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Pointers for Drafting an Effective Appellate Brief

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You've just joined a new firm, after two years practicing elsewhere, and a senior partner tasks you to draft an appellate brief for an important client. A plum assignment! Except, you've never drafted an appellate brief before. Well, of course, you should own up. But, no matter what, here are some pointers—for the novice tackling this new assignment or for experienced practitioners interested in brushing up.

Know the Record (Cold). Strong advocacy always involves the facts … and persuasive appellate advocacy, in turn, always involves the record. But what does that mean? You have to know the record well *to begin* the brief writing process. What was the decision below and what was it based on? What facts exist, whether consisting of pleading allegations (on, for example, a motion to dismiss), affidavits and documentary evidence (for a summary judgment motion) or proof submitted to a judge or jury (at a trial)?

If you handled the lower court proceedings, you should know your record well. Other times you might have been retained to handle the appeal, having not been involved below. Clients and lawyers often realize that it is sensible to have another lawyer, whether an appellate "specialist" or an able litigator, take a "fresh look" for an appeal. When in that latter situation, the first thing I do is learn the record. Typically, that means, as step one of the appeal, compiling the record from the trial court docket. In other words, know what you have to work with for developing your appellate arguments.

Then out of the gate, you need to synthesize the facts and zero in on those that define your issues and drive your legal arguments. "Knowing" the record means just that—who said what (whether in affidavits or trial testimony); what is established in the documents; what are the allegations in the complaint? Importantly, what is the procedural history—what happened to bring you to the appellate court? And how, if at all, does that procedure bear on an issue on appeal?

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Mastering the record is an *immediate* first step in outlining your brief. You must know the facts well to: (1) frame the issues effectively; (2) draft a statement of facts that tells your story objectively but still implicitly pulls the court to your side; and (3) present a legal argument that flows from the facts to persuade the court of your position.

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Use the Preliminary Statement to Make Your Case "Come Alive" in Your Favor. The preliminary statement is a critical piece of your brief. In a short synopsis, ideally two to three pages only, you need to note what happened below, identify the key facts and legal principles, and hit the main reason why error exists. You need to set up the theme of your appeal, and broadly describe the story underlying the parties' dispute.

Always look for a "hook" to interest the appellate court in your appeal. Appeals courts have busy dockets. How can you get the court's attention? Is your appeal fairly characterized as presenting an issue of first impression? Are there discordant lower court decisions that need to be reconciled? Are there particularly interesting issues, or issues of importance having an effect beyond the litigants themselves? Is there a serious injustice (particularly in a criminal case) that should not stand? Even, are the players or the case noteworthy? In short, is there something that really "sticks out" that might particularly interest the court in your appeal?

The preliminary statement must depict the real-life factual story. It should also broadly describe the law that requires the appellate court to find error below and therefore come out in your favor. You should write and rewrite it (and then write it again)—because it is critical to success.

Focus on and Refine the Issues for Appeal. Typically, court rules require that your brief state the "Issues on Appeal," the "Questions Presented" or the like. After gaining experience as an appellate advocate, you will have a feel for the appellate issues in a particular case, whether you handled it below or are a new choice for presenting the appeal. But always step back. Think through what happened below; what can you credibly raise as error; what law applies to help your position; how can you best define the issue, narrow it and cogently structure an argument on that issue?

All too often scant attention is paid to framing the issue cogently. That failure is a big mistake. Having the court decide a legal issue is, after all, why you are there. It is an important part of your advocacy to get the court to accept your position.

Work hard to tell the court what must be decided in simple language. State the issue as concisely as possible. Avoid the often-seen longwinded issue statement in the "when-did-you-stop-beating-your-wife" format. The issue statement should convey your position but should not be stridently argumentative. The latter approach obscures what the court must address and, even worse, shows a lack of objectivity in presenting your client's position—and therefore undercuts your credibility as an advocate.

There are competing views among legal writing mavens about the most effective form of a question presented. Some talk about a "deep-issue format" (where specific critical facts are contained within the question) or the "direct vs. indirect" method (a statement ending with a question mark contrasted with one starting as "whether …") and the like. No one size fits all. Tailor your formulation to your facts and the law in dispute against the procedural background. You should never cut-and-paste from a prior appeals brief.

Rule 14.1(a) of the U.S. Supreme Court describes the way to state an issue for a certiorari petition that should apply for most any appeal: the "questions presented for review" should be "expressed concisely in relation to the circumstances of the case, without unnecessary detail … [and] should be short and should not be argumentative or repetitive."

While best not "argumentative," an effective issue statement should subtly advocate for the answer to the issue that you want.

For example, in a case where the lower court denied dismissal of an aiding and abetting claim, compare these different issue statements:

Whether Plaintiff's complaint properly pleads a claim for aiding and abetting liability.

Whether Plaintiff's complaint properly pleads a claim for aiding and abetting liability where the factual allegations do not allege the necessary elements of aiding and abetting.

Whether the lower court erred in sustaining Plaintiff's claim for aiding

and abetting liability where the complaint fails to allege facts showing that the Defendant substantially assisted in the primary wrongdoing.

The first example is too broad. The second is somewhat focused and begins to foreshadow where you want the court to go. The third, however, sharpens the appellate issue (by identifying the error below); describes the error with reference to the law (by incorporating the legal element of "substantial assistance"); and focuses on the key determination (by highlighting the failure to plead that element).

