The Dos and Don’ts of Appellate Briefs

“A lawyer is a person who writes a 10,000 word document and calls it a ‘brief.’”

Franz Kafka

Who knew that Franz Kafka had a sense of humor? Or perhaps he was just expressing general frustration with the tendency of lawyers to think that every word they write is golden and of unquestionable interest and importance to their audience. Unfortunately, that is not always the case. U.S. Supreme Court Justice Anthony Kennedy put it another way: “I’ve never read a brief I couldn’t put down in the middle. It’s not the best part of the job.”

Your role as appellate attorneys is really, therefore, twofold. Your prime objective, of course, is to put forth your client’s position as convincingly as possible. But in doing this, you have to keep a court engaged and interested. The latter is sometimes, unfortunately, subsumed by the former.

When I first sat down to write this article, I discovered from a quick review of Westlaw that I have written at least 73 appellate briefs in the past 35 years. While I can’t say that they were all winners, or all masterpieces for that matter, I have come away with certain definite understandings of what does and does not work in appellate brief drafting, and I want to share some of that with you. Some of my suggestions may seem obvious, but I hope that you will find at least one or two helpful hints to improve your brief writing. Also, keep in mind that not all suggestions apply to all appeals, but I believe generally that these are good basic rules to follow.

Before You Start: Read Everything
Before you write, read everything. Whether or not you handled the case below or have a paralegal or associate helping you, it is critical that you, yourself, read the entire record. Not only is this necessary to have a total grasp of your facts and a good understanding of what occurred below and why, but you may well see something in the record that was overlooked in previous arguments. Reading the record may also open your eyes to new issues or a new slant to the arguments to be made.

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While the trial attorney’s input is certainly important, it is always good to approach an appeal without preconceptions. Even if you were the trial attorney, reading the record still may give you a different take on the proceedings below; it has been my experience that a transcript always reads differently than my perception of the testimony or argument at the time that it was given below.

It is also important to read every case cited by your opposition and every case that you cite, even if the case is cited solely for an uncontroversial or peripheral point of law. I cannot tell you how many times I have found a good point that supports my argument, or a new idea for an argument that I may not have even thought of, in a case that the opposition has cited for a related but different point.

Conversely, by carefully reading every case that you cite, you avoid the risk of citing a case for a general or noncontroversial point of law that has a holding that is actually adverse to your position or gives your opponent something else that he or she can use against you. Knowing the facts of the cited cases is also, of course, critical to allowing you to distinguish the bad cases and use your good cases to their best advantage effectively.

One final word about your initial review: it is critical that you familiarize yourself with both the standard of review that applies to your appeal and the required burden of proof in the proceedings below before you review the record. Lawyers sometimes do not review these two things until they sit down to write a brief, but they should be in your mind from the beginning.

Judges Are People, Too

The judges and law clerks who will read your brief have literally hundreds of briefs to read. As Justice Kennedy noted, it is not the most exciting part of their jobs. Try to write in a way that will hold someone’s interest. Remember, judges are people, too. I am not saying to make your brief sensationalistic or overly dramatic, but at the same time, don’t make it so dry that reading it is one big yawn. Tell a story, keep a good pace, and use an active voice and a conversational but respectful tone. Vary your word choices. Instead of always writing “argue,” substitute “contend,” “assert,” “suggest,” “insist,” or like words. Sometimes using analogies or literary references, when appropriate, can help keep a reader’s interest. Remember, judges are people, too.

Don’t Bury the Lead

A court wants to know right up front what your appeal is about, why you believe that the lower court erred or should be upheld, what specifically you want the appeals court to do, and why it should do it. Don’t bury the lead. You may want to ask yourself, “If I were the judge, what would I first want to know about the case?” Put this information in your introductory paragraph. Equally important is to include at the end of your brief a precise request for the exact remedial relief that you seek.

Don’t start with the typical opening paragraph advising logistically how you will identify the parties and citing the record or other procedural statements relating to the brief—that type of information is one of the few times that a footnote is more appropriate. Also, with respect to identifying the parties, don’t use initials or acronyms, which are often more confusing than helpful and tend to depersonalize the parties.

Maximize Your Credibility

It goes without saying that every fact set forth in your brief must have record support. Make sure that you have a record citation for every factual assertion that you include and double check each as part of your final proofread to make sure that each one does in fact support what you say that it supports. You also need to check that your opposing counsel has done the same. There is nothing more effective than calling out the other side for having misstated or fudged the record.

Most critically, be fair. Don’t ignore the obvious. Even in drafting an initial brief, you are probably well aware of the facts and the law that are in your opponent’s favor. Acknowledge these and address them head on. Not only does this enhance your credibility, but it can also diffuse your opponent’s use of those facts or that law in his or her response, which will require your opponent to address those issues in a defensive rather than an offensive posture.

The tone of your brief should reflect respect both for the lower court and opposing counsel. Don’t be overtly insulting or demeaning. Keep pejoratives and accusations to a minimum. Use words such as “misguided,” “flawed,” or “illogical,” rather than “preposterous,” “absurd,” or “ridiculous, even if the argument you are addressing is in fact preposterous, absurd, or ridiculous. If that is the case, have confidence that judges will recognize that themselves without the need for you to employ aggressively accusatory language. In other words, maximize your credibility.

