

Writing Appellate Briefs, for Young Lawyers

By Belinda I. Mathie

Advice on how to craft an effective appellate brief is readily available, ranging from the general to the specific. For example: Write clearly, persuasively, and concisely. Craft your arguments in light of the standard of review. If your client lost below, do not attack (or even mention) the trial judge—refer instead to the decisions of the trial court. All of these are excellent tips.

Sometimes, however, the advice overlooks the most fundamental purpose of the appellate brief: to explain to the appellate court why your client should prevail on appeal. Anything that does not contribute to that goal detracts from the issues at hand and takes up space that could have been better devoted to advancing the merits of your client's case. Also, appellate briefs are advocacy pieces, not law-review articles. Accordingly, appellate briefs are not the place to dazzle the appellate panel with proof that you have read every single case on point in the relevant jurisdiction, or worse, the entire country. Nor is an appeal an appropriate venue to try to settle old scores from the trial itself. In other words, if your client is the appellant, your brief should focus relentlessly on how the trial court misunderstood the relevant law, the key facts, or both, arriving at an erroneous conclusion that requires reversal. If your client is the appellee, your task is to explain why the trial court's opinion was well reasoned and why any errors therein do not require reversal. In short, an appellate brief is your opportunity to help the judges understand why they should vote in your client's favor. Below are some suggestions about how to accomplish this objective.

1. Do not misstate the law. Nothing will destroy your credibility faster than a deliberate misstatement of the law. Do not stretch a legal proposition beyond the limits of vigorous advocacy or deliberately omit a "not" or key qualifying phrase from

the case, statute, or regulation you are citing. Such unethical behavior will almost certainly be caught by a suspicious judge or his or her careful clerk. (Many judges require their clerks to review each authority cited in the appellate briefs. A blatant misquote is easy to notice.) Similarly, ignoring controlling authority that is problematic for your case is unlikely to be successful. If the authority can be found by competent research, do not bet your case on the belief that opposing counsel, the judges, and the clerks are all incompetent. Misstating the law gives opposing counsel a perfect opportunity to respond or reply with an explanation of why the court should "trust me, not them." No matter how tempting, avoid this tactic. It will only cause the remainder of your brief to be read with suspicion.

2. Do not misstate the facts. As with the law, deliberately misrepresenting the facts is a sure way to harm, not strengthen, your client's position. The fact section of your brief should contain meticulous citations—every time the reader turns to the appendix or record on appeal, he or she should be able to find exactly what you have promised will be there. Where possible, quote the relevant documents or testimony in your brief instead of characterizing them, allowing the reader to see for himself or herself exactly what the evidence was. However, extensive use of lengthy quotations is counterproductive. Do not clutter your brief with paragraph after paragraph of block text.

3. Focus only on your strongest arguments. An opening brief with 10 arguments is almost always a sign that a party is adopting the "kitchen sink" approach and cannot point to actual, reversible error. If your client is the appellant, be selective about the issues you present on appeal. Identify those most likely to result in a reversal, and do not devote time or space to discussion of marginal points.

Even if the trial court was dead wrong on a particular point, if it does not require reversal, the error merits a footnote at best. If your client is the appellee, consider whether appellant's presentation of the issues actually gets to the heart of the case. Is there one overarching theme that demonstrates why all four of your opponent's claims are wrong? If so, do not be constrained by your opponent's framing of the appeal.

4. Try to anticipate questions. When writing your brief, realize that the appellate panel has not lived with your case for the months or years that the trial court and parties spent with it. Think about what someone new to the case might want to know, or must understand, to come to the correct conclusion. Give the reader the information he or she needs—do not make the judge or clerk hunt for it. In addition, if there is a weakness in your argument, consider addressing it directly and providing the best response you can in a preemptive fashion. (If you do not do it in the brief, there is an excellent chance it will come up at oral argument; it never hurts to be prepared.)

5. Do not merely rehash your arguments below. This mistake occurs far too frequently, especially among counsel who do not often practice before an appellate court. If you find yourself cutting and pasting large amounts of text from your briefing on the motion to dismiss or the motion for summary judgment, it is time to reconsider your approach. If your client lost, it is unlikely that merely repeating the same arguments will lead to a different result on appeal. Identify why the trial court erred and be proactive to prevent the appellate court from making the same mistake. Similarly, if your client won, do not just assume that what worked below will suffice in the appellate court. Respond to the issues raised by your opponent, and be prepared to

address any weaknesses in the trial court's opinion. Also, remember that appellate judges are not jurors or trial-court judges. Certain tactics that might be effective at trial can come across as theatrical on appeal, are rarely persuasive, and can even be counterproductive. Also, be careful with analogies. If you think of one that appears to illustrate your point, consider whether and how your opponent might try to turn it against you. If there is an obvious rejoinder, skip the analogy.

