Young Lawyer's Corner

Key to Appellate Brief Writing: Keeping Your Reader in Mind

By Meir Feder

An appellate lawyer's career is built on effective legal writing. As those starting out in this practice will find out, oral argument is much more likely to produce an adrenaline rush (and can sometimes even decide a case), but most appeals are won or lost on the briefing. And yet, despite the obvious importance of submitting a persuasive brief, most appellate briefs—as any appellate law clerk will tell you—aren't very good. From the perspective of an aspiring appellate specialist, this is good news: It means that your ability to produce a superior brief can provide your client with a real advantage on appeal.

There's another piece of good news. Learning to improve your brief writing isn't as complicated as one might think. That doesn't mean there's a formula for turning out a high-quality brief without hard work—if you have visions of a standard template you can mark up, you probably should be drafting contracts, not briefs. And good writing won't cure poor arguments or inadequate research. But writing effectively is essential, and you can write better than most just by following a few fairly simple rules.

In fact, in some ways, it is even simpler than that. There's one essential rule from which most of the others follow: *Always write with your reader's perspective in mind.* Many lawyers seem to think their job is just to get their arguments down on paper. It isn't. The best arguments in the world will do you no good if your readers (judges and law clerks) don't absorb them. And there are real limits to what information readers can absorb, particularly busy and impatient readers. So you should constantly be thinking about whether the *way* you're expressing your ideas—organization, word choice, selection of arguments, clarity of expression, and the like—makes them easy for your reader to understand and inclines him or her toward agreeing with them.

This may not come naturally; you may find yourself fighting an unconscious desire to write in a way that seems "lawyerly." By all means, fight that tendency. Your goal in writing a brief isn't to sound smart. It's to make sure your audience (1) doesn't have to work too hard to understand your arguments, and (2) absorbs them in a way that is conducive to agreeing with them. As you will see, many of the rules that follow are really just applications of this idea to particular aspects of the writing process.

1 ***Never compromise your credibility.*** Your credibility with the court is crucial, and there is no surer way to lose it than to play fast and loose with the record or the case law. That sort of advocacy is worse than an ethical violation; it's a blunder.

2 ***Choose your arguments carefully.*** A surprising number of lawyers think that if a brief with three principal arguments is good, a brief with ten arguments is better. It isn't; it's much worse. Think about the implicit message this sends to the reader: that the brief's author has no particular confidence in any of his or her arguments and is, as they say, tossing spaghetti against the wall in the hope something will stick. In most cases, you'll be better off picking your two or three best arguments and jettisoning the others.

3 ***Think hard about why you should win.*** This doesn't just mean thinking through a by-the-numbers application of the legal analysis. It means imagining the judge's perspective and doing your best to figure out what key point or key fact will make the judge want to rule in your favor. If the court's rules permit, you should find a way to emphasize this aspect of the case as early as possible—preferably in an introduction or a preliminary statement.

4 ***Get right to the point.*** Each section of your brief should make clear, right at the beginning, what's going to happen in that section: what issue you're addressing, what legal rule governs that issue, and the essence of why your position is correct. There's nothing to gain from hiding the ball, and lots to lose in terms of reader comprehension. Never leave your readers unsure of the relevance of what they're reading.

5 ***Separate your ideas.*** No more than one idea or argument per paragraph. This makes it much easier for your reader to digest one idea before having to absorb the next one. And short paragraphs are easier on the eye than long ones; many readers' eyes will glaze over when they see a lengthy, overstuffed paragraph.

6 ***Keep your sentences short.*** Short, declarative sentences are much easier to digest than long ones with multiple clauses. They're punchier, too.

7 ***Write simply and directly.*** As a rule, plain English is better than legalisms, short words are better than long ones, and the active voice is better than the passive.

8 ***Cut mercilessly.*** Be ruthless in eliminating unnecessary words. You'll be surprised how much excess you'll find, and how much more effective your prose will be without it.

9 ***Quote when you can.*** Your reader has no particular reason to trust you when you claim a case supports a particular

proposition. You need to prove it, and the most effective way to do that is to quote from the case; the second most effective way is to describe or paraphrase it, either in the text or a parenthetical. A completely unadorned citation is usually useless.

10 ***Lead into block quotes.*** Readers tend to skim over block quotes without pausing to parse them. Block quotes can still be useful, but only if the text leading up to the quotation summarizes what the block quote is going to say.

11 ***Don't let your case cites get in the way.*** The use of authority is always important, but it takes work to avoid littering your prose with citations and parentheticals that destroy the flow of the writing and—the cardinal sin—make your reader work too hard to stay with it. Try to place your citations where they won't function as visual roadblocks. And, by all means, avoid needlessly lengthy string cites.

12 ***Try to put your best argument first.*** Within reason, that is. For example, in a case that turns on statutory interpretation, convention dictates that you'll almost always need to start with the plain language of the statute, whether or not that's your best argument. In general, though, your best argument will come first, unless there are real costs to doing it that way.

13 ***Place the affirmative before the negative.*** As a rule, the reasons you win (your affirmative arguments) should come before the reasons you don't lose (your response to opposing arguments). Doing anything else will strike your reader as defensive.

14 ***Address your opponent's best arguments.*** Don't hide from the better opposing arguments, even if it is not completely clear that your opponent is making them. The last thing you want is for a judge to hit upon a strong objection to your position that your brief fails to address.

15 ***Proofread!*** No judge is going to decide a case based on a lawyer's minor errors or typos—at least not consciously. But carelessness of that sort can raise doubts about how careful you are with the bigger things, including use of authority, scrupulousness in characterizing the record, and so on. And the absence of minor errors will help the judge trust you more on the bigger things. It is always worth the small additional effort to make sure this factor is working for you rather than against you.

This list of rules is far from exhaustive—one popular book lists 100 rules for winning appeals—but if you can follow these, you will be well on your way to drafting superior appellate (or, for that matter, trial court) briefs. And even these can largely be distilled to one essential imperative: Keep your reader in mind. Doing the hard work of making things easy for your reader will pay dividends for your client and for you. ■

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