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PREPARATION AND ARGUMENT OF THE CRIMINAL APPEAL

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The successful criminal appeal is most often shaped by the diligent, articulate, able trial lawyer who recognizes constitutional, procedural and substantive problems as they occur in the preparation and trial of a case and who protects his record in the assumption that the case will subsequently be appealed. This is not always true, of course, for many cases are won on appeal despite the conduct of the trial attorney,[1] and others, originally lost on appeal, are eventually won at some later date in the course of pursuing one or more post conviction remedies.[2] Generally, however, these latter proceedings are handled by the same attorneys who prosecuted the initial action for post-conviction relief at the trial stage and who, by reason of that fact, have prepared their case for appeal from the moment of filing the petition seeking relief. In a sense, these cases are being appealed even in the trial court,[3] and, while they may present the same mechanical and procedural problems as an appeal from the original judgment of conviction, when they reach the appellate stage, they generally do not present the same conceptual problems. That distinction defines the scope of this article, which is primarily limited to problems arising in the course of an appeal from a judgment of conviction.

The rules of procedure or statutory provisions governing appeals are of cardinal importance, for not only do they outline basic procedures and requirements, but quite often they signal major pitfalls. As a consequence, primary emphasis will be placed on the *Federal Rules of Appellate Procedure* which govern appellate practice in each of the eleven federal circuits[4] and most closely approximate the rules in force in the individual states. To augment this model, reference will also be made to the rules of procedure governing appeals in criminal cases in Illinois courts,[5] and, on occasion, to rules or provisions in other jurisdictions which represent a significant departure from federal and Illinois practice.

REACHING THE REVIEWING COURT

The most common method of initiating an appeal is by "notice of appeal." [6] This one-page document, standardized as to form in many jurisdictions,[7] is the keystone of the entire appellate process: it is the only jurisdictional step in the process of appeal.[8] Thus the statutes or rules must be consulted to determine the number of days following judgment within which the notice of appeal must be filed.[9]

This in itself is not always an easy task. "Judgment" in this context means judgment on the verdict (or finding) and sentence.[10] Sometimes, however, a trial court will enter judgment, sentence the defendant and then allow time for the filing of post-trial motions. The question then arises as to when the time for filing the notice of appeal has commenced to run.

In jurisdictions which follow such a practice, the time for filing notice of appeal is usually computed from the date upon which post-trial motions are denied.[11] There is, of course, good common sense as well as solid legal reasoning behind this. It is most commonly held that the filing of a notice of

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[1] *See, e.g.*, People v. Burson, 11 Ill.2d 360, 143 N.E. 2d 239 (1957).

[2] In chronological order the controversial murder case involving James Witherspoon occasioned the following decisions: People v. Witherspoon, 27 Ill.2d 483, 190 N.E.2d 281 (1963); United States *ex rel.* Witherspoon v. Ogilvie, 337 F.2d 427 (7th Cir. 1964), *cert. denied*, 379 U.S. 950 (1964); People v. Witherspoon, 36 Ill.2d 471, 224 N.E.2d 259 (1967), *rev'd.*, 391 U.S. 510 (1968).

[3] *Cf.*, People v. Lurie, 39 Ill.2d 331, 235 N.E.2d 637 (1968).

[4] 28 U.S.C.A. Hereinafter cited as FED. R. APP. P. ___.

[5] ILL. REV. STAT. ch. 110A (1967). Hereinafter cited ILL. S. CT. R. ___.

[6] FED. R. APP. P. 3; ILL. S. CT. R. 606.

[7] *See, e.g.*, Form 1, Appendix to Forms, FED. R. APP. P.; ILL. S. CT. R. 606(d).

[8] *See, e.g.*, FED. R. APP. P. 3(a); ILL. S. CT. R. 606(a).

[9] FED. R. APP. P. 4(b) (10 days); CAL. R. APP. P. 31(a) (West 1964), (10 days); ILL. S. CT. R. 606(b) (30 days); N.Y. CODE OF CRIM. P. § 521 (30 days).

[10] Berman v. United States, 302 U.S. 211 (1937); *cf.* People v. Adams, 73 Ill. App. 2d 1, 220 N.E.2d 17 (1962), *cert. denied*, 389 U.S. 443 (1967); *see generally*, 8 J. MOORE, FEDERAL PRACTICE § 37.05 (Cipes ed. 1968).

[11] *See, e.g.*, FED. R. APP. P. 4(b); *Committee Comments, Rule 37(a)(3)*, FED. R. CRIM. P.; *cf.*, ILL. S. CT. R. 606(b).

appeal divests the trial court of all but extraordinary jurisdiction in the case.[12] Compelling a defendant to file his notice of appeal prior to a ruling on his post-trial motions would deprive the trial court of authority to rule on those motions. Even if the court retained jurisdiction under these circumstances, there would seem to be little sense in requiring that a defendant take his case to the reviewing court (and incur whatever expenses are charged for the filing of a notice of appeal)[13] as long as the possibility exists that the trial court will correct those errors brought to its attention by the post-trial motions. This anomaly is avoided by computing the time for filing the notice of appeal from the date of denial of the post-trial motions (or the date of the judgment) whichever occurs last.[14]

Rule 4(b) of the federal rules allows some flexibility for late filing. Under such circumstances, the trial court is authorized to extend the time for filing "for a period not to exceed 30 days from the expiration of the time otherwise prescribed. . . ." Although 4(b) does allow for the tardy filing of a notice of appeal "upon a showing of excusable neglect,"[15] counsel, especially retained counsel, cannot rely too heavily on this provision, for it obviously is intended to afford relief only upon a showing of nonculpability.[16]

In states such as Illinois, where appeals in criminal cases are taken either to the supreme court or to an intermediate appellate court (depending on the nature of the claims made in the appeal or on whether a death sentence has been imposed),[17] counsel must consult the rules of practice and the applicable constitutional provisions in order to determine the court to which the notice of appeal should be directed. The criteria for making this determination vary in the different states having intermediate courts of review,[18] and failure to meet these criteria, although not necessarily fatal to the appeal, may result in delay and some embarrassment.

Provisions for appeal by notice of appeal designate the place where such notice should be filed. Filing the notice is the jurisdictional step in appeal, and not all jurisdictions allow late filings.[19] Hence, it is essential that counsel accurately determine where the notice should be filed. Federal and Illinois law[20] direct that it be filed with the clerk of the trial court; and the federal decisions have declared that any document mailed to the trial court and manifesting an intention to appeal shall be considered as the requisite notice.[21]

Other jurisdictions have not been so liberal, however, and have required a more complicated procedure in filing. In Vermont prior to 1961, for example, an appellant was required to file his notice of appeal with both the clerk of the trial court and the clerk of the court to which the appeal was being taken.[22] In *State v. Brown*,[23] the appellant directed a letter to the clerk of the trial court

[12] *See* United States v. Comulada, 340 F.2d 449, 452 (2d Cir. 1965); People v. Meyers, 35 Ill. 2d 311, 220 N.E.2d 297 (1966); People v. DeMarino, 72 Ill. App. 2d 38, 219 N.E.2d 132 (1966). The trial court still retains jurisdiction to hear and determine issues raised by a motion for a new trial based on newly discovered evidence. But under federal practice, in order to grant a new trial pending appeal, the case must be remanded by the reviewing court. FED. R. CRIM. P. 33; 8 J. MOORE, FEDERAL PRACTICE § 33.03(2) (Cipes ed. 1968).

[13] Five dollars in the United States District Court for the Northern District of Illinois, Eastern Division. No charge is made in the Illinois Circuit Courts.

[14] FED. R. APP. P. 4(b). Considerable confusion under the pre-1966 *Federal Rules of Criminal Procedure* was caused by the language of former Rule 37. That rule made it appear as though even an untimely motion for a new trial [such a motion must be filed within seven days after a verdict or finding as per FED. R. CRIM. P. 33] filed before the expiration of the ten-day period for filing notice of appeal, extended the time for such notice to be filed. *See* Smith v. United States, 273 F.2d 462 (10th Cir. 1959); *contra*, Lott v. United States, 280 F.2d 24 (5th Cir. 1960), *rev'd on other grounds*, 367 U.S. 421 (1961). In *Lott v. United States*, 367 U.S. 421 (1961), the Supreme Court avoided answering whether Rule 37 presupposed that post-trial motions filed pursuant to Rules 33 and 34 would be timely, stating that it preferred to leave the question "for resolution by the rule-making process." *Id.* at 425. Rule 37 was amended in 1966 and unquestionably establishes that the time for filing a notice of appeal will be automatically extended only by the filing of timely post-trial motions. Rule 4(b) of the Federal Rules of Appellate Procedure embodies this amendment.

[15] FED. R. APP. P. 4(b); *cf.* ILL. S. CT. R. 606(c)—upon showing of "reasonable excuse for failure to file a notice of appeal on time, accompanied by the proposed notice of appeal, filed in the reviewing court within six months of the expiration of the time for filing a notice of appeal, the reviewing court may grant leave to appeal and order the clerk to transmit the notice of appeal to the trial court for filing." *Contra*, 12 VT. STAT. ANN. § 252.

[16] *Cf.* United States v. Meyers, 406 F.2d 1015 (4th Cir. 1969).

[17] ILL. CONST art. VI, §5; ILL. S. CT. R. 603. *cf.*, ILL. CONST. art. VI, §4 of the new Illinois Constitution.

[18] *See, e.g.*, BURNS IND. STAT. ANN. Title 4, § 214 (all criminal cases reviewed in Supreme Court); MO. CONST. art. V, § 3 (all felonies reviewed in Supreme Court).

[19] *See, e.g.*, 12 VT. STAT. ANN. § 252.

[20] FED. R. APP. P. 3(a); ILL. S. CT. R. 606(a).

[21] *See* Coppedge v. United States, 369 U.S. 438, 442, n. 5 (1962).

[22] 12 VT. STAT. ANN. § 2382 (1960).

[23] 121 Vt. 459, 160 A.2d 879 (1960).

advising him that he was aware the time for filing a notice of appeal was "fast approaching"; he also filed a timely notice of appeal with the "Clerk of the Supreme Court, Montepelier, Vermont." In dismissing the appeal, the state supreme court ruled that the appellant had not filed his notice with the proper *supreme court* clerk and that the communication to the clerk of the trial court (who was also the "proper" clerk of the supreme court to which a notice should have been addressed) did not, in any event, constitute a notice of appeal. Within the year the Vermont Legislature amended the statute to provide for filing only with the clerk of the trial court.[24]

It is evident that if trial counsel does not file the notice of appeal, it becomes the responsibility of appellate counsel. In Illinois, the trial judge, at the time of entering judgment in a felony case is required by statute[25] to advise a defendant of his right to appeal even where the defendant has pleaded guilty. Moreover, a notice of appeal must automatically be filed by the clerk of the court in a case where the death penalty has been imposed.[26]

With the appeal filed, an appropriate "record" must be prepared. The record, representing the written history of the case in the trial court, is comprised of three basic parts: the pleadings and motions filed and orders entered;[27] the report of proceedings in the trial court;[28] and the exhibits, both admitted and refused.[29] In practice, the expeditious and successful compilation of the record, while the obligation of the appellant,[30] is the product of professional cooperation among defense counsel, prosecution and trial court clerk. The job is as difficult and complicated as these parties make it.

It is the appellant's obligation to advise the clerk of the trial court, within a certain period of time after filing the notice of appeal, exactly what portions of the pleadings, orders, proceedings and exhibits he wants included in the record and certified to the reviewing court.[31] This "designation" or "praecipe" not only directs the clerk what to prepare and certify, but also serves to advise the state what the record will contain.[32] This latter advice, of course, gives the state an opportunity to designate other items which it wants included in the record.[33]

A practical method in preparing the record requires the parties to stipulate to its contents.[34] This practice has the obvious advantage of saving the clerk both the time and effort he would otherwise spend in collating individual designations. Should the parties not designate or agree on the composition of the record, the clerk will prepare

[24] 12 VT. STAT. ANN. § 2382 (1961).