6. Consider the standard of review.

Another reason not to simply repeat your arguments below is the standard of review on appeal matters. Your arguments should be tailored to the relevant standard. If your client is the appellant and the standard of review in your case is abuse of discretion, you must show that the trial court made a significant mistake. Demonstrating only that reasonable minds could disagree will not result in a reversal. If you represent the appellee, the standard of review may present a valuable opportunity to remind the appellate court that even if some of the appellant's claims have some merit, they do not rise to a level requiring reversal. Finally, try to match the authority on which you rely to the procedural posture of your case. If you are appealing the grant of summary judgment, focus on summary-judgment cases, not cases on appeal from a motion to dismiss or a jury verdict.

7. Focus on the issues, not on how much you dislike your opponent.

Appellate briefing is not the place to attack opposing counsel's trial behavior, personality traits, or lack of professional courtesy. Tempting as it may be to tell the court that your opponent is the sorriest excuse for a lawyer against whom you have ever had the misfortune to litigate, such information has no place in an appellate brief. Invective and ad hominem attacks will rarely get you anywhere. Keep in mind that the appellate court's task is to determine if the case was correctly decided below, not to determine which lawyer is the better person. Even if your opponent is a jerk, he or she could

still be right. Moreover, complaining about opposing counsel takes up space that could have been spent on substantive argument. Years ago, I read a set of briefs, including a sur-reply, that consisted mostly of the parties harping on how dishonest the other side was. I remember that it was an ERISA case, but have no idea what the substantive issues were. But the parties' constant sniping at each other through four different briefs sticks out to this day.

Of course, it is entirely valid to inform the court if counsel or a party engaged in fraud on the trial court or the appellate panel. If you discover that opposing counsel inserted a new document in the record on appeal or fabricated evidence

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below, this should be brought to the appellate court's attention immediately. Similarly, if your opponent has misstated the law in its brief, the errors or omissions can and should be pointed out to the court. However, all of this can be done in a straightforward, professional manner. There is no need to attack opposing counsel personally or tell the court how horrible your opponent's actions were. Let the facts and law speak for themselves. If you are correct, the judges will reach their own conclusions about your opponent's trustworthiness. However, it is important to be selective when accusing your opponent of deliberately misleading the court. Making a huge issue over a minor error, especially if it might have been the result of honest oversight, will detract from the merits of your argument. If your brief is full of objections to picayune mistakes, the court may think you do not have any substantive arguments.

8. Choose your citations with care.

Appellate judges (and their clerks) have a tremendous amount of reading to do. As mentioned above, many judges require their clerks to read every authority cited in a brief, and many judges will want to review the key authorities themselves. Therefore, it is important to think about how much information you are asking the court to process and to make every citation count. Remember, the point of an appellate brief is to make it easy for the court to rule in your client's favor. Boggling down your brief with extraneous and unnecessary citations creates more work than necessary for the court and reduces your room to make substantive arguments. You do not get extra points for listing every potentially relevant case or statute somewhere in the brief, or proving that you reviewed them all. What does create a favorable impression is honing in on the most important authorities and explaining how they require your desired result.

There are several ways you can help the reader. First, streamline the number of cases you cite, and do not routinely include lengthy string cites. If there is controlling authority directly on point for your proposition, the court will typically be satisfied with a citation to one case setting out the law—there is no need to cite five additional cases that stand for the exact same point. If you have two strong cases for a proposition, there is no need to include a third that only supports your point tangentially. If you want to emphasize that a particular principle has been the law for 20 years, citation to the first case to so hold and to the most recent case on the same point should do the trick—there is no need to list every case that came between them. (Even better, if a recent case states that the proposition has been well established for 20 years, you could just quote that sentence and note that your case cited many others.) Another frequently overlooked method of reducing the court's reading load is to use the cases that you cite for substantive points to illustrate the standard of review and other procedural issues. There is no need to use "the usual" cases to support your

section on, say, the standard governing review of a grant of summary judgment, when the cases you will cite for substantive purposes later in the brief include the same information. Do not worry about not including “enough” citations. If your citations are rock-solid, the court will not rule in favor of your opponent because he or she cited 50 cases to your 25.

Second, focus on controlling authority wherever possible. If the circuit you are in has definitively ruled on an issue, the panel is unlikely to be interested in a report on which other circuits and district courts agree, or to be persuaded by the fact that other courts (with the obvious exception of the Supreme Court of the United States) disagree. Where there is a well-developed body of law in the relevant circuit, extensive citation to other jurisdictions, especially when coupled with failure to cite cases from the circuit you are in, suggests one of two things: Either you routinely practice in the other jurisdiction and have failed to update your research, or, more problematically, you are asking the court to ignore its own precedent. I once read a brief filed in the Eighth Circuit in a denial-of-Social-Security-disability-payments case that cited dozens of Ninth Circuit cases, despite the existence of controlling cases from the Eighth Circuit. The Ninth Circuit citations added nothing to appellant’s argument.

