Chapter 18: Parts of an Appellate Brief

# Overview

There are several components that make up your Appellate Brief: Title Page; Table of Contents; Table of Authorities; Statutes Involved; Standard of Review; Question Presented; Statement of Facts; Summary of Argument, Argument and Citation of Authority; Point headings that are within Argument section; Conclusion; Closing; and Signature Block.

In the sections below, you will learn the purpose of each section, what you should include in it, during what part of your writing process I recommend you write that particular component, and how to format the component.

# Title Page

The **title page** is the front page of your brief and it contains the case name, the appellate court case number, the lower court and its case number from which the case is being appealed, and a signature block. Make sure you check the local rules each time, just in case the court you will be filing in has different or updated requirements. For your brief in this class, you will sign your signature block using your blind grading number. An example title page can be found at the ends of the chapter.

# Table of Contents

The **Table of Contents** contains a list of everything in your brief and indicates the page number on which each section starts. Your Table of Contents will include the Table of Contents; Table of Authorities; Statutes Involved; Standard of Review; Question Presented; Statement of Facts; Summary of Argument; Argument and Citation of Authority; Point headings that are within Argument section; Conclusion; and Appendix. Make sure that you correctly identify the starting page of each section in the Table of Contents. You should format the Table of Contents in the beginning of your brief-writing process. You can either use your word processor to automatically insert page numbers tied to your sections or you can fill in the page numbers once you are finished making all changes to the brief. An example Table of Contents can be found at the end of the chapter.

# Table of Authorities

The **Table of Authorities** contains a list of every source of law you use in your brief, from Statutes Involved through Argument, and the pages on which that source can be found. Each source of law should be properly cited using the full citation. The Table of Authorities allows the reader to see what sources of law you rely on in one place and it allows the reader to go to a specific source of law for closer inspection. You must include every source of law you use, whether it be a statute, case, or secondary source.

Organize your Table of Authorities using the following order:

1. Mandatory authority statutes in numerical order
2. Mandatory authority cases from your jurisdiction in alphabetical order
3. Persuasive authority cases from other jurisdictions in alphabetical order
4. Persuasive authority statutes in numerical order
5. Rules in numerical order
6. Other authorities cited in alphabetical or numerical order as appropriate

Some cases, like your lead mandatory authority case, you will cite throughout your brief. For any source you cite on five or more pages, use the term passim, Latin for “here and there,” rather than listing page numbers. If you are referring to a case but are not including its citation because you have already extensively discussed the case (this is most likely to occur in your A section in your CREAC-block), you still should include the pages on which it appears in the Table of Authorities.

If you are going to manually input your page numbers, format the Table of Authorities at the same time that you format your Table of Contents. List all the cases you think you will use and be sure they are in proper citation form. You can fill in the page numbers once you are finished making all changes to the brief. Make sure to cross-reference your Table of Authorities with your Argument section to ensure that you do not include any cases that you did not end up using. If you are going to use your word processor to automatically insert page numbers tied to your sources, you should complete this task last because of the coding in the software and potential for error if you change the document after inserting the Table of Authorities. An example Table of Authorities can be found at the end of the chapter.

# Statutes Involved

The **statutes involved** section lists what statutes, if any, are directly applicable to determining the legal issue in the case. There are not always statutes involved. Sometimes you will have a statute that you are using to argue for a particular position, but that alone is not sufficient to require the statute to be listed in statutes involved.

After you have completed your legal research you should be able to state with certainty whether there is a statute involved. At that point, draft this section. Insert the language from the statute verbatim and then properly cite the statute. If the statutory language is lengthy then you can attach it as an appendix. If you chose to do this, be sure that you tell the reader that the full language is in the appendix and include the appendix in your Table of Contents.

# Standard of Review

Standard of Review, Black's Law Dictionary (11th ed. 2019), defines **standard of review** as “[t]he criterion by which an appellate court exercising appellate jurisdiction measures the constitutionality of a statute or the propriety of an order, finding, or judgment entered by a lower court.” If you think that definition is dense and obtuse, you are not alone. When I was in practice, I thought of a standard of review as being how much deference the appellate court has to give to what the trial court found. Judicial appellate opinions are more uniform in their outcomes when everyone defines and uses standards of review in the same way. Keep in mind that appellate courts are reviewing how the law was applied; they are not tasked with fact-finding.