[25] ILL. S. CT. R. 605. *See* People v. Sanders, 40 Ill. 2d 458, 240 N.E.2d 627 (1968). FED. R. CRIM. P. 32(a)(2), limited to cases which have gone to trial on a plea of not guilty.

[26] ILL. S. CT. R. 606(a).

[27] Popularly called the "common law record" in Illinois, People v. Johnson, 15 Ill.2d 244, 154 N.E.2d 274 (1958), and "original papers" under the Federal Rules. FED. R. APP. P. 10(a).

[28] Sometimes called a "bill of exceptions" and a "transcript of proceedings" in Illinois, People v. Johnson, 15 Ill.2d 244, 154 N.E.2d 274 (1958), but now called a "report of proceedings." ILL. S. CT. R. 608(a) and (b). Called a "transcript of proceedings" in the Federal Rules. FED. R. APP. P. 10(a) and (b).

[29] FED. R. APP. P. 10(a). In Illinois, the exhibits are part of the Report of Proceedings. ILL. S. CT. R. 608(b). Defense counsel will not, of course, want to include rejected prosecution exhibits, but an experienced prosecutor will be alert to the benefits he can obtain by having those exhibits included in the record.

[30] FED. R. APP. P. 11(a); ILL. S. CT. R. 608(a).

[31] ILL. S. CT. R. 608(a). The Federal Rules do not contain any equivalent provision requiring a designation, although Rule 10(b) does permit the parties to file an agreed:

> statement of the case showing how the issues presented by the appeal arose and were decided by the district court and setting forth only so many of the facts averred and proved or sought to be proved as are essential to a decision of the issues presented.

The statement must be approved by the trial court, and then certified to the court of appeals as the record on appeal. This procedure clearly envisages dispensing with the transcript of proceedings as well as the original papers. In criminal cases it might be effectively used where a limited issue, such as the validity of a search warrant, will be presented. Despite the absence of a provision which enables the parties to reduce the contents of the record to specific papers relevant to the issues on appeal, it is the practice in the United States District Court for the Northern District of Illinois for the parties to stipulate to the contents of the record, thus accomplishing what is intended by Illinois Rule 608(a).

[32] The term "praecipe" is a carry-over from the common law writ of error practice. *Cf.* ILL. S. CT. R. 322. It is synonymous with the statutory term "designation."

[33] ILL. S. CT. R. 608(a). *Cf.* FED. R. APP. P. 10(b), which imposes a duty on the defendant to advise the government of a "description of the parts of the transcript (of proceedings) which he intends to include in the record and a statement of the issues he intends to present on the appeal." Within ten days the government may demand that the defendant include other relevant portions of the transcript and, in the event of a dispute, apply to the trial court for an order requiring the defendant to do so.

[34] ILL. S. CT. R. 608(a); *cf.* FED. R. APP. P. 10(d).

and certify the entire file as the record.[35] While this method has the virtue of simplicity and safety, it has the vice of causing added expense and effort.

A crucial portion of the appellate record is the transcript by which the reviewing court is advised of the words that were spoken at the various hearings—including the trial—which culminated in the judgment. It need not be completely verbatim; it need not even be a stenographic transcript. It may be prepared by stipulation of the parties,[36] by the recollections of bystanders,[37] or by the memory of the appellant subject to the trial court's reconciliation of state objections.[38] Without this "transcript" the defendant cannot question the sufficiency of evidence to support either the judgment or various orders entered, and cannot raise errors occurring in the proceedings below.[39] The most common form of a report of proceedings, however, is the stenographic transcript.[40] With this in mind, many of the problems which perplex lawyers preparing their first appeal may be examined.

As previously noted, it is not necessary to include a full transcript in the record. Comprehending this, counsel can save the reporter a great deal of time in preparation of the transcript, his client a great deal of money in purchasing it[41] and the reviewing court the labor of examining too bulky a record. The sole necessity is that the transcript accurately portray those portions of the proceedings necessary to a complete understanding of the issues to be raised on appeal. Should the appellant decide, then, to omit a portion of the transcript, the appellee should be given fair notice and an opportunity to supplement the record with those additional portions it deems necessary.[42]

Once counsel decides how much of the proceedings are to be included in the transcript, he must bear in mind that almost all jurisdictions have a time limit, commencing with the filing of the notice of appeal, within which the transcript must be filed with the clerk of the trial court,[43] or certified and approved by the trial judge.[44] In some jurisdictions, failure to take this step within the time allotted proves fatal to an appellant's intentions of having issues covered in the transcript heard.[45] However, rules generally provide extensions of time for filing (certifying) the transcript.[46]

Exhibits are another essential part of the record,[47] and as a matter of policy should be made available for the reviewing court's consideration. The *Federal Rules of Appellate Procedure* so provide,[48] except for "documents of unusual bulk or weight and physical exhibits other than documents. . . ." [49] But many appellate attorneys,

[35] FED. R. APP. P. 10(a); ILL. S. CT. R. 608(a). By exclusion in Illinois, by the Rule in the Tenth Circuit (10th Cir. R. 8) and by implication in the other circuits, this does not include subpoenas, trial briefs and like documents.

[36] ILL. S. CT. R. 323(d). *See supra* note 40, regarding practice under Rule 10(d) of the Federal Rules.

[37] FED. R. APP. P. 10(c); ILL. S. CT. R. 323(c); *see* Griffin v. Illinois, 351 U.S. 12, 14 n. 4 (1956).

[38] FED. R. APP. P. 10(c); ILL. S. CT. R. 323(c). For procedure regarding settlement of incorrect or disputed records and transcripts, see FED. R. APP. P. 10(e); ILL. S. CT. R. 323(c) & 329.

[39] *See* Griffin v. Illinois, 351 U.S. 12, 13–15 (1956).

[40] Indeed, because of the decisions in *Griffin* and Williams v. Oklahoma City, 395 U.S. 458 (1969), it is impossible to conceive of any criminal case being appealed without a full transcript of the evidence.

[41] Official Court Reporters in Illinois are authorized to charge not in excess of twenty-five cents per one hundred words for a report of proceedings in a criminal case. ILL. REV. STAT. ch. 37, § 655 (1967).

[42] FED. R. APP. P. 10(b); ILL. S. CT. R. 608(b) provides:

> [t]he report of proceedings contains the testimony and exhibits, the rulings of the trial judge, and all other proceedings before the trial judge, unless the parties designate or stipulate for less.

[43] In Illinois the report of proceeding must be filed with the clerk of the trial court within forty-nine days after the filing of the notice of appeal (or, if a death sentence has been imposed, within forty-nine days from the date of that sentence). ILL. S. CT. R. 608(b). The Federal Rules contain no statement as to when the transcript must be filed with the clerk of the trial court, but do require the defendant to order the transcript from the reporter within ten days after filing the notice of appeal. FED. R. APP. P. 10(b).

[44] *See, e.g.*, TEXAS CODE OF CRIM. P. art. 40.09(7). Neither the Federal nor the Illinois Rules require that the trial judge certify or approve the transcript, although Illinois does require that it be certified by the court reporter or the trial judge. ILL. S. CT. R. 608 (b).

[45] *See, e.g.*, TEXAS CODE OF CRIM. P. art. 40.09(7).

[46] ILL. S. CT. R. 608(d). The extension may be granted by the trial judge or reviewing court if made either before the expiration of the time for filing or within thirty-five days afterwards upon "a showing of reasonable excuse for failure to file the motion earlier." By implication, motions made within the thirty-five days and not supported by a showing of reasonable excuse, or made beyond the thirty-five day period of grace, cannot be granted. The appellant then will have missed his opportunity to have issues covered by the transcript heard on appeal. *Cf.* Griffin v. Illinois, 351 U.S. 12, 13–15 (1956).

[47] FED. R. APP. P. 10(a); ILL. S. CT. R. 608(b). The latter rule makes the exhibits part of the report of proceedings, and according to the Committee Comments, they must be incorporated therein for consideration by the reviewing court.

[48] FED. R. APP. P. 11(a); *see also* note 56 *infra* for Illinois practice.

[49] FED. R. APP. P. 11(b).

perhaps because trial counsel had the prescience to read his exhibits into the record, fail to follow through to make sure that the material exhibits are included in the record on appeal. An even greater number of appellate attorneys fail to make an attempt to have rejected defense exhibits included in the record. These are serious mistakes.

While trial counsel may have read his pertinent exhibits into the record, the possibility may still exist that some portion of an exhibit, the significance of which could not have been appreciated at the time, was not so read. This possibility alone warrants the slight added effort necessary to insure that the exhibits themselves are transmitted. And, contrary to the apparent philosophy of the Federal Rules,[50] this is especially so with respect to "documents of unusual bulk" whose very existence suggests a case of unusual complexity in which such documents may provide crucial material on appeal.

Rejected exhibits are seldom the subject of an offer of proof which describes their contents verbatim. Yet these documents are even more essential to the appeal. Their rejection might prove erroneous, and may have even greater significance for the resolution of other issues. Assuming that criteria for certification of these documents by the trial court and acceptance by the reviewing court can be met,[51] counsel should make every effort to have these rejected exhibits made part of the record. If that fails he should be ever alert to possible indirect use of the exhibits.

Such a tactic was employed in *People v. Cullotta*,[52] where trial counsel made no explicit offer of proof. Counsel at the initial stage of the appellate proceedings was unable to include in the record a copy of rejected exhibit, a prior inconsistent statement by a key witness for the prosecution. As a result, the Illinois Appellate Court affirmed the conviction without considering the affect of the impeaching document.[53] New counsel petitioned the Illinois Supreme Court for leave to appeal, and thereby questioned the rejection of the exhibit and the sufficiency of the evidence. In arguing the latter issue, appellant attacked the veracity of the witness, a police officer, who had testified that a co-defendant had implicated the appellant as his accomplice while being questioned at the scene of the crime. This evidence was admitted in rebuttal of testimony by the co-defendant exonerating the appellant. The attack focused on the assumed lack of content of the rejected statement, the officer's report, and the officer's admission that it contained everything the co-defendant had told him. Without the document, but because ". . . the clear purport of the record . . . [was] that the statement made no reference . . . to defendant's participation in the crime" [54] the Illinois Supreme Court pointedly disregarded the officer's testimony in reversing the conviction.

The entire record should be filed in the reviewing court within a certain time after filing the notice of appeal.[55] As with the transcript of proceedings, extensions of time for doing this are available from either the trial court or the reviewing court,[56] although some jurisdictions limit the number of days a trial court may extend this period.[57] In such a case application must be made to the reviewing court for the extension.

When the record has not been fully prepared within the time alloted, an appellate court may allow the filing of a "short record." [58] The short record generally consists of the indictment, other motions or orders germane to the relief sought, the judgment order and the notice of appeal filed.[59]

[50] *See* FED. R. APP. P. 11(b).

[51] *See* FED. R. APP. P. 10(e); ILL. S. CT. R. 323(c) and 329.

[52] 32 Ill.2d 502, 207 N.E.2d 444 (1956), *rev'ing.* 48 Ill. App. 2d 180, 198 N.E.2d 748 (1964).

[53] People v. Cullotta, 48 Ill. App. 2d 180, 198 N.E.2d 748 (1964).

[54] People v. Cullotta, 32 Ill.2d 502, 207 N.E.2d 444, 446 (1965).

[55] Under the Federal Rules the record must be docketed in the reviewing court within forty days after the filing of the notice of appeal, unless the time is otherwise extended or shortened. FED. R. APP. P. 11(a). In Illinois the record, or a certificate of the clerk of the trial court attesting that the record has been prepared and certified in the form required for transmission to the reviewing court (ILL. S. CT. R. 325), must be filed within sixty-three days after the filing of the notice of appeal, or fourteen days after the filing of the report of proceedings, whichever date occurs last. ILL. S. CT. R. 608(c).

