

A Few Tips on Effective Appellate Briefs

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Writing a good appellate brief is one of the most demanding and time-consuming tasks in the practice of law. Help is available if you are a novice.¹ Whether a novice or a specialist, here are a few tips to keep in mind.

(1) Know Your Role. Whoever handles the appeal must take care to do it well. The quality of the appellate advocacy in the case will determine not only the client's fate, but also the future growth of the law. Mr. Justice Jackson, a former Solicitor General and the Nuremberg Prosecutor, was a consummate advocate in his own right. With characteristic eloquence, Justice Jackson described the essential role of the appellate lawyer in our legal system.

¹ In "Plain Talk On Appellate Advocacy," 20 Litigation No. 3 (ABA 1994), a federal appellate judge wrote a blunt plea for reliance on specialists for appellate advocacy: "Appellate advocacy is, in essence, a business for legal intellectuals" and "a specialty all to itself." Nevertheless, many lawyers capably handle their cases from beginning to end, sometimes with consultation on the appeal.

"Adequately and helpfully to present a case--as it is about to be transformed into a precedent to guide future courts, to settle the fate of unknown litigants, perhaps to become required reading for a rising generation of lawyers--will challenge and inspire the true advocate. Decisional law is a distinctive feature of our common-law system, a system which can exist only where men are free, lawyers are courageous and judges are independent. To participate as advocate in supplying the basis for decisional law-making calls for the vision of a prophet, as well as a profound appreciation of the continuity between the law of today and that of the past. He will be sharing the task of reworking decisional law by which every generation seeks to preserve its essential character and at the same time to adapt it to contemporary needs. At such a moment the lawyer's case ceases to be an episode in the affairs of a client and becomes a stone in the edifice of the law."

"As I view the procession of lawyers who pass before the Supreme Court, I often am reminded of an old parable. Once upon a time three stone masons were asked, one after the other, what they were doing. The first, without looking up, answered, "Earning my

living." The second replied, "I am shaping this stone to pattern." The third lifted his eyes and said, "I am building a Cathedral." So it is with the men and women of the law at labor before the Court. The attitude and preparation of some show that they have no conception of their effort higher than to make a living. Others are dutiful but uninspired in trying to shape their little cases to a winning pattern. But it lifts up the heart of a judge when an advocate stands at the bar who knows that he is building a Cathedral."

(2) Maintain Your Integrity. In filing appellate briefs, you should be completely candid, totally forthcoming, and absolutely honest with the Court. Always. The Solicitor General's Office, which represents the federal government in cases before the United States Supreme Court, has developed enormous credibility and prestige as a result of its longstanding practice of providing the Court with absolute candor and the utmost professional assistance in every case. You should likewise strive to earn the trust and confidence of each court in which you appear. Earning this trust and confidence is a

career-long process and maintaining it requires constant vigilance. A reputation built case-by-case over many years can be lost in an instant, just as a balloon explodes from a single pinprick.

Any lapse of integrity also exposes you to the modern judicial equivalent of the colonial stockade: a published opinion with a withering castigation of counsel. (Commonwealth v. Jackson, 432 Mass. 82, 89 (2000) (Spina, J.): "It may seem confusing at first that the defendant would cite the authority that stands precisely for the opposite of the proposition he advances, until it is revealed that he included only a portion of the quoted sentence in his brief. He omitted everything after the last comma, and thereby blatantly distorted the meaning of the material he quoted." Ouch!)

(3) Write Well. Good legal writing must first be good writing. Strunk and White's, The Elements Of Style is an invaluable guide to good writing. Bryan A. Garner's, The Elements Of Legal Style is a valuable guide to good legal writing; but it is basically an application of the general principles of good writing to the specific subject of law. There are other

helpful books and articles available, many of which are cited in the bibliography to Garner's helpful book, "The Winning Brief" (2nd Ed.). Justice Scalia has just published a book on appellate brief writing and oral argument entitled "Making Your Case" (Thompson 2008).

Many appellate briefs are now available online. Read the good ones. Get the briefs of counsel who know how to write effectively and study them. Develop your own writing skills and style. Although some legal writing is good, much of it is not. The more broadly you read outside the law, the better the writers you read, the better legal writer you will become. When you come across good legal writing, pay attention to why it works.

Prefer understatement. Justice Kass has pointed out that a "common fault of briefs is verbosity, pomposity, and overstatement. It is second nature to lawyers. Self-evident propositions, if they are in fact self-evident, do not need to be so described. Words such as "clearly," "obviously," "manifestly," and "incontestably" ought to be purged from the brief writer's vocabulary. They are just written table-thumping that reveal inherent weakness. As Justice

Benjamin Kaplan once observed, "When the word 'clearly' turns up, that's where the bones are buried."