Framing the issue will always be a balance between brevity, which speaks clarity of your position, and subtle advocacy, which typically must incorporate the key facts and core law. If your issue presented can be answered with a simple "yes" or "no," or can be rephrased as the desired holding of the court, you've probably struck the balance well.

Finally, present a limited number of issues. Most appeals should pose no more than three issues. Often other issues can be subsumed as subparts of a main issue. For example:

Whether the lower court erred in sustaining Plaintiff's claim for aiding and abetting liability where the complaint fails to allege facts showing that the Defendant (a) substantially assisted in the primary wrongdoing; and (b) knew about the primary wrongdoing.

And remember that the issue must exist—and must be subject to resolution—from your record.

Connect the Statement of the Case to Both the Record and (Subtly) to the Argument. The "Statement of the Case" or "Fact Statement" is where you expand your story beyond the condensed version in the preliminary statement. While portraying the "facts," this section is critical to your advocacy.

Diligently describe the facts from the record. That means that virtually every sentence of your fact statement should cite the record. Otherwise, you are, of course, arguing beyond the record. What you assert will not be credited.

How you describe the facts must always gently embed the legal principles to be presented in the argument section. You must know the law when you write the statement of facts. Other than the preliminary statement, I usually consider the statement of facts to be the most important part of an appellate brief. Most cases turn on the facts. Judges typically focus on the facts—why should the appellate court reverse, given what happened in your case? Obviously the law matters. But while some appeals present law-heavy issues, most appeals (like most cases generally) are decided on the facts.

You must present what happened 100 percent accurately. You should own up to the bad facts. Do *not* omit them. The other side assuredly will include them. Your credibility as an advocate will be eroded if you skirt over what hurts your position. But, of course, emphasize the positive and downplay the negative. Juxtapose the bad facts against the good ones, posit them as lacking significance, and the like. Integrate them into your story softly to minimize the impact. But never ignore them.

The purpose of the statement of facts is to give the court the real-life feel for the case *and* subtly advocate your position by presenting the facts favorably to the legal argument to come. By the end of your statement of facts, the appellate court judge should be "almost there" to ruling in your favor.

Make Sure That Your Legal Argument Adopts the Facts. In many ways, the legal argument section simply puts meat on the bones of your factual position. That is, the principles of law apply to the facts you've presented. Often this very fundamental advocacy point is lost. What the "law is" only matters for the facts at hand. Nonetheless, I frequently see opposing briefs that argue legal principles divorced from the record. Nothing is more certain to be readily rejected.

Argue what *really matters* based on the error below. This proposition corresponds with my "limited issues" notion. Winnow out rulings below that, even if you think they are wrong, might not carry the day on appeal. If you make too many arguments, the strong will get lost in the weak. Often clients will say, "appeal everything," akin to a client's "sue everyone" approach. Don't. Be judicious. Analyze the

strengths and weaknesses of your argument on each potential issue. Go with the ones that have a reasonable chance of success. The appellate court will thank you—and, if you've presented a strong issue well, maybe with a ruling in your favor.

Sometimes the nature of the appeal will dictate the structure of your argument. For example, if your appeal turns on the meaning of a statute, you know that your analysis is: What's the statutory language itself, is it clear and, if so, how did the lower court miss the boat? If an arguable lack of clarity exists, are there canons of statutory construction that help the appellate court reach your interpretation, and likewise, does case law interpret the statutory language? If case law and construction canons do not help your cause, is there legislative history that informs the lawmakers' intent in enacting the law, and, if all else fails, are there sound public policy goals that support your contention?

Sometimes the nature of the appeal will dictate the structure of your argument.

Of course, every appeal raises its own best argument formula. The presentation should follow logically from the ruling below, the procedural position of that ruling, and the legal principles that drive the rule of decision. But every legal argument must incorporate the facts organically, as part and parcel of its reasoning, to bring the appellate court over to your side.

Order Your Thought- and Brief-Writing Process. Some lawyers write an appellate brief from preliminary statement to conclusion in that order. I don't. My preferred sequential process:

- Learn/master the record
- Frame the issue presented, *preliminarily*
- Be sure you know the basic legal principles and authorities
- Draft the statement of facts
- Draft the legal argument
- Refine the issue presented
- Last, draft the preliminary statement

Of course, "draft" means write, revise, refine, edit and redraft some more. Multiple versions of each section should be the norm. Once the sections are put together, after each has been revised, read and revise the whole brief. Make sure the dots connect or, put similarly, that no disconnect exists anywhere between facts and law, the preliminary statement and the statement of the case, the issues presented and the argument, and so on. Any discrepancy will give your opponent an opening to undercut your appeal and bolster her opposition.

"Rule No. 1". Briefly, *be brief.* Countless others have noted that a legal "brief" is an inapt description of what we lawyers present to a court. Your brief should be as long as the appeal warrants. Not one issue, and not one word, longer. Of course, that is easier said than done. But nothing turns judges off more than an overly lengthy brief.

When you think your brief is finished, think again. Shorten it. Edit out unnecessary words, phrases, paragraphs and whole sections where they are unnecessary. Avoid footnotes like the plague; use them sparingly and only for discrete information. Even if you are the sole author, have a colleague review the brief particularly with an eye for redundancy.

Repetition almost never persuades. Rather, it annoys, and therefore dissuades. A winning brief presents a limited number of issues, describes the key facts succinctly, and advances legal arguments pointedly, without duplicative analysis.

Conclusion

Think about these pointers the next time you put pen to paper for an appellate brief. They will make a difference in persuading the appellate court to right a lower court's wrong.

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