Of course, there are times when you must cite to persuasive authority and when listing a dozen cases is entirely appropriate. On an issue of first impression, for example, you will want to line up cases that support your desired result from as many jurisdictions as possible. As another example, when seeking a hearing before the en banc court, it may be entirely appropriate to rely on decisions outside of the circuit to support your argument that the full court should reverse the course taken by an earlier panel. The key is to think about whether referencing a case adds something substantive to the brief, or is merely redundant, before adding it to the list.

Third, help the reader understand why you cited particular authority. If you are not quoting a case or statute, use explanatory parentheticals, even brief ones, to

show why the citation is relevant. Include accurate pin cites to help the reader immediately locate the cited proposition or quotation and easily verify that your citation is correct. If a case is directly on point, it is helpful to inform the court that it matches your case in terms of the issues, the facts, and procedural posture. Conversely, if your opponent cites a case that in inapposite, explain all the factors that distinguish your matter from the cited decision.

9. When you reach the end of your argument, stop. There is no rule that you must fill up as many pages as you can. If your arguments can be carefully and com-

Remember that spell-check is not infallible and that the find-and-replace feature can lead to unintended consequences.

pletely made in fewer pages than you are allotted, feel free to stop writing. Resist the temptation to add weaker arguments or repeat yourself just to take up room on the page. Do not fear that a court will rule in your opponent’s favor because he or she submitted 10 pages more than you did. A judge with a heavy workload will likely be grateful to read fewer, tightly crafted pages than to face a lengthy, rambling brief.

10. Follow the rules. This may seem like a no-brainer, but many parties fail to look up and follow the Federal Rules of Appellate Procedure or the relevant circuit rules, which sometimes alter the Federal Rules’ requirements regarding margins, line spacing, font size, cover color, and the like. Drafting your brief using the relevant formatting requirements will provide a good sense of how much space you actually have to work with, and can

help you avoid needing to make extensive cuts at the last minute. If a table of contents or table of authorities is required, provide them in the correct format. Do not let your brief be thrown out because of a technical failing. While a court will often provide an opportunity for you to reformat and refile the brief, the charity of the clerk’s office is not something on which you want to rely. Nor is submitting a motion for leave to file late an optimal way to start your appeal. Finally, do not try to circumvent page limits through either extensive use of footnotes and block quotes or cheating the margins “just a little bit.” Beyond making it problematic to sign the certification of compliance with page limits, these tactics are widely known, easy to spot, and universally loathed.

11. Consider the aesthetics of your brief. Again, appellate judges have an enormous amount of reading to do. A brief should be as easy to read as possible, both as a matter of content and of formatting. Do not introduce an unnecessary obstacle to your case by making it harder for the judges to decipher what you have written. In addition to following the applicable rules, check to see if the court has recommendations regarding preferred fonts, justification, the use of bold, italics, or underlining, or any other stylistic features. The Seventh Circuit, for example, devotes more than six pages of its *Practitioner’s Handbook for Appeals* (available at www.ca7.uscourts.gov/Rules/handbook.pdf) to suggestions for making your brief physically easier to read and comprehend. The handbook also helpfully explains the reasons underlying the Seventh Circuit’s guidelines. The formatting tips contained in the handbook are educational and merit consideration even if you are filing in another circuit. If a court has taken the time to recommend particular fonts or styles, it is advisable to follow its suggestions—even if that is not what you normally do and even if you can comply with the rules by doing it your usual way. You are unlikely to lose a case for using a disfavored font, but it makes sense to honor a court’s formatting request if reasonably possible. In this day of electronic

word processing, it often only takes a few clicks to make the necessary changes.

12. Avoid typographical errors. This too might seem so obvious that it hardly bears mention, but many filed appellate briefs contain typographical errors. It is doubtful that a few stray commas or misspellings would doom an otherwise meritorious appeal, and most people understand that small errors sometimes creep into briefs despite the author's best efforts. Nonetheless, it is important to remember that spell-check is not infallible and that the find-and-replace feature can lead to unintended consequences. I once

encountered a brief where it appeared that misuse of the "Replace All" function had caused every instance of "though" to be changed to "thou." Unfortunately, the author of that brief was extremely fond of using the phrase "even though." While the mistake did not prevent comprehension, you do not want your reader to be chuckling after every other page. Another mistake to prevent is the case of a properly spelled but incorrect word slipping through the spell-check. While the final hours before filing can often be hectic, taking the time to proofread as carefully as possible is invaluable for presenting a polished brief to the court.

In sum, writing an appellate brief should never be a rote exercise. Think carefully about both the substantive content and typographic presentation of your arguments. And always keep your ultimate goal in mind—helping the appellate court understand why it should rule in your client's favor. ■

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