K.I.S.S. (Keep It Simple Stupid)

Remember the shortcut, “K.I.S.S.” and what it stands for: Keep it simple stupid.” This expression is not intended to imply stupidity on your part, but rather it stands for the proposition that it is best to explain even the most complicated issues in the most uncomplicated way possible. This goes along with my strong belief that your brief should be as short as possible. There is general consensus among judges that most briefs are too long. Chief Justice John G. Roberts, Jr., has commented, “I have yet to put down a brief and say, ‘I wish that had been longer.’” Many writing experts cite Abraham Lincoln’s Gettysburg Address, which is 10 sentences long, as the best example of short and plain writing.

There is no need to show off to the court your vast wealth of knowledge on an issue.
being addressed unless that knowledge is truly material to an ultimate decision. Don’t include unnecessary facts or law, and try to zero in on only the facts and the law pertinent to your point. Choose your issues wisely, rather than using a shotgun approach or throwing everything up on the wall in the hope that something sticks. Thurgood Marshall once said that

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in all his years on the Supreme Court, every case came down to a single issue. Too many issues distract the court, weaken and dilute your good points, and don’t help a bad case.

Write So a Layman Would Understand
Writing style plays a big part here. Dropping formalistic legal jargon and writing conversationally, while of course always adhering to rules of proper syntax and grammar, helps to tell your story clearly. Don’t overwrite or be bombastic, don’t use fancy or complex words when simple words will do, avoid clichés, don’t be repetitive, and reduce hyperbole. Using a lot of emphasis is not really effective and often irritating.

Don’t overdo adverbs and adjectives. Many legal pundits have expressed dismay about attorneys’ overuse of adverbs in brief writing in a misguided intent to intensify or to exaggerate a point. One legal writer, attorney Robert Hill, has noted that when he sees the words “clearly,” “obviously,” and similar adverbs in an opposing brief, he searches the record and generally finds something showing the opposite, which he then points out to the court, noting, “If something is obvious or clear, prove it without saying that it is obvious or clear. Show, don’t tell.”

Don’t make your paragraphs too long, and keep your sentences short. Don’t use block cites or string cites, too many indented quotes, or excessive footnotes. They all interfere with the flow of the brief, and block quotes and footnotes are easily glossed over by the reader.

In short, your brief should be as easy to read as possible.

Know Your Court’s Brief Requirements
This may sound obvious, but you need to know your court’s brief requirements. Every court has different formatting, filing, length, and other brief requirements. There is nothing more disheartening than having a brief on which you have spent great time and energy rejected because it failed to comply with some procedural requirement. Know your court. Also make sure that all of your citation forms are correct because it is very annoying for the court not to be able to locate your authority. I still rely a great deal on the Blue Book, but you also want to be aware that some courts include acceptable citation forms as part of their rules of appellate procedure.

Edit and Proofread Ad Nauseum
Perhaps a truly gifted writer can achieve good results with little editing, but I have not found that to be the case. When I write a brief, my first draft generally includes anything and everything that I think could conceivably be important, and it is admittedly overwritten and replete with the very unnecessary and repetitive verbiage that I have just advised against. Through the editing process, I am able to whittle that down to the important core facts and law, expressed in the simplest way possible. By starting large and ending small I make sure that I am aware of everything that I may want to say, and then I am able to say it the best way that I can.

John C. Godbold, former chief judge of the United States Court of Appeals for the Fifth Circuit, has stated his belief that an attorney should look over his or her brief with an editor’s eye and as dispassionately as he or she can: “It should be clean and clear, as taut as a violin string and as terse as a rifle shot. It should contain not one ounce of fat or an excess word.”

At the end, always recheck your cites to make sure that they are accurate and still good law.

Additionally, no matter how many times you read your brief, or no matter how many other people read it, you will always find more typographical, formatting, and grammatical errors. I am ashamed to say how many times, when rereading a brief right before oral argument, I have caught something along those lines that should have been caught before the brief was submitted. While typographical errors are not the end of the world, they are distracting. The more times that you review a brief before its submittal, the less chance there is of that happening to you.

Have Others Read Your Brief
While I would expect that you would have the involved trial counsel review a draft of the brief, it is an even better idea to have other attorneys who know absolutely nothing about the case review it. There is no better way to find out that something that you thought was crystal clear is actually confusing and needs rewriting. Questions that the other reviewers may have after reading your brief will also help you see where you may need to fill in some gaps or change some arguments. Also, fresh eyes are often helpful in catching those persistent typographical and formatting errors.

Don’t Discount the Reply Brief
In preparing to write this article, I learned something of which I was not even aware: many judges prefer to start with the reply brief when they first begin to look at a case, under the theory that by that time, the appeal has been pared down to the truly critical issues. Given this approach, an appellant’s counsel should spend as much time and effort on the reply as on the initial brief.

Conclusion
Following my own rules, I will use this conclusion to state the relief requested by appellate courts from you as a brief writer: your brief should be a combination of sound and credible advocacy coupled with adherence to the fundamentals of good writing—precision, conciseness, simplicity, and clarity. While following these guidelines cannot ensure a win, doing so will at least give your brief a much better chance of receiving proper consideration.