(4) Use Tools of the Trade. Whenever you sit down to write, it is useful to have by your side or on your hard disk the following:

A good Dictionary;

A good Thesaurus;

Strunk and White, The Elements Of Style;

Fowler's, Modern English Usage (preferably the second edition;

Black's Law Dictionary;

Garner, The Elements Of Legal Style;

The Bluebook for citation forms;

The Rules of Appellate Procedure and any local Rules; and

Anything else that you find helpful.

The most comprehensive reference work on appellate briefs in state and federal courts in Massachusetts is MCLE's two volume set entitled Appellate Practice in Massachusetts (2nd Edition), edited Henry Clay and Neal Quenzer. For practice before the United States Supreme Court, the best

reference is Stern and Gressman's, Supreme Court Practice.

(5) Revise and Rewrite. It frequently took Justice Brandeis and Judge Learned Hand over a dozen drafts to produce an opinion. You should not be surprised, therefore, if your draft brief ends up in need of minor surgery or, more likely, a series of major operations. The virtues of clarity and brevity reign supreme in briefs. For most of us, these virtues appear in our writing only after extensive revision. Revise and rewrite, again and again. When you think you are finished, try to set the brief aside for a couple of days and come back to it with a fresh eye. You will then be better able to evaluate the brief and spot flaws that still need correction. And you can strike the extraneous and inappropriate stuff you wrote in the heat of combat.

(6) Leave Enough Time For Careful Proofreading.

First impressions count. You cannot gain the court's confidence with a brief filled with typographical errors, grammatical mistakes, and inaccurate citations. Sloppiness in these matters

makes the court wonder whether you are sloppy in your thinking as well.

Do not rely on a computer to proofread for you. A recent daily edition of the New York Times had "libel" for liable and "again" instead of against. Lawyers Weekly discovered that the computer spell-checker could not determine whether a case held a statute constitutional, unconstitutional, not constitutional, or not unconstitutional. They released an electronic bulletin to all their customers misstating the outcome of the case and then had to send a corrected version. Many mistakes slip by the computer that a human would never miss. These mistakes stand out and make you look lazy and unprofessional. Every document should be proofread carefully before it leaves a lawyer's office, particularly a brief submitted in court.

(7) Know, Understand And Follow The Rules.

Counsel is responsible for filing briefs that comply in all respects with the Court rules. See Federal Rules of Appellate Procedure; 1st Cir. Internal Operating Procedures, VI. Read the court rules and follow them. If you are unclear about what the rules

require, and your own research has been futile, ask the Clerk.

Once you know what the Court requires, just do it. As in the old adage, there is "a right way, a wrong way, and the Court's way." The place to argue about the format is a rules committee, not the front desk in the clerk's office at 4:30 p. m. on the day the brief is due NFE ("No Further Enlargements").

Today, most appellate briefs are reproduced in house or at a copy center, rather than at an expensive printing firm, so you are responsible for the form of the brief as well as its content. Briefs get tossed back to counsel over page limits, type size, and every picky thing imaginable. Getting a notice that the court has rejected your brief produces great anxiety and is embarrassing, to say the least, so take the time and care to file a brief that meets professional standards.

Some of these rules have a reason. The fetish over type size seems silly, but will make more sense as you too age and your eyesight starts to fail. Others are simply rules of the road, like driving on the right. For instance, the state appellate courts accept (and encourage) printing on both sides of the

page, but not the First Circuit. Not to be outdone by the Homeland Security crowd, the federal appeals courts recently introduced a new color: the covers of supplemental briefs must be tan. Just do it.

(8) Keep To The Page Limits. Page limits are perceived differently by a judge inundated by a heavy caseload and an attorney whose client has one case of overwhelming personal importance before the court. Keep in mind that you do not have to use the maximum number of pages allowed; shorter is better. If you really need more words or pages to argue a case on appeal, you can file a motion. Try not to do so unless absolutely necessary and keep in mind that the appellate courts view such motions with extreme disfavor.

(9) Specific Suggestions Tied To Appellate Rules.

Be creative in content but give your readers the format they expect, like a poet writing a sonnet. Your brief should follow the prescribed format.

Keep in mind basic principles of effective advocacy as you write the brief. Argue the merits of

the case, not the personality or conduct of the lawyers. Think your case through. Be intellectually honest. Anticipate the Court's concerns. Get to the point. Talk about what really counts. Be clear. Be concise. Write persuasively. Tell the Court precisely what remedy you seek.

These tips relate to specific sections of the brief.

Corporate Disclosure Statements. For recusal purposes, the federal courts require a Corporate Disclosure Statement, which must be inserted in the appellate brief before the Table of Contents (and thus does not count toward the page limit so do not number it). Similar requirements are now imposed in the state courts (Supreme Judicial Court Rule 1:21; Adopted by Order of June 26, 2002).

Table Of Contents. The Table of Contents tends to be written late and therefore suffers the most from deadline pressure. Yet it is the first section of the brief and in this prominent position can make a critical first impression on the judge. Ideally, the headings should be an effective outline and summary of the brief. The TOC should demonstrate sound organization of the arguments. A good TOC is helpful

in trial briefs as well. Do what you can to help the judge navigate your brief.