[56] FED. R. APP. P. 11(d); ILL. S. CT. R. 608(d). *See also* FED. R. APP. P. 12(a) and (c) concerning the powers of the courts of appeal to permit an appeal to be docketed out of time and to dismiss an untimely transmitted (or docketed) appeal.

[57] Under the Federal Rules the district court may not extend the time for filing to a date more than ninety days from the date of the filing of the notice of appeal. FED. R. APP. P. 11(d).

[58] ILL. S. CT. R. 328. *Cf.* FED. R. APP. P. 11(g).

[59] *See, e.g.*, ILL. S. CT. R. 328. The short record may be authenticated by the certificate of the clerk of the trial court, or by the affidavit of the attorney or party filing it. Thus, where it becomes necessary to file an emergency motion in the reviewing court to obtain for example bail pending appeal after the trial court has denied bail, the appellant need not suffer a delay while he waits for the clerk of the trial court to prepare the short record. He may file his own copies of the necessary

This record suffices in bringing the case before the court. With the matter docketed, the reviewing court may then extend the time for filing the complete record.

This same concept may be used to explain procedures for augmenting a record already filed, when, through inadvertence, items that should have been included were not. As a reviewing court has obvious jurisdiction to allow the complete record to be submitted after the filing of a short record, so it has the power to permit additions to be made to the record even after a purportedly complete one has been filed. Moreover, under the federal and Illinois practice, the trial court has this authority.[60] The methods for augmenting the record are varied, ranging from the ancient common-law method of suggesting diminution of the record,[61] to a stipulation of the parties or simple motion requesting leave to file the additional portions of the record.[62] Reasons for the addition must be assigned, but this amounts to little more than advising the court that the case cannot be properly adjudicated without the additions.

Presenting The Appeal

Once the mechanical tasks of perfecting the appeal have been completed, appellate counsel is faced with the task for which he was actually retained—presenting his client's case to the reviewing court in winning fashion. There are no rules or statutes which tell counsel how that can be done but a plethora of hints can be gleaned from these sources as well as from decided cases.

First, courts are emphatic in their demand that counsel provide an adequate summary of the record for the purpose of deciding the issues raised on appeal and to spare the court the burden of searching through the entire record.[63] There are any number of methods for meeting that obligation.[64]

An abstract is one form of summary in which the testimony of each witness is converted from question and answer form into a narrative account of the facts related by that witness. But the record is not all testimony of witnesses; likewise the abstract is not entirely a narrative account of facts. Technically, the abstract is the pleading in the reviewing court. What is sought to be reviewed must be contained therein.[65] Thus, the abstract must also set forth, in verbatim or encapsulized form, those portions of the proceedings in the trial court which are necessary to present fully every error relied upon—*e.g.*, pleadings which are to be the focus of an issue raised in the brief and specific objections and rulings thereon, or prejudicial comments by opposing counsel.

Some jurisdictions, however, require the preparation of an appendix rather than an abstract.[66] This form is distinguished by a verbatim account of the pertinent portions of the record rather than a narrative account, although in many instances it is sufficient to narrate or even paraphrase less important matters. Nevertheless, the appendix basically consists of a verbatim recitation of the essential facts and proceedings which must be brought to the attention of the reviewing court.

Both the appendix and the abstract may be distinguished from other methods of summarization by one principal factor: although summarizations, they purport to tell the total story of the proceedings in the trial court.[67] That story must be

papers accompanied by his affidavit that they are true and correct copies. *Cf.*, Fed. R. App. P. 9(b).

[60] Fed. R. App. P. 10(e); Ill. S. Ct. R. 329.

[61] *See, e.g.*, Chakeres v. Merchants & Mechanics Federal Savings & Loan Ass'n., 117 Ohio App. 324, 192 N.E.2d 323 (1962).

[62] Fed. R. App. P. 10(e); Ill. S. Ct. R. 329.

[63] *See, e.g.*, Campbell v. Fazio, 23 Ill. App. 2d 106, 161 N.E.2d 579 (1959).

[64] Dramatic change in substantive law has affected procedure as well, and the requirement that the record be summarized has been altered. As a consequence, it is necessary that counsel continuously check to determine the form of summarization that is required or permitted by the reviewing court, and whether summarization is even required at all.

[65] Gage v. City of Chicago, 211 Ill. 109, 71 N.E. 877 (1904).

[66] *See, e.g.*, former Seventh Cir. R. 10(b), 28 U.S.C.A., which also permitted the evidence to be abstracted or reduced to narrative form. This rule has been superseded by the Federal Rules of Appellate Procedure and especially Rule 30. As a consequence, there is presently no provision in the Federal Rules, or in the rules of the various circuits, permitting a party to file an appendix to which the evidence is abstracted or reduced to narrative form.

[67] Most rules contain a statement such as:

> Matters in the record on appeal not necessary for a full understanding of the question presented for decision shall not be abstracted. The abstract need only be sufficient to present fully every error relied upon.

Ill. S. Ct. R. 342(e)(4). As a practical matter most abstracts and appendices are composed with an emphasis placed on the word "fully." An appendix drawn under Rule 30(e) of the Federal Rules, which directs that the appendix contain "parts of the record to which the parties wish to direct the particular attention of the court," would not purport to tell the total story of the proceedings in the trial court. And the parties need not be concerned lest they omit some important aspect of the proceedings, for "[t]he fact that parts of the record are not included in the appendix shall not prevent the

told in a concise,[68] accurate[69] and yet illuminating[70] manner.

Without question the abstract/appendix method of summarizing the record is costly, time consuming and arduous. The modern trend is to do away with it. Basically, one of two methods may be substituted, according to the laws of the particular jurisdiction in which the appeal is being taken. Summarization may be dispensed with altogether,[71] or the parties may be permitted to designate and file "excerpts" from the record proper.[72] Some jurisdictions permit a choice between filing the more conventional abstract/appendix or following one of the procedures for dispensing with the summary.[73] In those jurisdictions, the decision counsel makes may well affect the outcome of his appeal.

No one can possibly enumerate all of the factors that go into the choice of whether to file a summary and, if so, what type to file. As a general rule, however, if counsel intends to challenge the sufficiency of the evidence, or to urge matters dependent upon a careful analysis of the evidence, one of the more conventional forms should be selected, provided the particular jurisdiction allows a choice. In these cases, the abstract, which provides a narrative summary of the essential evidence, is the most useful and effective method for understanding and presenting an intelligible recitation of the evidence.

The practice of filing excerpts from the record rather than the more formal abstract/appendix has found increasing favor in some jurisdictions.[74] The advantage with the excerpt practice is that it involves the filing of one document which contains only those portions of the record essential for the reviewing court to read in order to decide the issues presented. Though an abstract may illustrate the total injustice of the trial, it contributes to the effort, time and cost in preparation of an appeal. Furthermore, the finished product invariably contains a bulk of material which will never be directly referred to in the brief and argument. Excerpts obviate all of this. The secret is in the mechanics.

The appellant, in jurisdictions permitting or requiring excerpts, does not compose this "summary" of the record before writing his brief and argument. The brief is written first. In doing so, pages of the record are referred to directly for supporting citations. The appellant then files, con-

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parties or the court from relying on such parts." FED. R. APP. P. 30(a). *See* FED. R. APP. P. 30(b), which reads:

> In designating parts of the record for inclusion in the appendix, the parties shall have regard for the fact that the entire record is always available to the court for reference and examination and shall not engage in unnecessary designation.

See also ILL. S. CT. R. 342 (g). *But see* FIRST CIR. R. 3(c).

[68] While the abstract must be sufficiently detailed to supply the court a clear picture of what happened, it is also a summarization and therefore must tell the story concisely. That objective is not difficult to reach. All counsel need keep in mind are the requirements of the court and the issues which he intends to raise in his brief. Unless a question as to the sufficiency of the evidence is to be presented, a full exposition of the evidence is not necessary. FED. R. APP. P. 30(a); ILL. S. CT. R. 342(e) ("if the record contains the evidence it shall be condensed in narrative form so as to present clearly and concisely its substance").

One word of caution is necessary. Many jurisdictions require that specific portions of the record be included in the abstract as a prerequisite to raising certain issues. *See, e.g.*, Johnson v. United States, 370 F.2d 495, 496 (9th Cir. 1966), People v. Donald, 27 Ill.2d 289, 194 N.E.2d 227 (1963). In these jurisdictions it is possible to abbreviate oneself right out of court, unless proper steps are taken to excuse a failure to include the required material.

A method by which this omission may be excused is a motion to dispense with the required matter made prior to filing the summarization. In it counsel should advise the court of the material which he feels should be omitted, his reasons for suggesting the omission, and why omission of this material will not hinder or otherwise improperly influence the issue to be decided.

[69] If the abstract/appendix is not accurate, it is worse than no abstract at all. Aside from imposing a burden on the reviewing court, the inaccurate abstract offers the court little reason to place any confidence in the accuracy of counsel's brief.

Accuracy, however, means more than just a faithful summarization of the proceedings. It means that counsel has made the effort to place everything in context; that where portions of the record have been set forth verbatim, he has indicated omissions by proper ellipses; that where complaint is made concerning the conduct of the prosecutor or the trial judge, he has set forth any and all conduct by the defense attorney that may be said to have provoked and justified the challenged conduct. Nothing reveals more to a reviewing court about the quality of the defendant's appeal than to have the appellee point out, by a supplementary abstract, that appellant's counsel has distorted the record.

[70] Too often counsel misses the opportunity to point up the full flavor of the case where it may bear on the issues to be presented. Hence, counsel may want to point out that a continuance was granted prior to trial because of pretrial publicity, not to support a charge of prejudice in that publicity, but merely to add weight to a charge that he was restricted in voir dire or that the jury was not selected with the care that the nature of the case required. *See, e.g.*, People v. Kurth, 34 Ill.2d 387, 216 N.E.2d 154 (1966).

[71] FED. R. APP. P. 30(f); ILL. S. CT. R. 342(i).

[72] ILL. S. CT. R. 342 (a); *cf.* FED. R. APP. P. 30(b) and (c).

[73] *See, e.g.*, ILL. S. CT. R. 342(e).

[74] *Id.*

currently with his brief, a designation of those portions of the record which he intends to reproduce as excerpts for the court's use—in practice, those pages of the record to which he has referred in the brief. He does not, however, reproduce these portions until both parties have finally designated those portions of the record necessary to the determination of the case. The appellant then reproduces the pages of the record which have been designated.[75] The advantages of summarizing the record in this manner are self evident. Speed, economy and absolute minimization of the record are obtained.

In the federal practice, Rule 30(c) of the new *Federal Rules of Appellate Procedure* provides that unless a particular circuit has established a contrary rule an appellant by order of court may defer filing of the appendix until all briefs have been filed. The rule is an exception, however, to the general practice described in Rule 30(b) and, while the content of the appendix is the same under both provisions, the manner in which each is to be prepared is different. Both procedures depart from the older abstract/appendix method and move toward the newer excerpt method.

The key procedural change effected by these Rules is the elimination of the possibility that more than one appendix will be filed by the parties. Formerly, it was permissible, in all but two of the eight circuits using the appendix method, for both parties to file an appendix.[76] The Rules now establish a procedure whereby only one appendix may be filed,[77] thereby eliminating both confusion and added labor. The parties must either agree on the contents of the appendix, or designate the segments of the record to be included therein prior to filing the appendix. The appellant must serve his designation on the appellee within ten days after the record is filed in the reviewing court, and the appellee must serve his designation, if any, within ten days thereafter. To assist appellee in making this decision, the appellant must also serve a statement of the "issues which he intends to present for review" at the time of serving the designation.[78] And, as a further inducement toward brevity, the parties are specifically reminded that the entire record is available to the court for reference.[79] This latter provision alleviates any fear of inadvertent omissions from the designations or the appendix.[80]

Rule 30(c) can relieve the burden on appellate counsel retained shortly before, or even after, the record has been filed. Under the rule, appellant may, by order of court, defer preparation of the appendix until after the briefs for both parties have been filed. At the time of filing his brief he must serve upon the government a designation of those parts of the record which he intends to include in the appendix. After the government serves its designation at the time its brief is filed, the appellant has twenty-one days to prepare and file the appendix, thus giving him an opportunity to add portions of the record necessary for his reply.

