Twenty-Five "Dos" for Appellate Brief Writers

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> Only a lawyer could write documents with more than ten thousand words and call them briefs!
>
> —Milton Berle

Effective appellate advocacy requires a good brief as well as a good oral argument. Appellate judges look for a lucid, well-structured, and carefully researched brief and for oral argument that quickly gets to the heart of the case and provides direct and informative responses to questions from the bench. Like Diogenes looking for the elusive honest man, we look for the lawyer who is fully prepared, with complete mastery of the facts and the law pertinent to the case. We are about as successful as Diogenes was.

The brief is the more important part of appellate advocacy, because we judges have it in hand both before and after oral argument. It is with us after the argument evaporates and is forgotten. The briefs are the first thing I look at, even before the trial court's decision or any part of the appendix or record. When writing an opinion or signing off on a colleague's opinion, I refer to the briefs. A good one is essential to effective appellate advocacy, but it is rare.

In early American law, the brief was merely an adjunct to unlimited oral argument. Briefs still play such a role in English appeals, as I learned when sitting with the Court of Appeal. The briefs amounted to little more than a list of applicable precedents and authorities, but the argument was leisurely, with many questions and answers. In the United States, the sheer bulk of cases makes it impossible for counsel to proceed in this manner. Because the time for appellate argument is strictly limited, and the

caselaw so vast, much of the persuasion is necessarily confined to the written argument.

How to present that argument well — though the subject of any number of books and articles[1] — is all but a lost art. Surprisingly, advocates often forget that the object of the brief is to persuade.

Some years ago, I set out a list of 25 "don'ts" for oral argument.[2] But, to accentuate the positive — something I value more as I grow older — I present here a list of 25 "dos" for appellate brief writing:

1. Review the brief to correct inaccurate citations, typographical and grammatical errors, and citations to outdated authority. These common deficiencies detract from the brief writer's credibility.

2. Adhere to the format prescribed in the rules. Failing to do so may cause the clerk or the staff attorneys to reject the brief. Even if it gets past them, it will lose points with the panel.

3. Pack the brief with lively arguments, using your own voice and style of expression. We prefer briefs that are not pompous, dull, or bureaucratic. Open with some attention-getting statements. The first few pages are important. But avoid overkill and hyperbole.

4. Write concisely, unambiguously, and understandably. When I practiced law, I always submitted a draft of the brief to the client. Who knows more about the case than the client? If he or she understood what I wrote, then I felt the judges would understand

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1. *See, e.g.*, EDWARD D. RE, BRIEF WRITING AND ORAL ARGUMENT (6th ed. 1987); ROBERT L. STERN, APPELLATE PRACTICE IN THE UNITED STATES (2d ed. 1989); MICHAEL E. TIGAR, FEDERAL APPEALS: JURISDICTION AND PRACTICE 224–62 (1987); Roger J. Miner, *A Profession at Risk*, 21 TRIAL LAW. Q. 9 (1991).

2. *See* Roger J. Miner, *The Don'ts of Oral Argument*, LITIG., Summer 1988, at 3.

it as well. Clients generally have good sense: they will not stand for long, rambling, convoluted sentences and ten-dollar words. Remember that rules restrict the number of pages, not the number of sentences.

5. Make certain that the brief says what you want it to say. To accomplish this, you must read and reread what you have written and ask somebody else to look it over as well. When I was a district-court judge, an appeal was taken from one of my decisions. The brief to the circuit opened this way: "This is an appeal from a decision by Judge Miner, and there are other grounds for reversal as well." I don't think counsel intended to say that. (Maybe they did.) Be careful in your use of language, avoid redundancy, and justify the relief you seek.

6. Eliminate adverbs such as *clearly* and *obviously*. If things are so clear or obvious, why do we still have a legal dispute on our hands?

7. Be sure that your citations are on point. Awhile back, I read two briefs that provided a study in contrasts. One included six separate points, each point written on one page. There were no citations of authority in any one of the points. The other was chock-full of citations — citations of Supreme Court cases, circuit court cases, and even some state cases. Every citation was unrelated to the case on appeal. Give some authorities in the brief, but make sure that they support your contentions. And when discussing the law, start at the point of intermediate legal difficulty. (Assume that the judge knows the basics.)

8. Bring to the court's attention pertinent authorities that have come to your attention after you filed the brief.[3] Provide and discuss supplemental citations, but don't take improper advantage of the occasion by repeating material from the brief.

3. For authority to do this, see FED. R. APP. P. 28(j).

9. Deal with authority that contradicts, or seems to contradict, your position. First of all, an attorney is obliged to bring to the court's attention any pertinent authority, even, or especially, contradictory authority. An effective brief will seek to distinguish unfavorable precedent or argue that it should be modified or overruled. Second, the court will discover the unfavorable precedent anyway, so it is in your interest to deal with it in the brief.

