

## How to Write an Appellate Brief that Judges Want to Read and Answers Their Questions

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### **Oral argument is becoming an anomaly. The brief is the thing.**

One thing is certain: oral argument in appeals is becoming insignificant and your appellate brief is more important than ever.

There are two reasons why.

Most cases are decided on the briefs. Depending on who you talk to, judges say anywhere from 65 to 95 percent of appeals are decided without relevant input from oral argument, or irrespective of what is said.

Second, the strong trend is for courts to dispense with oral argument. Illinois offers good examples. In the First District, which encompasses Cook County including Chicago, oral arguments have dropped about 60 percent since 2000. In the Second District, the rest of northern Illinois, only 15 percent of cases decided in the first quarter of 2006 had oral argument. In the Third District, only 31 percent of cases decided on the merits in 2005 had oral argument.<sup>1</sup> Appellate lawyers around the country support the notion that oral arguments are declining.

We lawyers envision ourselves to be like Daniel Webster, making lengthy and complex oral argument and changing judges' opinions with divine-inspired force of argument. Well, drop the dream. That kind of oral argument is a relic. Your 15 or 20 minutes in front of an appellate panel doesn't compare. About the most you can do is to answer a few open questions about the record or a case.

It's a big mistake to depend on oral argument to "clean things up" or to answer the plaguing problem in your appeal or to swoop in with your *coup de grace* winning argument. You're unlikely to get the chance, and if you do it won't matter.

Corrupting a Pat Riley quote: The main thing is to remember that the main thing is to write a great main thing.

Your brief is the main thing.

### **How to write a great brief.**

So you've gotten your retainer and you have the record. What next? There is no single way to write a great brief. I can tell you what I do, and what works for me.

The first thing to do is clear your desk of other work. Put other stuff aside, in another office, in a corner. Give it to your partner; give it to an associate; give it to your secretary; file it.

Good writing requires a clear and active mind. You can't have either if your desk is loaded with problems from other cases.

Park yourself in your chair at your desk, and work there. Tempting as it is, you can't write a worthwhile brief during halftime or between innings. (I've tried. It doesn't work, although you can fool yourself otherwise.)

### **Before you try to write.**

There are certain things you must do before you tap the keyboard.

Study the orders from which appeal is taken. Virtually all appellate courts are paying close attention to whether there is appellate jurisdiction. Are the appealed-from orders final? Did you or your opponent meet all the deadlines? If you are appellee, should you move to dismiss the appeal based on jurisdiction? (Be careful: Post-trial motions in Illinois have to be filed within 30 days of the judgment to toll the time to file a Notice of Appeal, but if you wait that long in federal district court your next phone call will be to your malpractice insurer.) Read and re-read the rules on what orders are appealable and when they may and must be appealed. The rules change all the time, so even if you've done 10,000 appeals, read the rules again.

Study the record on appeal. The record is the appellate practitioner's universe. Generally, you won't be adding evidence, so the existing record is what you must live with. There is no substitute for knowing the facts. An appellate judge once suggested to me that my primary obligation was to tell him the facts of the case: You tell me the facts, I'll tell you what the law is.

Identify the appealable issues. This is different than identifying the orders you're appealing from. This exercise brings you to grips with what your legal issues are. You may well have more than one reason for appealing an order or a judgment. And because you've just reviewed the record, you should begin to list the facts that support each issue.

Even after doing all these things, you must still resist the temptation to jump into substantive research, or worse, start writing the argument. Before you can do any of that, you must identify the proper standard of appellate review. The standard of review drives the argument. Your argument and presentation of the facts will be considerably different depending on whether the appellate court is reviewing the case *de novo*, or if it is determining if there was an abuse of discretion, or whether the judgment was against the manifest weight of the evidence. (Be careful: You might have a mixed question of law and fact, requiring a "clearly erroneous" standard.)

Don't make the mistake of footnoting the standard at the end of the day just because the rules require you to state what it is. Cases often are won or lost based on the standard of review. The correct standard is not always apparent or readily known, so don't assume a clerk or a judge will just know it.

Your brief should state and support the correct standard of review. That will enable you to direct your reader down the proper path, and make your argument more understandable. (Tip: It's not too soon to incorporate the standard in your issue statement.)

Next, you should reach an understanding of the law of the issues you've identified for appeal. This requires the difficult and tedious work of legal research. That's a gargantuan and tangled subject unto itself. We won't discuss research techniques here. But I make this observation. Not every great brief writer is a great researcher. You should decide the best way to divide research tasks, and if best for your client, get the help you need.

When all of that is done, you can begin the "think process." This is when you formulate the skeleton of the brief. I actually write the heading for each section of the brief, and make a statement of what I want it to accomplish. Don't try to draft the brief yet. You're not ready to write. Spend time thinking about it.

This is the process that justifies our fees. It's what separates the lawyers from the staff. And it's what enables good lawyers to write great briefs.

Outlining helps a lot here. It will push you to look at each subject and decide how it supports your theme or argument. If everything is sufficiently outlined, the writing will come much easier.

In your Fact Section, it helps to break down the pertinent facts into understandable events. Each group of events should do at least one of two things: help the court understand what happened or support one of your legal theories. Each group of events merits its own subheading. The subheads are used in the brief to direct the reader through the facts and signal what each group of events will discuss.