As previously noted, the content of the appendix and the deferred appendix is the same. To the extent that they resemble excerpts from the record, or may be employed in the same manner as excerpts, they mark a significant trend away from the practice of lengthy, formal summarization of the record.[81]

The next task is preparation of the brief. A good brief is a rare combination of formal averments and informal statements, claims and concessions, cold logic and temperate emotionalism. The choice of subject matter, the method of presentation, the methods used to capture the minds and imaginations of those to whom the work is directed are

[75] ILL. S. CT. R. 342(e). The similarity to the practice under Rule 30(c) of the Federal Rules should be noted.

[76] *See* Notes of Advisory Committee on Appellate Rules, Rule 30(b), 28 U.S.C.A.

[77] *Id.*

[78] FED. R. APP. P. 30(b).

[79] FED. R. APP. P. 30(a) and (b); *But see* FIRST CIR. R. 3(c); *See generally supra* note 74.

[80] *See* Notes of Advisory Committee on Appellate Rules, Rule 30(a), 28 U.S.C.A.

[81] Some jurisdictions permit appellant to dispense with a summary entirely. Rule 30(f) of the Federal Rules of Appellate Procedure and Illinois Supreme Court Rule 342(i) specifically recognize this practice. Prior to adoption of the rules, the United States Courts of Appeal for the Eight and Ninth Circuits dispensed with the filing of any summary in a criminal case, but required the appellant to file additional copies of the record. *See* Former EIGHTH CIR. R. 8(i) & (j), 28 U.S.C.A.; former NINTH CIR. R. 10, 28 U.S.C.A. The Court of Appeals for the Tenth Circuit followed much the same procedure in cases where the record did not exceed two hundred pages. *See* Former 10TH CIR. R. 17(a), U.S.C.A.

Since enactment of the Federal Rules, several courts have dispensed with the appendix in forma pauperis, habeas corpus or other specific proceedings. *See* SECOND CIR. R. 30; THIRD CIR. R. 10(3); SIXTH CIR. R. 10(9); SEVENTH CIR. R. 9; EIGHTH CIR. R. 8; TENTH CIR. R. 12(a). The District of Columbia and Third Circuits have provided that an appendix may be dispensed with in any case upon motion and for good cause. *See* D.C. CIR. R. 9(a); THIRD CIR. R. 10(3) (by implication). The Ninth Circuit has dispensed with an appendix in all cases. *See* NINTH CIR. R. 4.

all highly individualized, and any attempt to conform to molds prepared by others must fail. This does not mean that there are not certain fundamental techniques which may prove useful guides.

Every jurisdiction has certain requirements concerning the contents of briefs submitted to its reviewing courts.[82] The best advice for an attorney preparing to file a brief for the first time is to obtain a copy of the rules of the reviewing court, determine what formal parts are required in the brief, obtain a brief previously submitted to and accepted by the court in order to see how others have followed these rules, and then prepare a draft outline incorporating the matters required.

Even if the applicable rules of court do not require it, no brief should fail to advise the court of when and how the prosecution below was brought, what the charges were, the plea, the court before whom the case was tried, whether trial was by the court or jury, the verdicts or findings, and the judgment and sentence. Opportunities to establish factual bases for argument in this manner are limitless.[83]

For example, where argument is to be made on the sufficiency of the evidence, or on factual questions going to the issue of the existence of a conspiracy, or on whether the appellant was an accessory, the fact that co-defendants were acquitted by the court or jury, or that certain counts were adjudicated in the appellant's favor, should be recited. Especially in those jurisdictions where the reviewing court has the authority to reduce sentences,[84] lesser sentences imposed on co-defendants, even if they have not appealed, should be recounted. A clear statement of the nature of the case, then, intended to apprise the reviewing court of the how, when, where and why of the case below, may be utilized to prepare and condition the court for some of the arguments that will appear later in the brief.[85]

In those states where an appeal may be taken to one or another reviewing court dependent on the nature of the issues raised,[86] a statement of the facts or circumstances giving rise to the jurisdiction of the reviewing court to hear the appeal is required. Especially in states such as Illinois, where the jurisdiction of the Supreme Court formerly depended on the existence of a "fairly debatable" constitutional question,[87] care should be taken to provide a clear, concise explanation of the basis for the claim that such a question does exist. Failure to adequately express the claim in this section may result in the appeal being transferred to a court of lesser jurisdiction with resultant expense and delay.

No one segment of the brief deserves more attention than the recitation of the issues presented for review.[88] Here is the first real opportunity to present a case to the court. A dull, muddled statement presents the issues, and thus the entire case, in its worst possible light. An appealing presentation, on the other hand, invites the attention of the court by making the issues seem significant and their disposition below questionable.[89]

The hypothetical questions raised should be keyed to the essential facts and circumstances of the case. They should not be overloaded with so many details that they seem hardly more than a synopsis of the case or a summary of the argument. Indeed, most courts demand brevity in these statements. The Illinois Supreme Court for instance requires that the issues be stated "without detail or citation of authorities." [90]

[82] *See, e.g.*, FED. R. APP. P. 28; ILL. S. CT. R. 341.

[83] Except in the federal courts where a statement of the issues presented for review precedes the statement of the nature of the case, the statement hereunder can accomplish much more. If one of the issues to be raised concerns an alleged denial of appellant's right to a speedy trial, counsel has for example the opportunity at the very beginning of his brief to advise the court:

> The indictment was returned on April 1 1963, and appellant was arraigned on April 7, 1963. Demand for trial was made at this time. No pretrial motions were interposed, with the exception of a motion to dismiss the indictment because of the failure of the State to afford the defendant the speedy trial guaranteed him by the Sixth Amendment to the Constitution of the United States and Article __, Section __ of the Constitution of the State of _____. Trial was commenced on September 3, 1968, before the Honorable _____, Judge of the Circuit Court of _____, and a jury.

By this method, counsel has advised the court, concisely and without elaboration, that a claim concerning denial of a speedy trial is to follow and has established the factual basis for that argument.

[84] *See, e.g.*, ILL. REV. STAT. ch. 38, § 121-9(b)(4) (1967).

[85] Illinois requires a statement as to the nature of any question raised on the pleadings. ILL. S. CT. R. 341 (e)(1).

[86] *See, e.g.*, ILL. S. CT. R. 603. *Cf.*, ILL. CONST. art. VI, §4 of the new Illinois Constitution.

[87] ILL. CONST. art. VI, 55; ILL. S. CT. R. 603; People v. Arbuckle, 31 Ill.2d 163, 201 N.E.2d 102 (1964). *Cf.*, ILL. CONST. art. VI, §4 of the new Illinois Constitution.

[88] *See generally* F. B. WIENER, BRIEFING AND ARGUING FEDERAL APPEALS 72–77 (1961), (hereinafter cited as WIENER).

[89] *Id.* at 73.

[90] ILL. S. CT. R. 341(e)(2). Many of the former rules of the circuit courts of appeals contained specific direc-

In order to avoid a violation of this directive, the relevant facts must be stated fairly and accurately, without putting the court to the task of resolving disputed facts or matters of credibility. The facts should then be related to the legal proposition asserted.[91]

Once counsel has composed a satisfactory statement, he should put it away, write his brief, and then re-examine the statement in the light of the finished product. If the statement of issues presents the matters discussed in the argument in a logical manner and if it presents those matters fairly and in conformity with the applicable rules, it is adequate.

Although the rules are not uniform in their designation of other formal parts, most require some form of statement of the propositions of law and citations of authority relied upon.[92] The statement of the propositions of law tends to receive little attention in those jurisdictions which also require a statement of the issues presented for review. Most practitioners are satisfied with a truncated version of the latter stated in positive terms. The list of authorities cited in support of these propositions, of course, must await final composition of the argument. This task is almost ritualistic; the only useful technique that need be remembered is to list the authorities in the order of their importance.[93]

The conclusion, too, may be considered in this category of formal parts. Sadly, counsel have on occasion neglected to request appropriate relief,[94] asking, for example, that the case be reversed when trial errors which would warrant remandment for a new trial were the only issues raised.

These preliminary sections of the brief lead to the statement of facts. Whether by direction, or otherwise, a statement of facts is a non-argumentative recitation of the facts "necessary to an understanding of the case" and "relevant to the issues presented for review." [95] But "non-argumentative" is not to be confused with sterile, or dreary. Too often, counsel, in their desire to avoid argumentation, present a statement of facts which reflects these vices. If the statement of facts is dull, the reviewing court will probably soon lose interest in the argument which follows despite its merits.

The interest of the court in a statement of facts must not be gained at the expense of accuracy. The statement of facts is the reviewing court's first encounter with appellant's presentation. If the statement lacks accuracy, little faith can be placed in the argument that follows. In short, if counsel cannot be relied upon to present the facts accurately, he will not be relied upon to present the law accurately. An inadvertent or unintentional mistake will not prejudice an otherwise meritorious argument, but a mistake of some magnitude will open the way for the appellee to divert the court's attention from the merits of the argument by suggesting that the facts have been tailored to fit the argument. To avoid inaccuracy, counsel should pay particular heed to those provisions in the various rules requiring "appropriate references to the record" (or summary) as supportive authority for recitations of fact.[96]

The statement of facts should serve as a preface for the arguments to come. But, in drafting an interesting statement, counsel must avoid argumentation.[97] The line between effective advocacy

tives on how to prepare the statement of the issues presented for review. *See, e.g.*, Former THIRD CIR. R. 24(2)(b), which directed counsel to state the issues "... in the briefest and most general terms, without ... particulars of any kind ... [the full statement] not ordinarily [to] exceed 20 lines, [and] never [to] exceed one page ...." The Sixth Circuit had formulated perhaps the most specific directive:

> Each question shall be numbered and set forth separately, in the briefest terms, and whenever possible, each question must be followed immediately by a statement as to whether the lower court answered it 'Yes,' or 'No,' or qualified it, or for failure to answer it, together with a statement that appellant contends that it should be answered 'Yes,' or 'No' as the case may be. Each question stated in the 'Statement of Questions Involved' shall be complete in itself and intelligible without specific reference to the record.

Former SIXTH CIR. R. 16(2)(a).

[91] For example, the claim that the actions of the defendant did not violate the statute under which he was prosecuted may provoke the question:

> [w]hether it is a violation of the Hobbs Act to extort money from a businessman whose business depends upon supplies shipped in interstate commerce, where the threat of extortion is to injure the businessman and members of his family physically, but does not carry with it, express or implied, a further threat to obstruct delay or affect any aspect of the business, and the only effect claimed is the depletion of the assets of the business by reason of a subsequent payment of money.

[92] *See, e.g.*, ILL. S. CT. R. 341(e)(5); *But See* FED. R. APP. P. 28.

[93] *Cf.* ILL. S. CT. R. 341(e)(5). Federal rule 28 requires only that the brief contain a table of cases, alphabetically arranged; other authorities cited; and a reference to the pages of the brief where they have been cited. FED. R. APP. P. 28(a)(1).

[94] *See, e.g.*, FED. R. APP. P. 28(a)(5); ILL. S. CT. R. 341(e)(8).

[95] ILL. S. CT. R. 341(e)(6); FED. R. APP. P. 28(a)(3).

[96] FED. R. APP. P. 28(a)(3); ILL. S. CT. R. 341(e)(6).