When you are writing your standard of review for your brief for this class, find the standard of review for each of your questions. You should look in the mandatory authorities provided and then quote that mandatory authority in your Standard of Review section. This will be short, perhaps only a sentence or two long. You must cite to specifically where you pulled the Standard of Review from.

When you are looking for the standard of review for appellate briefs filed “in the real world,” you may have to go outside of the cases dealing with your particular substantive issue to find the correct standard of review. You will have to be sure you stay within the proper jurisdiction, but it is acceptable if the case from which you pull the standard of review does not address anything to assist in answering the substantive legal issue.

Three of the most common standards of review are:

De novo: Least deferential to trial courts. Used for reviewing legal issues and how the trial court applied the law.

Clearly erroneous: Deferential to trial courts. Usually applied to trial court’s findings of fact.

Abuse of discretion: Most deferential to trial courts. Something had to be really wrong to reverse or vacate the trial court’s decision. Usually applied for procedural issues.

When formatting the standard of review for this case, please use the model at the end of the chapter, where you insert the correct Issue/Question and Standard of Review where indicated in italicized print.

# Question Presented

The **Question Presented**, or Issue, tells the reader the legal issue to be answered and incorporates the major relevant facts that must be considered to determine the answer. A Question Presented in a brief differs from a Question Presented in a memo because the QP for your brief will be written in persuasive language that suggests only one correct answer. In all other respects, including how to format, the Question Presented remains the same.

There are two different options to format a Question Presented. You can use the traditional under-does-when/whether-can-when model, or you can use the Deep Issue model proposed by Bryan A. Garner in The Deep Issue: A New Approach to Framing Legal Questions, 5 Scribes J. Leg. Writing 1 (1994-95).

In the traditional model, under the legal rule, you state the legally significant facts and the legal question as one sentence. If you use a whether/can/when structure you will punctuate the sentence with a period rather than a question mark.

In the Deep Issue model, you are not constrained by one sentence. Id. at 4, 6. Instead, with a Deep Issue, you write three separate sentences: one that states the legally significant facts, one that states the legal rule, and one that states the legal question. Id. Your fact sentence or your rule sentence will go first depending on what is the more effective arrangement. Id. Your final question with the legal question will go last and it will end with a question mark. Id. Each Deep Issue should be no more than 75 words. Id. at 5.

Keep in mind that when drafting Questions Presented for advocacy documents, you should frame the question in a way that strongly suggests only one acceptable answer. Depending on which side you are writing for, you will choose to emphasize certain facts over others. Below are two Questions Presented concerning application of the Alien Tort Statute, 28 U.S.C. § 1350, one from each side, in Doe v. Nestlé, S.A., 929 F.3d 623 (9th Cir. 2019), *cert. granted,* 141 S. Ct. 188 (2020), *consolidated with* Cargill, Inc. v. Doe I, 141 S. Ct. 184 (2020), *cert. granted sub nom.* Nestlé USA, Inc. v. Doe I, 141 S. Ct. 188 (2020), (No. 19-416).

Nestlé USA, Inc. filed for a writ of certiorari to the United States Supreme Court and stated its Questions Presented as:

1. Whether an aiding and abetting claim against a domestic corporation brought under the Alien Tort Statute, 28 U.S.C. § 1350, may overcome the extra- territoriality bar where the claim is based on allegations of general corporate activity in the United States and where plaintiffs cannot trace the alleged harms, which occurred abroad at the hands of unidentified foreign actors, to that activity.

2. Whether the Judiciary has the authority under the Alien Tort Statute to impose liability on domestic corporations.

Petition for Writ of Certiorari, in Doe v. Nestlé, S.A., 929 F.3d 623 (9th Cir. 2019), *cert. granted,* 141 S. Ct. 188 (2020), *consolidated with* Cargill, Inc. v. Doe I, 141 S. Ct. 184 (2020), *cert. granted sub nom.* Nestlé USA, Inc. v. Doe I, 141 S. Ct. 188 (2020), (No. 19-416).

John Doe I, et al. in their response brief stated its version of the Questions Presented as:

1. Whether a claim against a domestic corporation brought under the Alien Tort Statute, 28 U.S.C. § 1350, may overcome the extraterritoriality bar where the claim is based on violations of international law by aiding and abetting slavery and forced labor from the United States.

2. Whether domestic corporations are excepted from liability under the Alien Tort Statute despite the lack of an explicit exception in the statute.

