

TEN TIPS FOR WRITING A GREAT APPELLATE BRIEF

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The darkest moment for any lawyer who must write a brief—indeed, the worst moment for any writer, period—comes just before the first sentence is written. At this moment, the computer screen is blank and so it is likely to remain for many painful minutes or even hours. The screen fills with words. The words are deleted. The screen is blank again and it is at this moment that all of us question whether we will be able to write *any* brief, let alone a great one.

The purpose of this article is to get you through that moment of appellate stage fright so that you will fearlessly write compelling briefs that win the admiration of your clients, your adversaries and the courts. I'm convinced that we learned 90% of what we need to know to write great briefs, even U.S. Supreme Court briefs, by the end of high school. Law school and legal practice have, if anything, dulled the pen and diluted the power of our writing. We need, therefore, to concentrate on the basics and, with this mind, I give you a list of ten tips.

1. Good Writing Takes Time: I have never spent less than thirty hours writing a brief. I may have been trial counsel. There may only be one issue. The transcript may be under 100 pages. The law may be clear. It takes me around thirty hours, including formatting and creation of the table of authorities and table of contents. It takes a lot longer when I'm new to the case, when the transcript is voluminous, when the exhibits are dense, when the issues are many and when the law is unclear.

Good writing takes time. Presumably it takes time to write good novels, good screenplays and good musical compositions. Why should it take any less time to write good briefs? Briefs may be written in prose, but prose has its own rhythm and its own symmetry. *Every* fact should be *perfectly* supported by a citation to a *specific* page in the record, and it takes

time to ensure perfect factual citation. *Every* legal principle should be supported by the best possible citations, and it takes me a lot of time to get this right.

If you scrimp on hours then your brief may get your point across, but it won't sing. It will be read and understood, but it won't be read effortlessly. Your account of the facts and your explanation of the law will be noted, but perhaps more skeptically than necessary.

2. Be A Helpful Salesperson: I hate annoying salespeople. More important, I don't trust them. The car dealer or mattress salesman who tries too hard to get my money—"What can I do to put you in that car today"—rarely succeeds. Such tactics send me searching elsewhere for information. They drive me out of the showroom and I may not return.

On the other hand, a helpful salesperson can guide me through a purchasing decision to the point where he or she becomes my primary source of information. Perhaps, at the end of the day, I don't become a purchaser. But if I trust the salesperson, I'm more inclined to stay in the showroom.

Guess what, we're in sales. We are advocates for our clients' positions. The judges know this; they were advocates before they became judges. But that doesn't mean we can't be trusted. ***My first goal in writing a brief is to be helpful to the court and the clerks. I want them to use my brief, my appendix, my citations to the record, my citations to the law as their primary source of information. I want copies of my briefs to end up dog-eared and coffee stained by the end of the process.***

Like a good salesperson, we are guiding others through a "purchasing" decision. They can get the information they need to make that decision from four sources: (A) The lower court order(s); (B) Our briefs; (C) The other side's briefs; or (D) Their own, independent, review of the facts and the law. I assume that the first place an appellate court looks for guidance is in the

lower court's narrative order, if one exists. The second place should be *my* brief. Indeed, *my* brief should be more helpful than the trial court's order, especially if I am an appellant and the trial court ruled against me.

How do we do this? First, we make sure that every fact, no matter how small, is *perfectly* cited to a specific page or paragraph in the appendix or transcript. The citations *alone* speak to credibility and, when they are checked by the judges and clerks, our credibility is proven rather than undermined.

Second, we put no spin on the facts, at least at the most granular level. We include every "bad fact" along with the "good" ones. Regardless of the ethical issues involved, if you are caught cherry picking the facts, you will be viewed as an annoying salesperson rather than as a helpful one. The judge will leave the showroom and pick up the other side's brief. That will be the brief that gets dog-eared and coffee stained. Then, if you prevail it will be despite, rather than because of your hard sales tactics.

We make the facts compel the conclusion that we want the court to "buy" by arranging them in the correct order and the correct manner. Pick up any U.S. Supreme Court decision involving a death penalty case. Invariably, the justice who writes the opinion or dissent favoring affirmance starts his or her opinion with a chilling description of the underlying murder, typically told through the eyes of the victim. Equally invariably, the justice who writes the opinion or dissent favoring reversal begins with a tight factual description of the procedural history of the case, often explaining how the defendant objected time and time again to the precise ruling at issue on appeal. You can be exceedingly honest with the facts and remain an advocate at the same time.

Third, we don't take liberties with our citations to legal authorities. I typically include a lot of parentheticals which describe the precise point for which I cite an authority. I pay great attention to citation signals, so that I never use "see," when what I mean is "cf." or, even, "see e.g." Anybody who checks my citations will know that they are 100% honest. I've seen briefs where this was not true and such briefs won't keep the customer in the showroom.