The Argument outline should be done for each of the issues you've already identified for appeal. Outlining will force you to think about which issues you want to keep, the order you want to present them, and how to write them. (Caution: Just because you identified an issue doesn't mean you should present it to the appellate court. Almost every appellate judge I've heard on the subject says you should choose the two or three strongest points, but no more, to appeal. Many judges view the kitchen sink method of appeal as a sign of weakness and of fear that none of your issues is strong enough to prevail.)

#### **If you've done all that, you're ready to write a draft.**

Writing is hard work. It takes thoughtfulness; it takes clear thinking; it takes discipline; it takes persistence; and it requires you to vanquish ego. We'll talk about writing technique in the next article. Here are some thoughts from your battle-worn brief writer to think about now.

- Get your environment ready for writing. The writing environment can take many forms. I close the window shades and turn on music, low volume, with elaborate and pleasing melodies. (Ella Fitzgerald at the 1973 Newport Jazz Festival does it for me.) Closing the shades takes away distractions. The music assures my mind stays active and creative. The music and shades thing has a romantic edge to it, but romance is not what I'm after, at least not at brief-writing time. Blocking distractions and putting on Ella signals to my body and mind that it's time for writing.
- Almost all good briefs have one thing in common. They state unequivocally why you should win, and why your opponent should lose. I am continually amazed that otherwise well put together briefs with headline lawyers fail to tell the court why it should rule for them and against the other guy. Maybe it happens because inexperienced associates who are more accustomed to writing law review articles often

are assigned the laboring oar on a brief. But if you do nothing else, you must state why you're right, and your opponent, and the court if you're appellant, are wrong.

- Be forthcoming, positive, and assertive. Candor buys credibility. Trashing or dogging your opponent or the trial court is bad manners and makes for tiresome reading. Most people don't want to be around negative personalities too long. Likewise, readers are fatigued by sniping. Assertiveness, even boldness, often translates to confidence and conviction. It will inspire your creativity.
- Never forget your audience, in this case judges and their clerks. By one estimate, the typical appellate court judge reads about 1,000 pages per day of legal material.<sup>2</sup> If a judge takes a few days off, there's no reasonable way to catch up. This means, if you want your brief to be read, it must be direct, stripped of superfluous material, and interesting.
- Proofread your brief, and I don't mean run the spell checker. There is no better way to proofread than to read the piece out loud. That forces you to look at every word. You'll see and hear how your brief reads. James Michener, a Pulitzer Prize author of numerous lengthy historical novels, read his manuscripts aloud to assure everything was stated well and properly. A well-proofed brief is another way to gain credibility with your reader.

**How to assure your brief answers the questions judges want to know.**

Your brief contains argument about the questions you believe are at issue. But how many times have you read an appellate opinion that states wonderment at the parties' failure to address certain problems? How many times have you seen appeals won or lost based on an issue one of the parties overlooked or thought was unimportant?

You can improve your brief by assuring that outstanding questions do not go unanswered. Avoid being prey to a court's incredulity by stealing a page from the trial lawyer's playbook. Trial lawyers commonly use jury focus groups to inform them about the viability of their case theories and evidence. A thorough appellate practitioner should use an appellate focus group. It will go a long way to shoring up your brief.

(Full disclosure here. I am an owner of Trialology LLC, a company that facilitates jury and appellate focus groups. But I'm not the only one who suggests appellate focus groups. Legal writing maven Bryan Garner does too.<sup>3</sup>)

An appellate focus group should consist of a panel of three thoughtful lawyers. Retired judges are perfect. Panel members should be paid for their time. Like a jury focus group, the panel should be completely objective, no ties to the lawyers or the questions at hand. The panel should not be told which side of the appeal engaged the focus group. Don't look for panel members who have expertise in the area of law of your brief. After all, the real appellate panel is unlikely to be expert in your particular area.

A half day is sufficient for an effective session. The focus panel is given the briefs, asked to read them within time constraints, and to vote up or down on the appeal. The panel members give their impressions of the case and the issues, then are drawn into additional discussion by a facilitator.

This is where the brief writer, viewing the process from behind a one-way mirror, must lose pride of authorship and any ego tied with particular arguments. You'll often find that some arguments you thought were ingenious don't carry the day, and that some things you excluded are essential to understanding your position. You might find your appeal turns on something you hadn't even given thought.

This is different, and better, than recruiting the guy down the hall or your friend from around the corner to read your brief. You are unlikely to get the same kind of candor from them as you will from a professional, non-partisan panel. This exercise is to inform you, not to stroke you.

Writing an appellate brief is a creative process. The process is demanding because it requires intellectual honesty and observance of strict time constraints. If you are prepared to respect these conditions, you'll have the makings for a great appellate brief.

Next up: "The Brief-Writing Process," or, "How to Make Tax Law an Interesting Read."

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<sup>1</sup> Potter, Stephanie, "Value of Oral Argument Debatable," Chicago Daily Law Bulletin, 4/22/06.

<sup>2</sup> Ebel, J. David M., "How Judges Read Appellate Briefs," Presentation to Defense Research Institute, March 2006.

<sup>3</sup> Garner, Bryan, The Winning Brief, pp. 385-88, Oxford University Press, 1995.

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