Table Of Authorities. The Table Of Authorities enables a judge to turn immediately to the pages of your brief discussing a particular case. It is an important and timesaving cross-reference when reading the briefs and while writing the opinion. Once you master the latest technology, a TOA is fairly easy to assemble. Take the opportunity to check the form and accuracy of each citation. Make any necessary corrections in the table and the text. Do a final rundown of each authority to be sure it is still good law and review the latest citations to it.

Statement of Subject Matter Jurisdiction and Appellate Jurisdiction. Don't neglect this section of your brief, which is expressly mandated by the Federal Rules of Appellate Procedure.

Issue Presented. Except for the facts, this is the most important section of the brief. The first question in every judge's mind upon picking up the briefs in a case is, "What do I have to decide?" Be precise in formulating the legal issue. The depth of your legal analysis is best reflected in the quality of your statement of the issue. In many cases, the

definition of the issue ordains the result. In all cases, it frames the argument. Give it careful thought.

Statement of the Case. The Statement of the Case first describes the pertinent procedural history of the case (Prior Proceedings) and then the facts (Statement of Facts).

In the Prior Proceedings section, give the judge a preliminary sense of how the case got there and what must be decided. Is it a challenge to the sufficiency of the evidence to support a jury verdict? Was the complaint dismissed for failure to state a claim upon which relief can be granted? The Appellant should demonstrate that the issue presented was properly raised below and that a timely notice of appeal was filed.

Statement Of Facts. The Statement Of Facts is usually the most important section of the brief. Tell the story of the case. Document each fact with an Appendix reference. Save the argument for later.

Summary of the Argument. A Summary of the Argument is required. Never assume that the attention

span of appellate judges encompasses the entire length of your brief, no matter how short.

Argument (Including Standard of Review). Every brief you file should address the standard of review. On a pure question of law, the appellate court makes its own de novo determination of what the rule of law should be. Abuse of discretion is a standard that defers to the trial judge's decision to some extent. Substantial risk of a miscarriage of justice makes the lottery's odds look good. Always address what standard of review the court should apply. If different standards apply to different arguments, make that clear.

The Argument section of the brief is where you bring to bear your skills in legal reasoning. The great complexity of our society is reflected in the nearly infinite variety of legal arguments that can be made. Become a scholar and a philosopher. Think deeply about where your case fits in the pantheon of the law.

Study how judges decide cases and tailor your arguments accordingly. Former Chief Justice Edward F. Hennessey's two slim volumes are useful primers for thinking about how judges make law and decide cases.

(Judges Making Law and Excellent Judges, available at MCLE). Frank Coffin, the former Chief Judge of the First Circuit, in his book, On Appeal, has written perceptively about how appellate courts work and the role of counsel. Hart and Sacks's great teaching materials, The Legal Process (Foundation Press), illuminate the role of the lawyer in our legal system and the work of courts, legislators, and administrative agencies. Justice Abrahamson compiled an extensive bibliography of articles by judges on judging, 24 St. Mary's L.J. 995 (1993), to accompany her own thoughtful article, "Judging in the Quiet of the Storm," 24 St. Mary's L.J. 965 (1993).

Conclusion. Be specific about the relief you want. Consider relief in the alternative. Make sure the relief you seek is supported by the arguments you made.

Certificate of Compliance. If needed.

Addenda. Help your reader. Reproduce the text of statutes and regulations. If the court below wrote an opinion, include it here as well as in the Appendix. Would a chalk help in understanding the facts? Put it in an addendum. Is legislative history important? Provide it to the Court in an Addendum.

Use common sense and think about what would make the Court's task easier.

Reply Briefs. In the old days, one could always take care of misstatements in the Appellee's brief in the oral argument; and therefore one avoided filing a reply brief for minor stuff. Today, given the number of cases that do not receive oral argument, prudence dictates that you file a reply brief anytime you feel the need to rebut something the Appellee has written. Nevertheless, it is still true that reply briefs have a specific purpose. Resist the lawyer's urge to get the last word in for no other reason than to have the last word.

Justice Kass has captured the role of the Reply Brief in his usual distinctive style:

"Reply briefs should be used as a stiletto to skewer misstatements of fact, misquotations, miscitations, matters not in the record, or grossly erroneous propositions of law. Reply briefs ought not be used to reargue the case nor to bring up arguments not made in the primary brief. They ought not repeat statements of the case and statements of fact. If a reply brief is to be effective, it will come directly and concisely to the point."

(10) File it. Although we start each case with the hope that our brief will be a masterpiece, and we labor mightily in the endeavor to produce it, the available time seldom permits perfection. Never forget the overriding first principle for lawyer's briefs: file the damn thing. See In the Matter of Richard D. ABBOTT, SJC-08649 (Aug. 1, 2002) (Cordy, J.) (two and one-half year suspension for lawyer who failed to file brief and tried to cover up).