Petition in Opposition, in Doe v. Nestlé, S.A., 929 F.3d 623 (9th Cir. 2019), *cert. granted,* 141 S. Ct. 188 (2020), *consolidated with* Cargill, Inc. v. Doe I, 141 S. Ct. 184 (2020), *cert. granted sub nom.* Nestlé USA, Inc. v. Doe I, 141 S. Ct. 188 (2020), (No. 19-416).

Both of these sets of Questions Presented are valid for the issue in the case, but each side chose vastly different facts on which to focus.

When you are writing your brief, plan to write a first draft of each Question Presented after you have completed your research and before you have written your Argument. By using this order, you will be testing your understanding of the legal question and helping you determine the organization of the Argument. However, after you have written the Argument you should then revisit your Question Presented and confirm that it still accurately reflects how you wrote your Argument. Your Questions Presented must be in the order as you present your legal arguments in the Argument section.

You should also periodically revisit the question in the Notice of Appeal or posed by the court to make sure you are actually answering the question directly. Sometimes, your research and opinions can cause you to stray from the task on which you are supposed to write. It is critical that you answer the question as directly as possible; avoid giving answers that relate to the question but do not answer it head-on.

In the example at the end of the chapter, I show you one question presented using each model. However, when you write your brief, you should select one model to use.

# Statement of Facts

**Statement of Facts** in a brief differs from Statement of Facts in a memorandum because you will use the tools discussed in the Persuasive Writing chapter to frame facts as an advocate rather than as an advisor. The organization of and what should be included in the Statement of Facts remains the same.

Your Statement of Facts section is where you tell the reader four main types of facts. First, you state the parties and their relationship both to one another and also to the legal question. You will also include the legally significant facts to know to answer the legal questions, the key background facts to understand the entire picture, and the procedural facts that tell what actions, if any, have been taken in this current situation (the case at hand).

The first paragraph of the Statement of Facts should serve as a context paragraph, identifying the parties and establishing their relationship to each other and to the legal question. The reader needs a clear understanding of the players involved in order to understand why the facts being shared are relevant and to whom they matter. The remaining paragraphs should tell a story using the legally significant facts and key background facts. The facts should be presented persuasively, using the various techniques we have discussed, while still remaining accurate and truthful. Even though you are serving in an advocacy role when writing this brief, it is still part of your duty to accurately present information.

The Statement of Facts can be organized either chronologically or topically. As the writer, it is up to you to arrange the facts in a manner that makes the most sense for the reader to understand why the facts matter and how they fit into answering the legal question. What this arrangement will look like varies from legal question to legal question. Use your best judgment and think about what organization you, as a reader, would want to see. Also consider what order will make for the best presentation for your side of the legal issue.

Do not write the Statement of Facts in the order in which you encounter the information in your provided materials. Rarely will a client give you the facts in a usable order. Likewise, the assignments that you receive during your legal writing classes also anticipate that you will use your judgment to rearrange the facts in a manner that best fits with the legal question.

The final paragraph should give the procedural history, consisting of the actions that have thus far been taken in the current situation, including whether a lawsuit has been filed, if opposing counsel has given any deadlines for a response, or if there are any statutes of limitations that are about to run.

Finally, be sure that you only write facts in your Statement of Facts; it is not the place to argue, to draw legal conclusions, or to editorialize. A fact statement for an appellate brief uses persuasive writing techniques to highlight the facts that support your position and minimize the unhelpful facts. However, it still must present all the information, and must not stray into argument. The Argument section of your brief will provide you ample opportunity to present legal analysis and draw conclusions.

Plan to write your first draft of Statement of Facts after you have written your first draft of your Question Presented and after you have created an outline of your Argument but before you write your Argument. By writing your Statement of Facts before you write the entirety of your Argument, you ensure that you have a solid grasp on what the facts are in this situation, which is key for providing effective legal advocacy. After you have written your full Argument, you should then read back through your Statement of Facts to confirm that you have included all legally significant and key background facts that you used in your Argument and that your organization of the facts matches with your Argument organization in a way that will make the information most accessible and persuasive to the reader.

# Summary of Argument

The **Summary of Argument** section of your brief provides an overview of what the reader should expect in the Argument and Citation of Authority. State the legal issues that must be addressed and highlight the legal analysis steps you took to reach your conclusion. Use the same organizational structure that you use in your Argument and Citation of Authority. Do not cite to any sources of law or to the record. This should be a quick read that primes the reader to digest your Argument. Typically, you will draft one paragraph per issue.

