

“Begin with the End in Mind means to begin each day, task, or project with a clear vision of your desired direction and destination, and then continue by flexing your proactive muscles to make things happen.”

Stephen R. Covey, *7 Habits of Highly Effective People* (Habit 2)

Chapter 3: What Do You Want?

You aren't going to go charging into the writing of your brief without asking some fundamental questions first. As the Cheshire Cat observed to Alice, if you don't know where you want to go, it doesn't matter what road you take. But, presumably, your client has an actual legal issue that they need resolved, and, thus, any road will not do. You need the right road. And to pick it you first need to know where you are going.

You would be surprised at the amount of time spent at oral argument discussing what should be a relatively easy question: what do you want, counselor? Why is this so? Because most lawyers on appeal do not have a clear idea of what exactly it is they want the court to do. And even those who do, often fail to clearly articulate it in their briefs.

In a judicial opinion, the disposition usually appears in the very last section—indeed, it is often the last sentence. But when you read an opinion that remands the case back to the trial court “for further proceedings consistent with this opinion,” this can be an indication that the court did not get much help with the disposition. By telling the trial court to figure it out, the court may be inviting additional fights between the lawyers about the law of the case. What is or isn't consistent with the appellate court's ruling can become a quagmire. You don't want this.

Instead, starting with the end in mind, you will clearly state how you want the court to dispose of this case. You will craft the ideal disposition and ask for it. In your brief, the disposition will occupy the last section of your brief and will take the form of a request.

There are several options for disposing of a case: affirm, partially affirm, modify, partially reverse, reverse and remand with an order disposing of the case, reverse and remand for further proceedings, and any permutation or iteration in-between.

To figure out what disposition works best for your case, you will need to answer the question: if the court rules in my favor, what's left to be done? What can the appellate court order outright? What things might have to be accomplished back at the trial court level?

In addition, because appellate courts generally seek to uphold trial court determinations if possible (indeed, many standards of review demand it), you should expect the court to seek the most minimally invasive disposition it can reach while upholding the law. Depending on your perspective and your client's needs, you will want to emphasize this or will want to explain in

your brief the reasons why taking minimal action is legally or equitably insufficient to correct the error.

Exercise

Take a moment now and write down exactly what you want. Do it in plain language. You don't have to use terms such as "reverse and remand." Just say exactly that you want. You might write: "I want the court to say that the trial court was right, we win, and the case is over." Or you might say: "I want the court to say that the trial court was wrong when excluded my jury instruction. The court must send the case back to the trial court for a do over."

CHECKLIST OF SOME POSSIBLE DISPOSITIONS

Affirm.

Affirm in part.

Modify.

Reverse in part.

Reverse and remand with an order for (partial) judgment in favor of _____.

Reverse and remand for a new trial.

Reverse and remand for a new trial solely on the following question: _____.

Reverse and remand for a hearing on the limited issue of _____.

Reverse and remand for further proceedings consistent with this opinion.

After you have written this prayer for appellate relief in plain language, hold on to it. Although you will probably revise it later, you've just written the last line of the body of your brief.

Congratulations. You know what you want. You are ahead of a significant number of other lawyers who appear in appellate courts. Knowing exactly how you want the appeal to turn out will shape and clarify the rest of your brief writing.

Now that you know what you want, it's time to figure out how to get there.