[97] *See, e.g.*, ILL. S. CT. R. 341(e)(6).

and argumentation is thin indeed, but there are distinct limits that should be observed. For instance, it is improper in the statement to argue that a certain prosecution witness is "unbelieveable," yet it is within the bounds of propriety to point out at a convenient place in the recitation of his testimony that the witness admitted testifying in hope of reward. Again, it is improper to argue that a prosecution witness could not observe the matters about which he testified, but it is proper to relate those circumstances under which the witness made his observations. In essence then, argumentation is the vice of drawing personal conclusions about a witness, or his testimony, while advocacy is the art of marshalling and detailing facts which will lead the court to the same conclusions.

Choice of phrases is important in this task. If a witness has testified that the defendant said or did something which the defendant disputed, a recitation that the witness so "testified" or "claimed", even if the bulk of the statement is in narrative form, is attention-catching. When immediately contrasted with testimony in which the appellant and his witnesses "denied" or "contradicted" the version, or when it is pointed out that circumstances made the version impossible or improbable, it proves especially effective. A word of caution is necessary, however. These conclusionary terms must be substantiated by an immediate recitation of the contradictory evidence.[98]

The goal here remains an "integrated" statement of facts. One should attempt to present a chronology of events as distinguished from a witness-by-witness summary of testimony. Artistically, the integrated statement is apt to be more interesting and intelligible. A witness' testimony is not always confined to a specific portion of the facts; nor do witnesses always testify in an order which conforms to the chronology of events underlying the case. Setting forth the facts as they transpired, rather than as they were recited in the courtroom, spares the court difficulty in picking up the trend of events. The integrated statement holds the further advantage of providing a structure wherein claims and denials, probabilities and improbabilities, and conflicting testimony may be juxtaposed.[99]

Some attorneys tend to minimize the importance of the statement of facts. They argue, not without some degree of persuasion, that the statement should briefly apprise the reviewing court of the essential facts and circumstances of the case and that all attempts to persuade the court should be strictly confined to the argument portion of the brief. They reason that any attempt to "condition" the court in the statement of facts must necessarily

[98] A more subtle technique consists in using the conjunctives "although" or "even though" to describe improbabilities. Thus:

> [t]he arresting officer claimed the defendant admitted participation in the holdup immediately upon being confronted by the victim (Abst. ____), even though the victim himself (Abst. ____), Officer Brown who was present at the time (Abst. ____), and the defendant (Abst. ____) all denied any admission was made and even though the arresting officer's official report, made that same night, failed to contain any mention of such an admission, (Abst. ____).

This one sentence could challenge the witness' credibility without argumentation and warn the reader that anything related by the witness ought to be subject to careful scrutiny. With appropriate references to the abstract included, the court stands advised that the record fully supports the implied incredulity.

[99] An illustration may prove useful in describing the differences in strategy. In *United States v. Amabile*, 395 F.2d 47 (7th Cir. 1968), the appellant, charged with a conspiracy to violate the Hobbs Act, claimed that the evidence did not support the charge of conspiracy and that his conduct did not violate the statute since his threat of extortion held no reasonable causal relation to interstate commerce. To condition the court for these arguments, the appelant's statement of facts was presented in an integrated form highlighting two essential factors: (1) the only agreement entered into by appellant and the co-defendants was a plan designed to obtain money from the victim by false pretenses; the eventual threat of extortion was made by appellant alone without the knowledge or concurrence of his confederates in the fraudulent scheme; (2) the threat of extortion was not directed against the business of the victim, but only against his person. Appropriate "heads" were used to segregate the evidence depicted thereunder. The motive was to isolate the charged threat from other facts showing the participation of the co-defendants with appellant in a fraudulent scheme, and from other threats by appellant over the course of a number of years.

Government counsel, on the other hand, claimed that the defendants had "embarked on a criminal venture of indefinite outline" and were criminally responsible for appellant's threat against the victim's person. He argued that the victim's response to the threat against his person—the payment of money—depleted his business assets and thereby "affected" commerce within the meaning of the statute. But he also wisely realized that the testimony given by the three principal government witnesses presented in a witness-by-witness fashion would divert proper focus from the events immediately connected with the charged threat of extortion thereby obscuring the rather narrow issues drawn by appellant. Thus, even though expressly conceding the sufficiency of appellant's statement of facts, he took the unusual course of presenting a statement of facts on behalf of the government in witness-by-witness form. The measure of success for each of the respective tactics of counsel is evidenced by the divided opinion of the Court of Appeals. United States v. Amabile, 395 F. 2d 47 (7th Cir. 1968).

result in an extended discussion of the evidence and, consequently, argument on the facts will become repetitive at a loss to its force. This need not be so. As one acknowledged expert has noted,

> The greatest mistake any lawyer can make, after he has written a fine brief on the law, is to toss in a dry statement of facts and send the thing off to the printer.... [I]n writing briefs, the facts should first be studied, mastered, sweated over—and written out into an acceptable draft before the rest of the brief is even touched.[100]

In addition, the statement of facts "should always be written in such a way as to advance the cause of the party on whose behalf it is prepared." [101] To do this the statement should—within the confines of the rules—offer the court a basis for accepting the appellant's version of the facts of the case even though a challenge to the sufficiency of the evidence is not intended. The reason for this is clear: if the reviewing court gains the impression that the evidence against appellant was "overwhelming", rejection of his arguments is apt to follow as a result of the "harmless error" rule.[102] Conversely, if the court can be conditioned to accept the proposition that there is ". . . a reasonable possibility that the . . . [error] complained of might have contributed to the conviction," [103] or that, but for the intervening error, the jury might have returned a different verdict,[104] the appellant's cause has been greatly advanced.

By the time counsel is ready to write his argument, he should be thoroughly steeped in the facts of the case. That is the principal reason why composition of the statement of facts is recommended prior to composition of the argument. Mr. Justice Brandeis, it is said, adhered to a belief in the primacy of facts in dealing with every case.

> However much he encouraged his law clerks to present the results of their legal research in a form which might be directly useful in drafting an opinion, he took on himself the burden of drafting the statement of facts. This was his private assurance that he would not be seduced by the fascination of legal analysis until he had grounded himself in the realities of the case as they were captured in the record.[105]

The first step in drafting the argument is to select those issues worthy of presentation. There are only two real aids to assist in this task: counsel's own legal instincts and his faculty for inventiveness. This seeming disregard for the traditional methods of legal research and the principles of *stare decisis* deserves explanation.

Theoretically, cases are appealed because the defendant, in some respect, did not receive a fair trial.[106] Thus, while some today claim that the courts are "soft" on criminals, in many respects the present trend is to overlook insubstantial errors which in years past would have warranted remandment of the case for a new trial,[107] and to insist on substance (that is, prejudice) as the criteria for reversal.[108] As a consequence, little confidence should be placed in the traditional assertions of error such as claims that the trial court erred in permitting the prosecutor to ask leading questions or in admitting hearsay evidence.

Conversely, a great deal of faith should be placed in assignments of error based on claims that the appellant was prejudiced at trial. Counsel may not always find a specific expression in the case law establishing that a particular occurrence has been recognized as reversible error. That is where instinct enters to aid in selecting points to be argued. From there counsel should determine how the incident or evidence prejudiced his client and then research the law. If the law conforms to his instincts, writing the argument should be a relatively simple task. If it does not, inventiveness must be employed to show why the law should be changed,[109] or, at least, why it should not apply in that particular case.[110]

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[100] WIENER at 44.

[101] *Id.* at 46.

[102] *See, e.g.*, 28 U.S.C. § 2111; FED. R. CRIM. P. 52(a); ILL. S. CT. R. 615(a); United States v. Granello, 365 F.2d 990, 995 (2d Cir. 1966); People v. Hopkins, 76 Ill. App. 2d 350, 222 N.E.2d 85 (1966).

[103] Fahy v. Connecticut, 375 U.S. 85, 86 (1963); *see also* Kotteakos v. United States, 328 U.S. 750 (1946); People v. Sumner, 92 Ill.App.2d 386, 234 N.E.2d 537 (1968).

[104] Fiswick v. United States, 329 U.S. 211, 218 (1946); People v. Walker, 84 Ill.App.2d 264, 266-68, 228 N.E.2d 597, 598 (1967).

[105] P. FREUND, ON UNDERSTANDING THE SUPREME COURT 50 (1949).

[106] *Cf.* Johnson v. United States, 352 U.S. 565 (1957); Johnson v. United States, 318 U.S. 189, 202 (Frankfurter, J., concurring).

[107] *See, e.g.*, Whitesides v. People, 1 Ill. 21 (1819), indictment, which did not specify whether offense committed in "A.D." or "B.C." held faulty.

[108] *See, e.g.*, Johnson v. United States, 318 U.S. 189, 202 (1943) (Frankfurter, J., concurring); People v. Hill, 17 Ill.2d 112, 160 N.E.2d 779 (1959); State v. Moreno, 92 Ariz. 116, 374 P.2d 872 (1962).

[109] *See, e.g.*, Mapp v. Ohio, 367 U.S. 643 (1961).

[110] *Compare* People v. Bedard, 11 Ill.2d 622, 145 N.E.2d 54 (1957) *with* People v. Siciliano, 4 Ill.2d 581, 123 N.E.2d 725 (1955), *cert. denied*, 349 U.S. 931 (1955).

There is one extrinsic aid in this task of selecting issues. Most jurisdictions require, in some way, that trial counsel list those errors occurring during the course of the case that warrant a new trial.[111] These post-trial motions provide on-the-scene impressions of the errors in the case as distinguished from later impressions gleaned from the "cold record." These motions also serve a more fundamental function for the appellate lawyer. Ordinarily, errors not raised during the course of the trial cannot be raised on appeal.[112] Many jurisdictions extend this general rule and require that these errors be made the subject of post-trial motions.[113] Appellate counsel cannot ignore these rules in selecting points to argue.

He can, however, seek to circumvent them. The vehicle for doing this is often referred to as "plain error," [114] but whether a particular jurisdiction has a statutory "plain error" provision or not, errors of magnitude will not be ignored by a reviewing court merely because trial counsel failed to object or to make them the subject of a post-trial motion. An expression of this principle may be found in *People v. Burson*[115] where the Illinois Supreme Court, before Illinois had a "plain error" statute, reversed and remanded for an error not raised on appeal. In so doing, the Court carefully examined the foundations of a reviewing court's ultimate power to consider all errors appearing on the face of the record:

> We recognize that counsel for defendant did not present or argue this point; and that the general rule is that where a question is not raised or reserved in the trial court, or where, though raised in the lower court, it is not urged or argued on appeal, it will not be considered and will be deemed to have been waived. However, this is a rule of administration and not of jurisdiction or power, and it will not operate to deprive an accused of his constitutional rights of due process. The court may, as a matter of grace, in a case involving deprivation of life or liberty, take notice of errors appearing upon the record which deprived the accused of substantial means of enjoying a fair and impartial trial, although no exceptions were preserved or the question is imperfectly presented.[116]

Power and disposition are two different matters, however, and, as the Illinois court recognized, reviewing courts are rarely disposed toward considering errors not argued on appeal.[117]

Counsel should avoid argument upon errors which cannot be said to have prejudiced his client. A useful standard in designating such errors is the "harmless error" rule[118] announced in *Chapman v. California:*[119] "... before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." While this standard was designed expressly for testing the significance of "constitutional errors," [120] and is not to be confused with the more stringent standard adopted in *Kotteakos v. United States*[121] for testing the effect of nonconstitutional errors, it does serve as a useful guide by which counsel may decide whether or not to assert a point.

In short, where a number of substantial issues are available, it makes good sense not to dilute the effect of these by adding marginal ones. The length of briefs is generally regulated by rule,[122] and counsel takes the risk of wasting space on tenuous points that would best be allocated to stronger arguments.

In framing arguments, the goal is to establish that appellant was prejudiced and that settled principles of law have condemned or should condemn such prejudice. The argument depends upon facts. If an adequate statement of facts—one which moves the reviewing court in the defend-

[111] *See, e.g.*, ILL. REV. STAT. ch. 38, § 116-1 (1967); People v. Irwin, 32 Ill.2d 441, 207 N.E.2d 76 (1965); People v. Orr, 24 Ill.2d 100, 180 N.E.2d 501 (1962).