Draft your Summary of Argument after you have completed your Argument and Citation of Authority section and after you have made all substantive edits on that section. The Summary of Argument serves as an overall roadmap to your Argument and Citation of Authority, so you want to make sure that you create a roadmap that matches what you have actually done.

# Point Headings

**Point headings** are conclusions for each of the legal arguments you make in your Argument and Citation of Authority that provide an outline of why your side should prevail to the reader. Point headings serve as clear markers to show the reader, step-by-step, where the argument is going.

You can have major point headings and minor point headings. A major point heading is like a Brief Answer to a Question Presented in a memorandum. Any minor point headings show the steps that had to be taken to reach the major point heading. Minor point headings are not always necessary, so do not try to force them into your argument.

Each point heading should be written as a sentence that clearly states the relief being sought, the law that applies, and the key facts that determine the outcome. Prefer using verbs and active voice when constructing your point headings. Focus on the legal argument and not on the other side; an affirmative statement of your position is usually better than a negative statement of why the other side is wrong. Do not use point headings to issue personal attacks.

Because your point headings serve as an outline to your Argument, you should be certain that each point heading is easy to read and understand. Point headings that are garbled or unclear will detract from, rather than enhance, your Argument.

Your point headings will be used within your Argument, but I have listed them separately to ensure that you focus on how they can be used effectively in your brief. An example of Point Headings formatting can be found at the end of the chapter.

# Argument and Citation of Authority

**Argument and Citation of Authority** is the place in your brief where you show the legal analysis that supports your conclusions about why your side should prevail on each legal issue that has been identified by your Questions Presented. The Argument uses the CREAC analytical structure to show the reader what steps to take to understand your position, and the Argument uses persuasive tools to sway your reader that your side is correct.

**C** - Persuasive conclusion, where you state why the court should find for your side

**R** - Persuasive rule, where the rule is phrased favorably for your client but you are still accurately stating the law

**E/A** - Explanation/Application [*when using persuasive authority*]

**E** - past mandatory cases showing how the law has been used before

**A** - current situation using fact-matching through analogy and distinction

*[****E*** *- positive persuasive authority from other jurisdictions with similar policy goals as mandatory jurisdiction*

***A*** *- current situation using policy-matching through analogy*

***E*** *- negative persuasive authority from other jurisdictions with different policy goals as mandatory jurisdiction*

***A*** *- current situation using policy-matching through distinction]*

**C** - narrowed conclusion reminding the reader why your side should prevail using the rule given and connecting the specifics from the E/A that show how the rule applied to the current situation works

When using persuasive authority in your brief, you will end up using an E-A/E-A/E-A format. For the brief you write for this class, you will be using persuasive authority. However, not all briefs written in practice will require or even benefit from looking at persuasive authority.

Within your CREAC-block, your policy arguments from persuasive authority will go into your E and A sections. In the E sections, you will use cases from other jurisdictions to show how particular policy considerations in those jurisdictions led to particular outcomes. Then, in the A sections, you will show how the outcomes in those cases, relying on policy considerations, can inform the court in your current situation what the right outcome should be.

When you want the court to use a particular persuasive authority to come to an outcome you like, you should show how the policy considerations in that case are similar to policy considerations in the mandatory authorities by demonstrating how the policies in both value similar things. This showing of similarity will mean that you can use the positive persuasive authority to inform the outcome in the current situation because the policies match. Then you link the mandatory authority to your current situation to ask for your desired outcome.

When you do not want the court to use a particular persuasive authority to come to an outcome because you do not like that outcome, you should show how the policy considerations in that case are inapplicable to the mandatory authorities by demonstrating the policy considerations are different and therefore do not value similar things. This showing of inapplicability will mean that you cannot use the negative persuasive authority to inform the outcome in the current situation because the policies do not match Then, you state the policy considerations in the mandatory authority that do reach the outcome you desire.

The bulk of your writing time will be spent crafting, drafting, and refining the Argument section. I recommend creating an outline of your Argument after you have written your first draft of your Question Presented. Once the outline feels complete, then write the Statement of Facts. After you have your first draft of your Statement of Facts, return to your Argument outline and write a complete first draft of your Argument section.