Fourth, we go one step beyond the rule that says we must cite *controlling, directly adverse authority*. If I cite a number of cases from other jurisdictions, all of which stand for the same proposition, I will throw in a "but see" citation as well, even if its not ethically required. This does not mean that I necessarily include every non-controlling, arguably adverse authority I find. I certainly don't do that. But I include enough in my brief so that when the justices read the opposing brief, or do their own research, they don't say I tried to sneak anything by.

Fifth, we recognize that our judges are all generalists. Most of us focus our practice on one or more areas of substantive law. The justices of the New Hampshire Supreme Court and the First Circuit don't have this luxury. In a single day, they hear commercial disputes, criminal appeals, marital cases, insurance coverage matters, zoning appeals and constitutional challenges. Without being either presumptuous or patronizing, a good brief can help them by explaining the law.

I make sure that every brief I file has a clear description of the standard of review (which is required in the First Circuit by FRAP) along with appropriate case citations. If the standard of review is in doubt, I explain why. While this may be a formality a lot of the time, I think it is helpful to the court.

I make sure that every brief I file has a clear description of the general governing standards that should have been applied by the trial court. Again, this may be a formality in

many cases—judges know the boilerplate test for granting a motion for summary judgment, setting aside a verdict or suppressing evidence resulting from a questionable automobile stop. But in other cases, a concise and clear statement of the general governing standards can actually assist the reader.

I've read briefs which leap to the specific, narrow legal issue in an esoteric area of the of the law without first explaining the standard of review and the general governing standards. Such briefs require judges to look elsewhere for information. To use my analogy, they have to leave the showroom. Remember that our judges are generalists.

3. Be Concise: Know your audience. You are writing to appellate judges and their clerks. They spend all day, every day, reading. Most of what they read is—I'll go ahead and say it—boring. A lot of what they read is turgid. When they go to sleep, they know that the next morning they will have to start reading this boring, turgid stuff again. Thirty pages of factual nuances concerning your client's boundary dispute or medical history may not be received with unmitigated glee.

If you can say everything that must be said in a twelve page brief, then don't feel the need to make it a thirteen page brief, let alone a thirty-five page one. A short but brilliant brief is no less brilliant because it is short. Nobody remembers the two hour speech that Edward Everett made at Gettysburg in 1863. Yet we can all recite by heart the two minute, 286 word speech by Abraham Lincoln that followed. I've been to a number of CLEs featuring appellate judges and they all say the same thing: Long ≠ Good.

Of course, the reverse is not always true. Some long briefs are very good. I tend to write long briefs. But I try very hard to make my briefs feel shorter than they are, to make them *easy to read* and even, I hope, *enjoyable*. My goal is for a busy judge to forget about the fact that he

or she is reading a brief and instead get transported into the case, much we all get transported into a good novel. While I doubt that I often reach that goal, I strive to be concise, if not always short.

One way to be concise is to exclude completely unnecessary information. Sometimes the names of particular witnesses may be important, but at other times you can keep your writing concise by referring to them by their function, i.e. “the investigating detective” instead of “Manchester Police Detective John Doe,” or “the nurse” instead of “Nurse Jane Doe.” Is it really important to your appeal that the parties’ contract was signed on October 22, 2006? Or that the writ was filed on January 1, 2008? Or that the defendant’s vehicle was Chevy Impala? Or that the tort plaintiff’s prior accident took place on Second Street? If not, leave them out of the brief. Remember, when you use proper nouns, the reader has more to keep more facts in his head as he digests what you have to say. Therefore, you should use them sparingly.

Another way to be concise is to present your facts in the order and manner most appropriate for the standard of review. For example, if you are appealing the trial court’s denial of a directed verdict, then you must present the facts in the light most favorable to the other party. This means that you don’t need to go meandering through all of the factual disputes which the jury was asked to resolve. If you wish to note that there was a factual conflict (i.e., if it was a credibility case and your client denied the allegation), say this briefly. By all means, give the court a full sense of the trial, but don’t make the court work harder than it must to understand the facts of the case.

When you must present multiple factual conflicts in a complicated case, explain up front why are doing so. In such cases, I often start the *statement of facts* with a brief sentence stating that since the central issue on appeal is “X,” a careful review of all of the facts relating to “X” is

necessary. This will be the case if you are in the unfortunate position of appealing a discretionary evidentiary ruling which called for the trial court to balance several factors in light of the evidence presented at trial. However, if you explain *why* you need to present the facts in this manner, you will focus the reader's attention on the important issues in the case.