[112] United States v. Vasen, 222 F.2d 3 (7th Cir.), *cert. denied*, 350 U.S. 834 (1955); United States v. Jones, 204 F.2d 745 (7th Cir. 1953); People v. Carter, 76 Ill. App. 2d 323, 22 N.E.2d 91 (1966); People v. Fleming, 54 Ill. App. 2d 457, 203 N.E.2d 716 (1965); People v. Pike, 22 Cal. Rptr. 664, 372 P.2d 656 (1962).

[113] *See supra* note 111.

[114] *See, e.g.*, FED. R. CRIM. P. 52(b); ILL. S. CT. R. 615(a); Pinkard v. United States, 240 F.2d 632 (D.C. Cir. 1957); People v. Bell, 61 Ill. App. 2d 224, 209 N.E.2d 366 (1965).

[115] 11 Ill.2d 360, 143 N.E.2d 239 (1957).

[116] People v. Burson, 11 Ill.2d 360, 370-71, 143 N.E.2d 239, 245 (1957).

[117] *See* Dranow v. United States, 307 F.2d 545, 571-72 (8th Cir. 1962); People v. Smith, 404 Ill. 125, 88 N.E.2d 444, 449 (1949).

[118] FED. R. CRIM. P. 52(a); ILL. S. CT. R. 615(a).

[119] 386 U.S. 18, 24 (1967).

[120] *See* Chapman v. California, 386 U.S. 18, 22 (1967).

[121] 328 U.S. 750, 764 (1946):
And the question is, not were they right in their judgment, regardless of the error or its effect upon the verdict. It is rather what effect the error had or reasonably may be taken to have had upon the jury's decision. The crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own in the total setting.

[122] *See, e.g.*, F. R. APP. P. 28(g) (briefs shall not exceed 50 printed or 70 duplicated pages); ILL. S. CT. R. 341(a) (briefs shall not exceed 75 printed or 100 duplicated pages).

ant's favor—has been prepared, the argument section is the place to consolidate and move ahead. It is not necessary to restate the facts, but they must be argued and this can be best accomplished by reasserting particular facts to show in detail the degree of prejudice suffered by the appellant. If, for example, the issue concerns the admission of irrelevant evidence, counsel should show how the prosecutor utilized this evidence in his argument to the jury. Counsel should further point out that under the instructions given by the court, the jury improperly considered this evidence and reached improper conclusions.

Once this foundation has been established, the applicable law may be infused into the argument. Citations to authority are intended to show the reviewing court that it, or another court, on a previous occasion, has handed down a ruling which directly, or in principle supports the appellant's claims. But despite *stare decisis*, former rulings are always subject to modification,[123] revision,[124] or disregard. As a consequence, counsel should rely more on the facts of the case than on a string of decisions which seemingly support his arguments in principle.

Effective citations, then, depend less on lengthy quotations from supporting authorities and more on the holdings of those authorities as they are particularly applicable to the facts of the case. For example, to demonstrate that a particular statute is a Bill of Attainder, it is most effective to point out that the statute in issue applies "to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial,"[125] and, by appropriate introductory signals, show that this is the test established by prior decisions of the Supreme Court.[126] Quoting lengthy passages from each of these authorities to explain why the statutes questioned in each were Bills of Attainder would not be helpful. The court knows that the statutes in these cases were condemned as Bills of Attainder; what it wants to know is why the statute in question should be similarly condemned.

[123] *Compare* Cooper v. California, 386 U.S. 58 (1967) *with* Preston v. United States, 376 U.S. 364 (1964).

[124] *Compare* Mapp v. Ohio, 367 U.S. 643 (1961) *with* Wolf v. Colorado, 338 U.S. 25 (1949); *compare* Benton v. Maryland, 395 U.S. 784 (1969) *with* Palko v. Connecticut, 302 U.S. 319 (1937).

[125] United States v. Lovett, 328 U.S. 303, 315 (1946).

[126] *See Ex Parte* Garland, 71 U.S. (4 Wall.) 333 (1866); Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1866).

At times, however, a lengthy quote cannot be avoided. This is especially true when the reviewing court is being urged to abandon its own former holding on a certain point and adopt that of another jurisdiction. Usually, the language of the latter decision is self-sustaining and so compelling that to urge the proposition without setting forth the supporting language of the court which first, or most strongly, espoused it, may be ineffective. Here it is best to remember that reviewing courts place more reliance on the expressions of other courts than on the words of counsel.

It is, on occasion, necessary to preface an argument with a statement of applicable law. An argument based on a specific interpretation of a statute might well be prefaced by a resume of existing law which requires interpretation in the manner claimed. Here there is no need for lengthy quotations. A statement of law, followed by an applicable citation, and followed in turn by derivative statements of law and citations is most effective except for the rare occasion where all of the applicable law is found in one decision.[127]

For purposes of brief writing, it is significant to note that "authorities" are only those decisions of the court to which the appeal is being directed, or of courts of superior jurisdiction in the context of the issue being presented. Other decisions are "persuasive," "advisory," or "illustrative." A decision of United States Court of Appeals of one circuit is not binding on a Court of Appeals for another.[128] Neither, except in the most unusual circumstances,[129] is it binding on a state court.

[127] There is only one proper form for citations and that is the form prescribed by the rules of court. It is unusual for a reviewing court to impose drastic sanctions for a failure to observe these rules, but such a failure may prove enough of an annoyance to cause a reviewing justice subconsciously to pay less attention to the offending brief than he otherwise would.

The improper use of introductory signals may have a more noticeable effect on the outcome of an appeal. The truth of this statement becomes apparent when, in the reply brief or on oral argument, counsel is called upon to explain why he has cited a particular case as authority for a proposition of law when all he meant to assert was that, rather then being stated therein, the proposition would be supported or suggested by an examination of the cited authority. The explanation could have been avoided merely by using the signal "see" before the citation. A UNIFORM SYSTEM OF CITATION § 26:1 (11th ed. 1967).

[128] *See, e.g.*, Affronti v. United States, 221 F.2d 150, 152 (8th Cir. 1955), *aff'd*, 350 U.S. 79 (1955). Indeed, a conflict between circuits is a ground for grant of certiorari.

[129] *Cf*, People v. Kurth, 34 Ill.2d 387, 394–96, 216 N.E.2d 154, 157–58 (1966).

Naturally, counsel will not always be able to find a decision that is absolutely authoritative. He will then have to resort to decisions of a "secondary" character. His sources for those decisions depend a great deal on the attitude of the court to which the appeal is directed. Every court tends to rely on decisions of certain courts more than others. It would be less than realistic to assume that courts and individual judges do not have a similar tendency to react more favorably to decisions authored by judges who, over the years, have gained respect for their judicial abilities. Decisions from these sources should naturally be accorded primacy.

Commentators and text writers are not "authorities" in this strict sense of the term. Although courts may occasionally rely on these sources to support a particular holding,[130] counsel is better advised to limit his references to them. When utilized, however, it is advisable to show that the general statements of the commentator cited have found recognition in decided cases.[131]

Arguments in a brief should be devoid of excessive emotionalism. Rash, exaggerated statements and ominous warnings do little to further an argument. Courts of review are comprised of men with years of legal experience; they have all heard of the "dangers inherent in permitting the prosecutor to run roughshod over the rights of a defendant;" what they want to know is why the proceedings in the case under review were unfair. Similarly, unless counsel is prepared to prove that "no court in the civilized world would permit the prosecutor to argue as he argued here," [132] he is much better advised to show why the argument prejudiced the defendant and how other courts would have condemned identical or similar arguments.

There is a more practical reason for avoiding such statements. They invite the response of opposing counsel, and provide a fertile climate in which he can develop his own arguments. Cold hard fact contrasted against hyperbole is effective. The more extravagant the hyperbole—if such is possible—the more persuasive a contrasting factual recitation becomes until it is not even necessary for opposing counsel to draw conclusions. He can leave them for the court to draw.[133] Hence examples of emotional attack are rare, but, when they do occur, they evoke immediate response either from opposing counsel in the form of a motion to strike the offending brief,[134] or from the court in the form of an explicit censure,[135] or worse.[136]

In addition, the appellate advocate simply cannot afford to mislead the court either as to the status of the law or the facts in a case. That does not mean, however, that he must labor to negate all possible exceptions to a proposition which he proposes. For example, when urging that a closing argument was prejudicial, it is not always necessary to establish that defense counsel did not provoke such argument in his closing remarks. This is especially true where defense counsel has invited some form of response, but the offending argument went beyond the bounds of legitimate reply.[137] If the summarization of the record sets forth the arguments of both counsel fairly, there is no need for the appellant to shoulder the burden of proving a negative—that his closing argument did not justify the prosecutor's.

This is equally true with respect to "legal" arguments. If counsel urges the adoption of a position taken by another jurisdiction, he is morally obligated to advise the reviewing court of the existence of a contrary position taken by it, or that the rule advocated does not represent the majority view. Candor in this circumstance makes good sense. But authorities which, by way of exception, differ from those advanced in support of an argument need not be recounted unless the applicability of that exception is the issue raised on review. Again, while counsel should not avoid obvious issues, it is not incumbent upon him to

[130] *See, e.g.*, People v. Kurth, 34 Ill.2d 387, 394–95, 216 N.E.2d 154, 158 (1966).

[131] Occasionally, a law review article or similar professional exposition will serve as the inspiration for a change in existing law. If that is the aim of counsel's argument, he may find citation of such articles effective. But there is a danger in relying too heavily on these writings. Law review articles reach conclusions which the authors have drawn from their consideration of a number of cases. The temptation is great to refer to the article alone in urging adoption of these conclusions and leave the analysis of prior decisions to the authors, and to the court.

[132] *See* Gurinsky v. United States, 259 F. 378 (5th Cir. 1919).

[133] *See* WIENER at 245–56.

[134] *See, e.g.*, Cox v. Wood, 247 U.S. 3 (1918); Green v. Ebert, 137 U.S. 615 (1891).

[135] *See, e.g.*, Dranow v. United States, 307 F.2d 545, 549–55 (8th Cir. 1962); United States v. Miller, 233 F.2d 171, 172 n.1 (2d Cir. 1956).

[136] *See, e.g.*, Matter of Fletcher, 344 U.S. 862 (1952); Knight v. Bar Association, 321 U.S. 803 (1944). *See also* S. CT. R. 40(5).

[137] *See, e.g.*, People v. Dukes, 12 Ill.2d 34, 341–42, 146 N.E.2d 14, 18 (1957); Campbell v. People, 109 Ill. 565 (1884).

search out and eliminate every possible exception to the proposition he advocates.

Counsel, then, must strike a delicate balance between candor and advocacy. Advocacy has a definite advantage over candor. A brief which does not exhibit partiality risks a loss of direction fatal to any argument.

Above all, it must be remembered that a brief is not a law review article designed to examine all available data and arrive at a conclusion. Its function is to start with a conclusion, and argue its merits.[138] It cannot perform that function if it does not have direction and purpose. An erudite exposition on the law of search and seizure, its history and its future, is pointless where the only question is whether or not the defendant consented to the search. Although the given example may seem absurd in the abstract, courts everyday consider arguments which have lost their vitality because they have been infected by needless side issues. Abandonment of meritorious or fairly debatable arguments is not recommended, but there is little to be gained, and indeed much to be lost, by being overly contentious.

There is always a great deal of indecision concerning the order in which points in the argument should be arranged. For instance, if the jurisdiction of the reviewing court depends on the existence of a fairly debatable constitutional question, either the rules of court,[139] or common sense dictate that these issues be raised first. But where the rules do not so require and the constitutional question is not of principal significance, or where no constitutional question is involved, the general tendency is to arrange points in their order of strength or relative importance. While there is nothing particularly wrong with this plan, and indeed much to be said in its favor, the eventual layout of the argument may detract from its overall total effectiveness. When this occurs, an alternative should be considered.

