, 30 Sw. L.J. 801, 811 (1977) (unfamiliarity with standard of review may result in "trying to run for a touchdown when basketball rules are in effect").
17. *See* Michael R. Bosse, *Standards of Review: The Meaning of Words*, 49 Me. L. Rev. 367, 368–69 (1997).
18. "Any reasonably competent attorney can raise the proper issues in a brief, but judgment provides perspective and a sense of the relationship between the case and the specific jurisprudence into which it fits. A brief informed by such judgment draws the reader to a particular outcome of the case as if it were the only one consonant with the law as it is and should be." Edith Hollan Jones, *'How I Write' Essays*, 4 Scribes J. Legal Writing 25, 27 (1993), https://tinyurl.com/4uky6yhr.
19. *Id.* at 29.
20. *See, e.g.*, *Patterson v. Balsamico*, 440 F.3d 104, 119 (2d Cir. 2006).
21. *See, e.g.*, *Estate of Simpson v. Gorbett*, 863 F.3d 740, 745 (7th Cir. 2017).
22. *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 Facts Ballad*, 46 Wake Forest L. Rev. 983, 997–99 (2011); Spektor & Zuckerman, *supra* note 6, at 308 ("[D]o not waste the appellate court's time with, for instance, a discussion of the trial court's factual findings in a case subject to clear-error review.").
23. *See, e.g.*, *Meyer v. Veolia Energy N. Am.*, 482 Mass. 208, 209–11 (Mass. 2019).
24. *See, e.g.*, *Mahaska Bottling Co., Inc. v. Bottling Group, LLC*, 6 F.4th 828, 841 (8th Cir. 2019).
25. *See, e.g.*, *id.* at 831–34.
26. *See* Pregerson, *supra* note 8, at 437.
27. *See, e.g.*, *Incalza v. Fendi N. Am., Inc.*, 479 F.3d 1005, 1013 (9th Cir. 2007).
28. *See, e.g.*, *Beacham v. Lee-Norse*, 714 F.2d 1010, 1012–16 (10th Cir. 1983).
29. *See generally Nuwestra v. Merrill Lynch, Fenner & Smith, Inc.*, 174 F.3d 87 (2d Cir. 1999).
30. *See, e.g.*, *Meyer*, 482 Mass. at 209–11.
31. *See, e.g.*, *Santiago-Diaz v. Laboratorio Clinico y De Referencia Del Este*, 456 F.3d 272, 275–78 (1st Cir. 2006).
32. *See, e.g.*, *Incalza*, 479 F.3d at 1013.
33. *See* Spektor & Zuckerman, *supra* note 6, at 307–08.