We walk a tightrope. On the one hand we must describe *all* of the salient facts of the case. On the other hand, we must distill the facts to a concise, readable account and this necessarily entails reducing, rather than reproducing the transcript. Our value to our clients is, in large part, that we know how to boil the facts down without losing a single granular fact that could make a difference on appeal.

4. Never Submit Your Trial Motion Or Objection As Your Appellate Brief: I've been involved in cases where opposing counsel does little more than re-caption his trial court argument and submit it to the appellate court. Almost always—even in cases where summary judgment or some other ruling based on a closed written record is at issue—this is a significant blunder.

First, we usually present the trial court with a different distillation of the facts than the ideal distillation on appeal. We may fight a multi-front war in the trial court and the issues on appeal may be narrower. We may want to focus on issues raised by the trial court in its narrative order. We may want to actually expand on some factual descriptions if our submissions to the trial court were bare boned.

Second, no matter how complete our legal argument was in the trial court, it should be *more* complete on appeal. This is especially the case when dealing with issues of pure law. In the trial court, we can get away with arguing that whatever the right legal rule may be, our client should prevail. On appeal, as explained below, we don't have that luxury.

While you should certainly use your trial court submissions as a starting point, you need to write an entirely new document on appeal. You are writing to a different audience, with different concerns and for a different purpose.

5. When You Are The Appellant, Choose Your Issues Carefully: I was trial counsel in a complicated commercial dispute in which innumerable issues were raised and decided. There were two rounds of cross-motions for summary judgment, choice of law issues, jury instruction issues, evidentiary objections, and motions for directed verdict. When the client instructed me to file a cross-appeal, there were no lack of issues to choose from.

Some lawyers subscribe to the proposition that every arguable issues should be raised on appeal. Perhaps in certain sorts of cases—death penalty appeals come to mind—this makes sense. However, in the ordinary run of cases it is generally better to focus the appellate court’s attention on no more than four well briefed issues which, ideally, are in some way related to each other. A brief that gives cursory treatment to ten issues may be worse than no brief at all. Such a brief is likely to result in a opinion that rejects all ten issues in equally cursory fashion. An oversize brief that gives the full appellate treatment to ten issues, if allowed by the court, may induce fatigue rather than keen interest.

More important, rarely do we have a multitude of equally appealing issues. In the typical case, some of the issues that we preserved are much more likely than others to result in reversal. Why should we clutter our briefs with long-shot issues if we have one or two clear cut potential winners?

Once again, our value to our clients is in distilling the case to its core without losing anything important in the process. Law students are asked to spot every issue to show off their

knowledge. We are in the business of picking and choosing issues, which requires *judgment* and not merely knowledge.

One of the most important considerations in issue selection is the standard of review. The standard of review is often dispositive and always central. Issues that are reviewed for an unsustainable exercise of discretion are far more likely to be decided in the trial court's favor than issues that are reviewed *de novo*. We may fiercely believe—perhaps correctly—that the trial judge reached the “wrong” result when he or she balanced a multitude of factors and then made a discretionary ruling based on the totality of the evidence. However, to prevail on appeal, the trial judge must be so “wrong” that the exercise of discretion was unsustainable. In contrast, no deference at all will be given to even the most thoughtful and careful trial court decision on an issue that is reviewed *de novo*.

Another important consideration is the relief that you are seeking. In the case that I discussed above, the same issue was addressed to the trial court in the form of (a) an objection to jury instructions and (b) a motion for a directed verdict. Although the jury instruction issue had a better standard of review, if we were successful on that issue the case would have been reversed for a new trial. The client viewed a new trial as anathema. Therefore, we instead briefed the directed verdict issue despite its nearly insurmountable standard of review. In this instance, we actually preferred the long shot issue.

A third consideration, in state criminal cases, is whether any federal issue should be briefed for the purpose of preserving it for a possible federal habeas petition. I won't dwell on this point, but despite (a) the extremely deferential standard of review in federal habeas cases, see, 18 U.S.C. §2254, and (b) the fact that our State Constitution is often more protective than

the Federal Constitution, sometimes it makes great sense not to waive an issue that could be raised on collateral federal review.

I always include my clients in the discussion over issue selection. Some don't want to be included. Some don't have the head for it. But I want to hear their thoughts before I irrevocably toss preserved issues overboard or, alternatively, choose to brief issues with little likelihood of success. I understand that at the end of the day it is my ethical responsibility to exercise independent judgment in choosing issues. But I also believe that it is impossible to do so in the absence of client consultation. I should add that I've never had a real disagreement with a client over what issues to brief.

6. Avoid Personal Attacks: It is one thing to say that your opponent is wrong. If you are an appellee that is the purpose of your brief. It is another to take the argument into the sandbox by calling names. That is exactly what happens when you accuse opposing counsel of misrepresenting the facts or the law. *Compare,*

Acceptable Argument

Unacceptable Name Calling

1. Defendant's reliance on Brown v. Board of Education is misplaced; OR, Defendant misapprehends the holding in Brown.

Defendant misrepresents the holding in Brown.