Arranging the issues in the order in which they arose or, more importantly, so that they relate one to the other has the advantage of giving the court a panoramic view of the manner in which the asserted unjustifiable conviction came about. Even though an issue concerning a particular instruction to the jury may be the strongest point on appeal, it is often cumbersome to argue that point without first elaborating on other matters, especially if those other points help develop an argument concerning the instruction. Counsel may thus elect to argue the admissibility of a confession before mentioning the failure to instruct concerning the weight to be given it, even though the latter is the stronger argument.[140] Here the first argument establishes a predicate for the second by detailing the circumstances under which the confession was obtained, a matter which the jury must be given an opportunity to consider and, consequently, about which they must be properly instructed.

One important rule must be observed in structuring the argument. A weak point, or one which does not have the capacity to stimulate the court's interest, should never be argued first. But such points, even though relegated to lower rank, should be related to other points. The seemingly innocuous admission of hearsay evidence can be made to appear more significant if it is shown that the questioned evidence is further reason why a severance should have been granted appellant from his co-defendants.[141] Both arguments can be made more effective by a third argument that the trial court did not give a proper cautionary instruction in admitting such evidence.[142] The object is to structure the argument so that all three issues, perhaps individually weak, lend support each to the other.

Finally, in framing arguments for cases arising in the state courts, counsel often fail to assess the prospects for further appeal, or, more properly, for a petition for certiorari from the Supreme Court of the United States should their case be affirmed. As a result, they neglect to raise the full spectrum of constitutional rights in their arguments, omitting, for example, to allege violations of the Fourteenth Amendment as well as a violation of the applicable provision of the state constitution. Although the Supreme Court may grant certiorari despite the failure to raise the federal rights explicitly in the court below,[143] it is equally possible that it will refuse to consider the issue, or reject the claimed error, because of such failure.[144] Similar

[138] *Cf.* Anders v. California, 386 U.S. 738, 744 (1967); Ellis v. United States, 356 U.S. 674, 675 (1958).

[139] *Compare* ILL. S. CT. R. 302(b) *with* ILL. S. CT. R. 603. *Cf.* ILL. CONST. art. VI, §4 of the new Illinois Constitution.

[140] *See, e.g.*, People v. Cook, 33 Ill.2d 363, 211 N.E.2d 374 (1965).

[141] *See, e.g.*, United States v. Haupt, 136 F.2d 661, 672–73 (7th Cir. 1943).

[142] *See, e.g.*, United States v. Guido, 161 F.2d 492, 495 (3d Cir. 1947).

[143] *Cf.* Douglas v. Alabama, 380 U.S. 415 (1965); Braniff Airways v. Nebraska State Board of Equalization & Assessment, 347 U.S. 590 (1954).

[144] *Cf.* Beck v. Washington, 369 U.S. 541, 549–54 (1962); Ferguson v. Georgia, 365 U.S. 570, 572 n. 1 (1961).

considerations may apply in jurisdictions having intermediate courts of review.

Certain arguments are particularly demanding of special skills—especially those which challenge the sufficiency of the evidence to support a conviction. Legal scholarship, a keen sense of logic, an ability to be analytical and a faculty for expressing these talents are all necessary. And, wherever remotely possible, the assignment should be undertaken if for no other reason than to demonstrate that, but for intervening trial errors, the jury could have returned a different verdict.[145]

The principal impediment to such arguments are the differing attitudes of the courts toward review of the sufficiency of the evidence. Some courts openly permit such review.[146] A few, limited by statute or constitutional provision, absolutely prohibit it.[147] Others profess to prohibit it, but in practice do review the question employing criteria which are so varied from jurisdiction to jurisdiction (and even within the same jurisdiction)[148] that it is impossible to formulate any definite statement applicable to all. The problem is further complicated by the fact that these criteria often vary according to the nature of the charges in the cases being reviewed.[149] As a consequence, an attack on the sufficiency of the evidence must be charted within the limits of review allowed by the particular jurisdiction for the particular type of case on appeal.

There are two types of challenges to the sufficiency of the evidence. The first and most difficult to maintain is that which, in effect, asks the reviewing court to resolve conflicts in the evidence or to substitute its judgment for that of the jury as to the credibility of witnesses. Although the challenge itself may be couched in different language, it generally rests on the premise that there was unsatisfactory evidence on the guilt of the defendant. This type of challenge may succeed in some jurisdictions.[150] But in light of the Supreme Court's ruling in *Glasser v. United States*[151] that a federal reviewing court must view the evidence and all reasonable inferences which may be drawn therefrom in a light most favorable to the government,[152] it seldom, if ever, succeeds in the federal courts.

The second type of attack is directed toward the technical sufficiency of the evidence and is based on the premise that the conviction is tainted by the absence of proof of a material element or by otherwise incompetent proof. The appellant may assert a variance between the evidence and the charge;[153] he may contend that the prosecution failed to prove a material element, such as ownership of allegedly stolen property,[154] or use of the mails,[155] or scienter;[156] or he may even contend that the prosecution failed to establish the requisite plurality of parties to a conspiracy,[157] or that it failed to establish that the defendant on trial was the person who committed the acts charged in the indictment and was the person named therein.[158] Plainly, this type of argument is not met with the sort of restriction voiced in *Glasser*. To the extent that it does not depend on resolutions of conflicts in the evidence or weighing the credibility of witnesses, it is received more readily by reviewing courts.

The purpose is to obtain a checklist by which the material elements of the crime and the facts in evidence are compared. This technique is particularly helpful in conspiracy and complicated fraud cases wherein appellate counsel must determine the exact charge against each defendant and the specific evidence offered in support of each facet of the charge. This is not always as simple as it appears, especially in those cases involving several defendants, a multiplicity of transactions and

[145] *Cf.* United States v. Guajardo-Melendez, 401 F.2d 35, 39 (7th Cir. 1968).

[146] *See* People v. Cullotta, 32 Ill.2d 502, 504–05, 207 N.E.2d 444, 446 (1965); People v. Ikerd, 26 Ill.2d 573, 578–90, 188 N.E.2d 12, 16 (1963).

[147] *See, e.g.*, State v. Rideau, 242 La. 431, 137 So.2d 283, 291 (1962).

[148] *Compare* People v. Cullotta, 32 Ill.2d 502, 207 N.E.2d 444 (1965) *with* People v. Turner, 91 Ill. App. 2d 436, 235 N.E.2d 317 (1968).

[149] *See, e.g.*, The Illinois rule with respect to crimes against children where the prosecution depends principally upon the testimony of the child: People v. Williams, 414 Ill. 414, 111 N.E.2d 343 (1953); People v. Pazell, 399 Ill. 462, 78 N.E.2d 212 (1948).

[150] *See, e.g.*, People v. Cullotta, 32 Ill.2d 502, 207 N.E.2d 444 (1965); People v. Panczko, 20 Ill.2d 237, 170 N.E.2d 130 (1960).

[151] 315 U.S. 60 (1942).

[152] *Id.* at 80. *See also* United States v. Mims, 340 F.2d 851 (7th Cir. 1965).

[153] *See, e.g.*, United States v. Borelli, 336 F.2d 376 (2d Cir. 1964); Cannella v. United States, 157 F.2d 470 (9th Cir. 1946).

[154] People v. Struble, 275 Ill. 162, 113 N.E. 938 (1916).

[155] United States v. Browne, 225 F.2d 751 (7th Cir. 1955).

[156] *Cf.* Smith v. California, 361 U.S. 147, 154 (1959).

[157] Hartzel v. United States, 322 U.S. 680 (1944).

[158] People v. Dante, 35 Ill.2d 538, 221 N.E.2d 409 (1966); Commonwealth v. Pressel, 194 Pa. 5, 184 A.2d 358 (1962).

a conspiracy which is claimed to have more than one objective.[159]

Having determined which elements were not proved, where the proof varied from the charge, or why the conduct disclosed by the evidence did not amount to a violation of the statute, counsel should direct his argument to that facet of the case, conceding that which has been proven. As elementary as this may seem, too often counsel attempt to argue the entire factual structure of the case and lose sight of their real objective.

A different technique must be employed in arguing that the evidence was unsatisfactory. No matter what criteria are employed for testing the sufficiency of evidence at the appellate level, counsel should approach the problem as though he held the burden of persuasion and attempt to convince the court of the probability of defendant's innocence. It is well to point out that even for a conviction to stand on appeal circumstantial evidence must exclude every reasonable hypothesis except that of guilt.[160] As a practical matter, however, the court should be shown that other hypotheses not only exist but are also far more reasonable. If a key prosecution witness's testimony is alleged to be unbelievable, it is not enough to point out a motive or inclination to lie. The court must be made to believe that the witness did lie—or at least that the possibility of his having done so is so great as to render his testimony valueless.[161]

It is, of course, easier to speak of these matters than to put them into effect. If trial counsel failed to elicit sufficient facts on cross examination or in the presentation of defendant's case, little can be accomplished on appeal. Even where trial counsel has elicited sufficient facts, there is always a reasonable probability that an attack on the sufficiency of the evidence will be met with the answer:

> The credibility of the witnesses and the resolution of the conflicting testimony was a matter for the trial court (jury), and this court will not substitute its judgement for that of the trial court (jury).[162]

Identification cases, too, present a particular problem. Reviewing courts have a tendency to refer to claims of mistaken identity as challenges to the credibility of the identifying witness.[163] As a consequence, these claims are often dismissed with the observation that the "credibility" of the witness is a matter for the trier of fact. But a claim that a witness has erred does not involve a challenge to his veracity. Truthful people make mistakes. To assert this point, it is always best to emphasize the inadequacy of the identification, the difficult circumstances under which it was made and the opportunities for mistake.[164] It is a good policy to refrain from suggestions of bias or other motive for the alleged untruth. Sympathize with the witness because of the hardships imposed on him by the circumstances, but reject his "conclusion" as based on insufficient data.[165] The reviewing court may then be persuaded that what it is being called upon to weigh is the reliability and the accuracy of the witness' conclusion that the man in court is the man he saw commit the offense, not the witness' credibility.[166]

As the appropriate arguments are devised, counsel should remember that whether the applicable rules of court[167] set a limit on the length of the brief or not, his brief is only one of many that must be considered by the court at the same session. Although permission to file an extended brief may generally be obtained from the reviewing court prior to filing,[168] the courts frown on lengthy briefs even if they do permit them. The best admonition is the one found in the Rules of the Supreme Court of the United States, an admonition which provides a fitting summary of the entire subject of brief writing:

> Briefs must be compact, logically arranged with proper headings, concise, and free from burdensome, irrelevant, immaterial, and scandalous matter. Briefs not complying with this paragraph may be disregarded and stricken by the court.[169]

[159] *See, e.g.*, United States v. Hoffa, 367 F.2d 698 (7th Cir. 1966).

[160] Dawes v. United States, 177 F.2d 255 (6th Cir. 1949); People v. DeVito, 66 Ill. App. 2d 682, 214 N.E.2d 320 (1966).

[161] *Cf.* People v. Quintana, 91 Ill. App. 2d 95, 234 N.E.2d 406 (1968).

[162] *See, e.g.*, People v. Woodruff, 9 Ill.2d 429, 137 N.E.2d 809 (1956).

[163] *See* People v. Turner, 91 Ill. App. 2d 436, 343–44, 235 N.E.2d 317, 320 (1968); Commonwealth v. Shelbert, 404 Pa. 263, 171 A.2d 785 (1961).

[164] *See, e.g.*, People v. Cullotta, 32 Ill.2d 502, 207 N.E.2d 444 (1965); People v. McGee, 21 Ill.2d 440, 173 N.E.2d 434 (1961); People v. Peck, 358 Ill. 642, 93 N.E. 609 (1934).