# Conclusion

Your **Conclusion** section of your brief summarizes the relief you seek that will benefit your side. The Conclusion will be shorter than both your Argument and Citation of Authority and Summary of Argument sections.

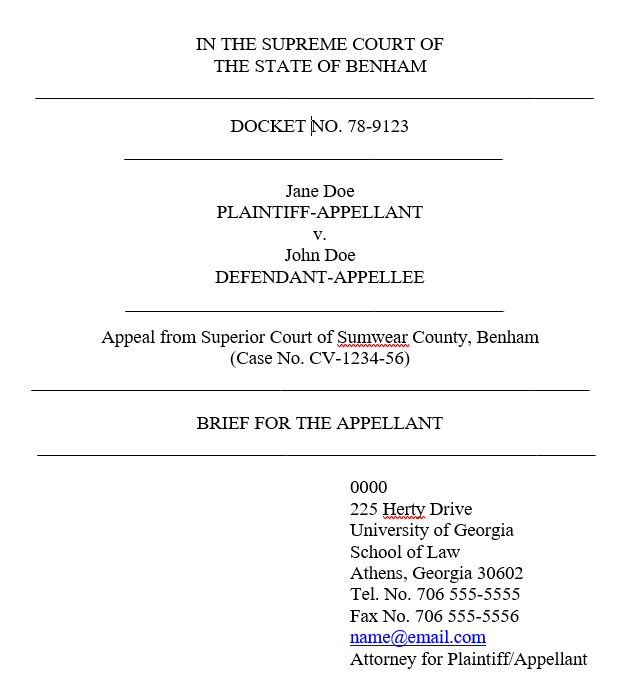
Write this section once you have completed all the other sections of the brief. You might not be certain how your Conclusion should look until after you have thought through the rest of the sections. However, be careful that you do not rush the Conclusion drafting process. Ending on a strong note with a well-crafted Conclusion enhances a brief, while rushing to tie everything together leaves a sour note in the reader’s mind.

# Closing and Signature Block

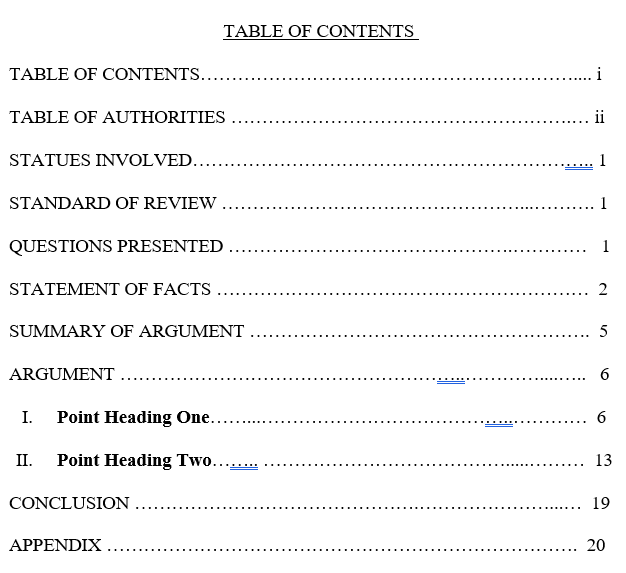
The **Closing** section of your brief is short and contains a sentence where you ask the court to grant the relief you seek, the date on which the brief is filed, and your signature block. The signature block should contain your blind grading number (as a stand-in for your eventual bar number), the office address (225 Herty Drive, Athens, Georgia 30602), phone number (706 555-5555), fax number (706 555-5556, and email address ([name@email.com](mailto:name@email.com)). These requirements for what information should go into your signature block come from Georgia Uniform Superior Court Rule 4.2.

# Template Components

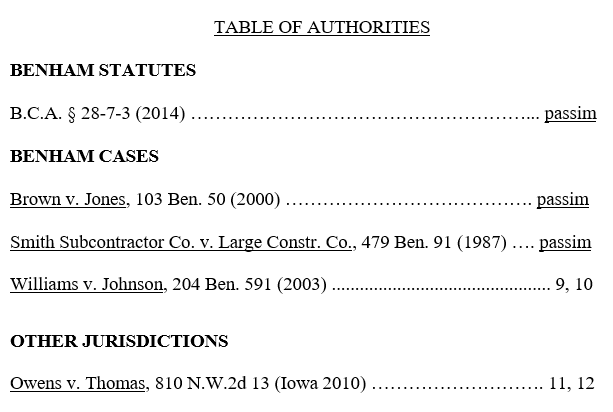
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## [Table of Contents](https://borusg.sharepoint.com/team_sites/galileo/Shared%20Documents/Affordable%20Learning%20Georgia%20(ALG)/OER/Textbooks/law/legal-writing-manual/18-table-of-contents.docx)

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## Statutes Involved

STATUTES INVOLVED

The statutes involved in this case are \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_.