10. Restrict the brief to issues raised in the trial court. Often we find a well-briefed, logical argument that we cannot consider because it was not raised below. No matter how good a point is, don't include it in the brief unless it pertains to an issue properly before the appellate court.

11. Prepare the statement of facts carefully. It is a critical part of the brief. It should not be incomplete on the one hand or overlong on the other. It should cover only those facts relevant to the legal issues in the case. Some lawyers have the bad habit of presenting the facts by summarizing the testimony of each witness. We much prefer a narrative of the facts. And never misrepresent the record.

12. Choose three or four or five strong points, preface them with concise point headings, and proceed to argue how the trial court erred or did not err. Including too many points suggests that none is any good. Support your conclusions with appropriate authorities and reasoned arguments. Meet your adversary's arguments head-on, describe where you agree and where you differ, and if you are ever short on authority, say so. Weave the facts of your case into the law cited in your points, using well-constructed sentences, and you'll have the makings of a winning brief.

13. Make sure that the testimony and exhibits referred to in the brief are included in the appendix, and that you cite the appendix in the brief. There is nothing quite so frustrating as finding some reference in the brief to a piece of evidence not included in the appendix. The diligent judge must then go to the original record in our clerk's office or possibly back to the district

court clerk's office to find what he or she wants. Make the appendix easy to refer to.

14. Remember that a brief is different from most other forms of writing because its only purpose is to persuade. It isn't written to amuse or entertain or even to edify. We don't look for a prize-winning literary style in a brief. We do expect clarity, well-organized argument, and understandable sentence structure. All too often, we find rambling narratives, repetitive discussions, non sequiturs, and conclusions unsupported by law or logic.

15. Remove from the brief any long quotations of testimony or precedent. Short quotations are acceptable, but remember that we can find the full text of the precedent in the library and the full testimony in the record. I have seen page after page of quoted materials in some briefs and have thought: "What a waste of precious space!" Excessive quotation leaves little space for persuasion. Paraphrase! And woe to the excessive quoter who moves for leave to file an oversized brief! One other comment on this point — it is not necessary to use all the pages allotted to you.

16. Edit the brief with a view to excising most or all the footnotes. We are well aware of the efforts to increase the number of words in the brief by extensive footnoting. We deplore such efforts. I have a colleague who refuses to read footnotes in a brief. He has renounced footnotes in opinions as well, and each year he furnishes a report on judges who are the worst footnote offenders. The small print of footnotes doesn't fool anyone.

17. Restrain yourself from attempting to sneak something into the brief from outside the record. From time to time, a brief will draw to our attention a fact that cannot be found in the record. Opposing counsel will note the omission soon enough, but I have seen judges take counsel to task for this type of deficiency even before opposing counsel became aware of it. In either event, the credibility of a brief is seriously impaired by the inclusion of matters outside the record.

18. Structure your brief as you would desire the opinion to be structured. Judges are always interested in having some help in their jobs. You may even see your own prose surface in a decision.

19. Be truthful in exposing all the difficulties in your case. Tell us what they are and how you expect us to deal with them. Never dissemble.

20. Elicit sympathy for your cause. Don't overdo it, but don't be afraid to show how an injustice may occur if we don't decide in your client's favor. Sometimes the law requires an unjust result, but we certainly try to avoid it.

21. Develop, if possible, a central theme leading to a sensible result. This is especially important in a case of first impression. When there is no precedent, try logic. The higher the court, the less interested it is in precedent anyway.

22. Refer to parties by name or description, rather than as *appellant* or *appellee*. Doing so makes the brief easier to follow and more interesting. Moreover, a rule even requires it.[4]

23. Provide appropriate citations without cluttering the brief with duplicative authorities. Where there is one authoritative case in point, don't give six. Ban all string citations. Save the space for persuasive argument.

24. Use the reply brief to reply. Most reply briefs are worthless because they merely repeat the argument stated in the appellant's original brief. Answer the appellee's brief by specific, rather than scattershot, responses. The reply brief presents the opportunity to have the last word in a very effective way.

25. Omit irrelevances, slang, sarcasm, and personal attacks. These serve only to weaken the brief. Ad hominem attacks are particularly distasteful to appellate judges. Attacks in the brief on

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4. *See* FED. R. APP. P. 28(d).

brothers and sisters at the bar rarely bring you anything but condemnation by an appellate court. All that scorched-earth, take-no-prisoners, give-no-quarter, hardball stuff is out.[5] And never, *never* attack the trial judge!

5. *See* Roger J. Miner, *Lawyers Owe One Another*, NAT'L L.J., 19 Dec. 1988, at 23.