2. Plaintiff's brief ignores three crucial facts.

Plaintiff blatantly attempted to mislead this court by misstating the facts.

3. Respondent's argument is without merit.

Respondent filed a frivolous brief.

4. The flaw in petitioner's argument is...

Petitioner's counsel should know better.

I have listened to a number of appellate judges, from different courts, comment at CLE's about what they don't like to see in a brief. All of them said "personal attacks. You will

embarrass yourself and hurt your credibility if you choose to go into the sandbox. While there may be an exceptional case that disproves this rule, believe me—it's not your case.

7. Use Short Sentences, Short Paragraphs And Plain Language—And *Never* Use Legalese: Think Steinbeck. Think Hemingway. Don't think Joyce. Short sentences make our briefs more readable. I use some longer sentences to make sure that the writing is not too staccato. But I try to keep the sentence structure as simple as possible.

I don't always live up to this goal during my first draft. When I edit the brief, however, I usually divide a number of long sentences into two or three smaller ones. Also, I use plain language. In every brief, I use a few more advanced vocabulary words. But most words that I use, excepting legal terms of art, can be found in an elementary school dictionary.

Short paragraphs tell the reader that he or she can take a break. A good paragraph has no more than four or five separate sentences. A paragraph that takes more than half a page may overtax the reader.

I *never* use legalese except when I have to. It is necessary, of course, to use correct and precise legal terminology. An executor is not an administrator and a man whose house was burgled was not "robbed." But when is it necessary to use words such as "herewith" or "hereinafter" or phrases such as "within said time period" or "on or about"? Why would anybody ever say "at this point in time," when what he means to say is "now?" Once again, think Hemingway. Think Steinbeck. Think Scalia.

8. Use Sub-Headings: The facts and the law need to be chopped up into bite size chunks. To accomplish this we must use Sub-Headings. A section heading that reads, "Statement of the Facts" is not very helpful. A sub-heading that reads "The Arrest and Interrogation," or "The Purchase And Sale Agreement" says a lot. Sub-headings (and sub-sub-headings) can break a

thirty-five page brief down into manageable two page sections. They tell the reader what to expect next. There is a reason that most high school and college textbooks have Sections, Chapters, Sub-chapters, and sub-sub-chapters.

9. Read The Rules: The New Hampshire Supreme Court, the First Circuit and all other appellate courts have exacting rules about what must, and must not be in a brief. There are page limits, font restrictions, citation conventions and rules governing the color of the brief. There are specific rules about what sections each brief must have and what documents must be included in the addendum and appendix. Read those rules (a) before you file a notice of appeal; (b) before you file an appearance as an appellee; and (c) again before you start writing your brief.

Although this “tip” is so obvious that it is not really a tip at all, you’d be surprised at the number of non-conforming briefs that get filed.

10. Be Creative—You Are The Director Of Your Movie: Appellate briefs are like haiku. They follow very narrow and traditional conventions, yet there is great room for creativity. Although my briefs are generally straight laced, in the past year I’ve cited *The Wizard Of Oz* and an old Heineken beer advertising slogan. While there is precious little room in a brief for whimsy, a single citation to a non-legal source which follows labored legal argument, may serve to drive the point home. (Of course, while such citations may be argumentative in the best sense of the word, they may also fall flat. You need to be careful before you get that creative. I never file a brief without giving it to two other attorneys to read first.).

In another brief, I included actual images of portions of certain business records that were introduced at trial. This was a white collar embezzlement case involving dense facts. The business records were essential evidence and they were reproduced in the appendix. I thought that using “pictures” to illustrate my brief would (a) break up the dry exposition of turgid,

reticulated facts; (b) focus the court's attention on the most important evidence in the case; and (c) engage the reader.

In a summary judgment motion (albeit not an appellate brief), I used a Venn diagram to illustrate the difference between my interpretation of a statute and my adversary's. In that case, I went so far as to submit *color* copies of the page with the diagram to the court. It made the parties' differences crystal clear in a way that words could simply not do.

Earlier this year, I submitted a Superior Court sentencing memorandum in an attempted murder case (again not an appellate brief) that featured a Langston Hughes Poem on the front page, above the caption of the motion. It was designed to be provocative and it was.

My goal is to be creative without either bending any of the formal rules or otherwise stepping outside the medium of brief writing. I know that I'm writing a legal argument for an appellate court, not a magazine article or blog entry. Yet at the same time, I try very hard to keep the reader engaged, so that reading *my* brief will be the best part of his or her day.

Oh...and one more tip...

11. Proofread.