*Then, based on your decision where to place the language of the statute, either reproduce the language of the statute in full here, or state, “See Appendix for full text of the statute.”*

## Standard of Review

Insert the correct Issue/Question and Standard of Review where indicated in italicized print.

STANDARD OF REVIEW

The standard of review for *Issue/Question* is *Standard of Review.* *Cite mandatory authority from which standard came.*

## Question Presented

This shows one example of each type of format for Question Presented. When you write your brief, you should select one to use for all Questions Presented.

QUESTION PRESENTED

1. **Under** the legal rule that controls this issue **does** the legal question that needs to be answered occur **when** specific legally significant facts are present?
2. This is the legal rule that controls this issue. These are the specific legally significant facts that should be considered when applying the rule. What is the answer to the legal question?

## Point Headings

1. **This Major Point Heading Addresses Issue One and the Key Facts that Determine Your Side Should Receive the Relief it Seeks.**
2. **This Major Point Heading Addresses Issue Two and the Key Facts that Determine Your Side Should Receive the Relief it Seeks.**
   1. This minor point heading addresses the first part or step of issue two that shows why your side should prevail and it is beneficial to the reader to have it broken down.
   2. This minor point heading addresses the second part or step of issue two that shows why your side should prevail and it is beneficial to the reader to have it broken down

## Closing and Signature Block

For the reasons discussed above, Plaintiff/Appellant respectfully requests the Court to reverse the summary judgment granted by the trial court and remand this case for a trial on the merits.

Respectfully submitted, this 10th day of November, 2020.

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# Step-by-Step

* Read through all given instructions and materials
* Take notes on parties, facts, authorities, procedural history, etc.
  + Make a timeline of the facts
  + Write down any questions
* Ask professor questions ASAP if you are confused
* Research
  + Make a research plan
  + Determine how to organize research
  + Begin research.
  + Analyze research and determine what sources to keep or omit
  + Form a narrowed legal rule
  + Determine Statutes Involved
  + Determine Standard of Review
* Begin formatting
* Create Title Page
* Create Table of Contents
  + Fill in page numbers once finished editing or use Word’s Table of Contents function
* Format Table of Authorities.
  + Cross-reference with Argument when finished editing or use Word’s Table of Authorities function
* Format Statutes Involved
* Format Standard of Review
* Format Closing and Signature Block
* Write a first draft of QP using under/does/when; or deep question format.
* Write first draft of Statement of Facts.
* Create an outline of Argument, including the Introduction; CREACs, including Counterargument; and Conclusion.
* Write first draft of Argument; this is where you will spend the bulk of your time.
  + Write Introduction section, including narrowed rule and roadmap for organization of Argument
  + Write the body of your Argument; this consists of CREAC-blocks, including Counterarguments
  + Write preliminary Point Headings within the body of Argument.
  + Write Conclusion.
* Revisit QP and confirm that it still accurately reflects Argument
* Revise Statement of Facts and confirm that all facts used in Argument are included in Statement of Facts
* Write Summary of Argument
* Revise Argument.
* Edit the entire brief by completing read-throughs for each of the following:
  + Consistency and cohesion
  + Large-scale organization
  + Small-scale organization
  + Citation
  + Grammar/Punctuation/Style/Spelling
* Read it aloud
* Edit again based on the flow to eliminate wordiness and ensure conciseness
* Turn in before the deadline once proud of the work product

# Conclusion

The Brief assignment is designed for you to demonstrate everything that you have learned in Legal Writing since August. Employ all that you have learned, including source of law selection, careful case reading, rule synthesis, case synthesis, CREAC legal writing paradigm, citation, clear legal writing, and persuasive writing tools. Practice effective time management. If you feel like this assignment is a large task, you are correct. However, you are equipped to complete this Brief successfully, and I know that you can accomplish this.