[165] People v. Peck, 358 Ill. 642, 349–50, 193 N.E. 609, 612 (1934).

[166] People v. Gold, 361 Ill. 23, 196 N.E. 729 (1935).

[167] FED. R. APP. P. 28(g); ILL. S. CT. R. 341(a).

[168] FED. R. APP. P. 28(g); ILL. S. CT. R. 341(a); *see also* EIGHTH CIR. R. 8(c).

[169] S. CT. R. 40(5).

The Reply Brief

The fundamental question faced by every appellant in a criminal case is not how to file a reply brief, but whether to file one at all. The answer is suggested by the rules of the various courts. Rule 28(c) of the Federal Rules authorizes a brief "in reply to the brief of the appellee" and, as though to underscore the fact that this is to be a "reply" and not a further exposition of the issues, the Seventh Circuit adds the caveat that it "shall present only matter in reply to questions discussed in appellee's brief." [170]

If counsel has fully prepared his brief, there are few situations in which a reply brief need be filed. One is always necessary when the appellee's brief contains important misstatements of law or fact. Minor misstatements, or ones which have no relevance to the issues at hand, need not always evoke a reply. Similarly, if the appellee's brief misinterprets the propositions advanced in the appellant's brief, it may not be necessary to reply if the misinterpretation is an obvious attempt to avoid the issues. If, however, the misinterpretation is caused by the appellant's lack of clarity in developing his propositions, then a reply is in order. A reply is clearly necessary when the appellee's brief raises issues not covered in appellant's brief.

One situation not covered by these suggestions is the emergence of new authority during the period between the filing of the brief and the receipt of appellee's brief. The Rules of the Supreme Court of the United States expressly authorize an additional memorandum at any time—even after oral argument—should this occur.[171] By analogy, it must be assumed that no reviewing court would disfavor a reply brief that pointed out recent decisions, even if their only import were to lend support for what was stated in the brief.

From the foregoing, a general rule as to the content of reply briefs may be developed. The less said the better. Not only are reviewing courts already overburdened with too many briefs to consider, but an extensive reply brief leaves the impression that what was argued originally needs modification, or additional support.

As a consequence, the reply brief should be restricted to the purpose for which it is intended. It should identify the errors or misinterpretations contained in the appellee's brief with specificity and make the desired corrections. It should not restate the premises upon which appellant's arguments are based, or reargue collateral matters.

Oral Argument

A case worth appealing merits oral argument. There can be no deviation from this general proposition. Although the rules of various courts may assume that there are cases in which briefs will be filed, and not argued orally,[172] the majority of judges will privately affirm that no criminal case should be submitted on briefs alone. The reason, perhaps, is psychological, for the attorney who will not argue his case suggests his own lack of interest in the appeal.

Although the setting of the docket for oral argument is a matter of the court's own internal administration,[173] some jurisdictions require counsel specifically to request oral argument. Illinois, for example, requires that counsel state on the cover of his brief that oral argument is requested,[174] although an inadvertant omission to note this request certainly will not preclude counsel from moving to have the cause set for argument. The tenor of the Federal Rules of Appellate Procedure assumes that the case will be argued,[175] and the Rules of the Supreme Court, if they may be taken as an indication of the sentiment throughout the federal system, disfavor any waiver of argument.[176] The oral argument should thus be viewed as an integral part of the appellate process and should be prepared with equal care.

Each jurisdiction has its own rules governing the conduct of oral argument. As with the preparation of briefs, counsel cannot begin to prepare his argument without consulting these rules. For instance, time is the most jealously guarded prerogative of the reviewing court. No counsel should begin oral argument without first having

[170] Seventh Cir. R. 10; *cf.* First Cir. R. 3(a), which states:

> An appellant intending to file a reply brief must notify the clerk of his intent within seven days of service of appellee's brief.

[171] S. Ct. R. 41(e). Leave of court is necessary to file a "supplemental brief" after the case has been called for hearing.

[172] *See, e.g.*, Ill. S. Ct. 352(a).

[173] *See, e.g.*, Ill. S. Ct. R. 611(a) and 351; Third Cir. R. 12; Fifth Cir. R. 11; Second Cir. R. 34.

[174] Ill. S. Ct. R. 352(a).

[175] Fed. R. App. P. 34(f).

[176] S. Ct. R. 45(l). It should be noted that the Court may "require oral argument by the parties." *See also* First Cir. R. 4; Fifth Cir. R. 11(d) and (e).

determined how much time the court will allow him and how the time may be apportioned.[177] No general statement as to the time allotted in the various jurisdictions is possible. Rule 34 of the Federal Rules allows each "side" 30 minutes for argument.[178] Because the appellant is allowed to open and conclude the argument,[179] it is assumed that counsel will apportion his time between closing argument and rebuttal.[180] Counsel are permitted to apply by letter to the clerk "reasonably in advance of the date fixed for the argument" for enlargement of time,[181] but, although such requests are to be "liberally granted if cause therefore is shown," some circuits have intimated that they will not be favorably viewed.[182] Moreover, Rule 34 recognizes that "the court may terminate the argument whenever in its judgment furthur argument is unnecessary."[183]

Time is usually only a problem when more than one counsel are to argue from the same side. This usually occurs when more than one defendant below was convicted and their separate appeals, prosecuted by separate counsel, have been consolidated for review, or when a single appeal was filed on behalf of each defendant but by separate counsel.[184] Although the Rules do not so provide, the Committee Notes to Rule 34 indicate that multiple defendants having a common interest "constitute only a single side", and that "the time allowed by the rule is afforded by opposing interests rather than to individual parties." Separate counsel representing separate appellants must therefore request additional time if necessary. They should, of course, "avoid duplication of argument."[185]

The cardinal rule on oral argument is that "counsel will not be permitted to read at length from briefs, records or authorities."[186] Counsel may wish to deviate slightly from this rule in one respect: a particular passage from the record, either the testimony of a witness or the comments of the judge and prosecutor, may be so essential to the point being argued that it must be repeated verbatim. In such a case, counsel should identify the passage, cite where it may be found in the summary or brief, tell the court he is reading the passage, explain why he is reading it, and permit the individual members of the court sufficient time to locate the passage in their copies of the summary or brief before he begins his reading. In no other instance should counsel read anything to the court.

Two other assumptions are necessary in planning the content of the argument. In the first place, counsel must assume that the court has not read the brief and is not familiar with the facts of the case or the details of the issues raised.[187] Hence, the facts and the argument on the issues to which they relate should be presented concurrently.[188] But in planning, counsel must also assume that the court is fully aware of the legal principles urged in support of his arguments. There are exceptions, of course, as in the case of a newer principle announced by a different jurisdiction, but in the main counsel cannot hope to expound at length on the legal principles involved in the time available to him.[189] Yet, many judges are fond of inquiring whether the court has ever adopted a certain principle of law, or whether the decisions in other cases are controlling in the case under consideration. To this extent, counsel must be fully prepared to discuss the decisions by which the law has been developed.

Every bit of preparation undertaken by counsel will be to no avail if, on argument, he fails to adopt a proper attitude toward the case and the court. The appellate court room, though austere and formal, is not the place for a bland, dispassionate discussion of abstractions. It is a place for advocacy

[177] *See, e.g.*, ILL. S. CT. R. 352(b); FED. R. APP. P. 34(b) as implemented by the following circuit rules: D.C. CIR. R. 12(b); SECOND CIR. R. 34(d); SEVENTH CIR. R. 11(b); TENTH CIR. R. 11(c).

[178] FED. R. APP. P. 34(b); *see also* ILL. S. CT. R. 352(b).

[179] FED. R. APP. P. 34(c).

[180] *Cf.* FIRST CIR. R. 4; ILL. S. CT. R. 352(b).

[181] FED. R. APP. P. 34(b).

[182] *Cf.* SEVENTH CIR. R. 11.

[183] FED. R. APP. P. 34(b); *cf.* SECOND CIR. R. 34(d), permitting the presiding judge of a panel to shorten the time for argument after a consideration of the briefs "if he concludes that a smaller amount of time will be adequate." *See also* TENTH CIR. R. 11(c)(6), allowing fifteen minutes for oral argument of cases assigned to the "summary" calendar.

[184] *See* FED. R. APP. P. 3(b).

[185] FED. R. APP. P. 34(d). So too, argument by more than one counsel on behalf of one appellant should be avoided. A division of responsibilities can result in a piecemeal presentation. Time is too short and the argument too important to permit this distraction. Moreover, apportioning issues between counsel imposes an undesirable limitation on inquiries from the court.

[186] FED. R. APP. P. 34(c); *see also* S. CT. R. 44(1); ILL. S. CT. R. 352(c).

[187] *But see* FIRST CIR. R. 4.

[188] Counsel for the appellant must present the facts "fairly." *See* FED. R. APP. P. 34(c); SEVENTH CIR. R. 11.

[189] Counsel should assume that questions by the court will take up a significant amount of the time allotted. This, in turn, necessarily assumes a relatively abbreviated presentation.

and insincerity is the deadliest enemy of winning advocacy. Counsel should not forget that the judges who comprise the court have been exposed to legal arguments for a major portion of their professional lives. By training, experience and intelligence they will be the first to detect a lack of conviction in counsel's presentation, and this alone can be fatal to an appellant's claims.

So too, counsel must be candid in oral argument. Candor requires a thorough mastery of the law and facts and is not to be confused with ill-conceived concessions made out of lack of knowledge or a desire to ingratiate oneself with the court. Too often counsel readily concede the validity of a particular doctrine of law or the applicability of a particular case because their lack of preparation has left them poorly equipped to deal with inquiries from the bench.

Oral argument is essentially a forum where the advocates expose themselves to the inquiries of the court. To face these inquires, to answer them and to tie together all of the loose ends that may have been left by the brief are the challenges that face counsel as he approaches the lecturn. He can prepare the law and the facts; he cannot prepare answers to as yet unexpressed problems which may concern an individual justice.

But he must answer those questions. He cannot avoid them; he cannot put them off. He is much better off to openly admit that he does not know the answer—and promise to find it and advise the court by the most appropriate means[190]—than he is to slough it off or offer an evasive answer.

With the rebuttal portion of the oral argument comes the best opportunity to answer those questions posed during the opening argument which counsel was not able to answer at that time. In fact, the rebuttal may also provide time for answering those questions asked of the appellee which were not answered, or were answered unsatisfactorily. This function suggests the proper tenor for rebuttal. It is not the time to argue matters contained within the reply brief. They should be developed, if necessary, during the opening argument. Concluding arguments should be restricted to rebuttal of unexpected matters.[191] This encompasses questions by the court and new arguments (or misstatements) by the appellee.

[190] It is not uncommon for some appellate court judges to interrupt an oral argument and inquire why a complete citation has not been provided the court. It is accepted, of course, that counsel may not have the complete citation of a very recent case available at the time he files his brief.

Conclusion

A court of review does not act *sua sponte*. It operates on the presumption that the judgment in question was properly obtained.[192] The appellate lawyer who loses sight of this and does not, in the preparation and presentation of his appeal, employ every legitimate method at his disposal to upset this presumption not only neglects his client's present interests, but runs the risk of doing very serious damage to his client's chances for subsequent relief.[193]

But an expertly prepared and presented brief and oral argument will not affect a conviction based on sufficient evidence and obtained during the course of a fair trial in which the defendant was accorded all of his rights. In the end, the manner in which counsel has faced his task is measured less by the outcome of the decision than by the extent to which counsel has provoked the court to give full and careful thought to each alleged violation of his client's rights. In the final analysis, counsel can hope for no more, and the bench and public can expect no less.

[191] First Cir. R. 4; *see also* Ill. S. Ct. R. 352(b).

[192] *See* Dranow v. United States, 307 F.2d 545, 571–72 (8th Cir. 1962).

[193] *Cf.* United States v. Jonikas, 197 F.2d 675, 678–79 (7th Cir. 1952).