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APPELLATE BRIEFING: A JUDICIAL PERSPECTIVE

BY JIM REGNIER

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Effective appellate brief writing is, as is everything in the law, both a science and an art. Every practitioner knows that representing a client before an appellate court is a critical phase of advocacy. Whether your task is to preserve a judgment on appeal or to persuade the higher court that prejudicial error occurred, it is crucial that you give your client every opportunity for success.

The goal of this article is to provide both students and legal writing instructors with helpful tips on how to represent clients successfully during the appeal phase of litigation. The majority of my comments will be directed toward effective brief writing. First, I will address overall strategy considerations, followed by some technical aspects of appellate brief writing. Finally, I will focus on the persuasive aspect of the appellate brief.

I. Know Your Audience

I recall agonizing as a trial lawyer, pouring over jury lists in anticipation of an upcoming trial. As soon as the list was available, I immediately provided copies to all the lawyers and staff in our firm so that we could brainstorm and hopefully learn about the folks who were going to decide the fate of our client.

It is just as important that you know something about the judges who are going to decide your case on appeal. Where has the court been heading? What will be its approach to your case? How can you most effectively communicate your message?

- A. What are the ground rules? Each appellate court operates under rules of procedure that may cover any and all aspects of the appeal. Be familiar with them! The sheer numbers of filings are increasing in almost all courts, limiting the amount of time a judge has to work on each case. If your brief violates the court's ground rules, you have—at a minimum—created a distraction from your message and done your client a grave

disservice even before you've started to make your argument.

- B. The brief is important. The brief is your first—and perhaps your only—chance to present your client's case to the court.

II. Develop a Strategy on Appeal

We all know the importance of developing a strategy or game plan for trial. Every successful trial lawyer knows that he or she must develop a theme or strategy to guide an orderly and persuasive presentation. A new strategy must be developed on appeal because the issues generally shift from combined factual and legal issues to purely legal questions. The advocate must carefully consider the framing of the legal issues. In fact, this may be the most important step in preparing your brief. Identify one or two of your best issues and state them well. Write out a short three- or four-sentence outline of your argument.

III. Know the Rules

Before undertaking the task of composing your brief, the first step is to know and carefully read the rules of the court to which you are presenting your appeal. Without knowing the rules you can't effectively play the game. Failure to scrupulously follow the rules risks dismissal of your appeal.

I direct your attention to the following considerations:

- A. The appeal must be derived from an appealable order.
- B. Make sure the notice of appeal is properly and timely filed. If another party has filed a notice of appeal, is a cross-appeal necessary on any issues that you would like the appellate court to consider?
- C. Make sure your brief complies with rules as to length and format. Be sure to cite to the record. Pay attention to the standard of review.
- D. Follow the rules regarding ordering of the transcript on appeal.

IV. General Comments Regarding Persuasive and Effective Brief Writing

- A. Provide a short but complete procedural history of the case. Provide the reader with

an outline of where you are going. Make sure you identify the order or issue you are appealing.

- B. Initially identify the parties' role in the appeal, e.g., appellant, respondent. Then refer to the parties by name.
- C. Clearly identify the standard of review and write with the standard in mind.
- D. State the legal issues clearly and concisely in short simple sentences.
- E. Limit yourself to no more than three legal issues.
- F. Present your facts as a short story.
- G. Pay particular attention to format. Use short paragraphs, subheadings, and bullet points.
- H. Don't make personal attacks.
- I. Poor grammar, spelling, sentence structure, etc., distracts the reader. Make sure the brief is understandable. Avoid overuse of italics, changing fonts, and overuse of bold. This becomes too distracting and doesn't help the judge.
- J. Cultivate credibility. This is not only important for the pending case but also because your reputation as an attorney is at stake, particularly your reputation in the court.
- K. Keep it short. Some judges immediately look to see how long the brief is. If it is long, they read it more quickly; if it is shorter, they take more time.
- L. Provide accurate citations.
- M. Tell the court what relief you're requesting.
- N. Never incorporate by reference.
- O. Make complete legal arguments.
- P. Have a friend read your brief. If your friend can't determine what the case is about, what your argument is, and what relief you're seeking, you need to start again.

V. Appellant's Brief

You have lost the case in the trial court. Appellate judges look for any way to affirm (contrary to the belief of the trial bench). Your task is daunting. Your true goal is to grab the attention of the appellate judges and let them know that your client has been unfairly treated in the court below. A sterile, legalistic approach will not carry the day. You must, in good taste, persuade through

a combination of a legally compelling and emotional presentation. Judges are most concerned about fairness. Was the playing field level at trial or did the trial judge skew the contest by misapplying the rules?

- A. Develop a one- or two-sentence plot.
- B. In the statement of the case, provide an accurate history of what has occurred below. Don't clutter this unnecessarily with facts. You need to grab the reader's attention as quickly as possible and let him or her know what the case is about. What happened below? What area of law is involved?
- C. Identify and simplify the issues. Consider the order of presentation.
- D. Let the facts do the talking. Make your presentation people-oriented. Bring in your strategy and develop your factual presentation around your strategy.
- E. A summary of the argument may be the most important part of your brief. It requires you to state clearly and concisely why you should win this appeal. This takes time to prepare. Focus the judges' attention on the heart of your appeal.
- F. The argument should meld the facts and law. A "controlling" case is persuasive if it is factually similar.
- G. What do you want the court to do? In the conclusion, take the opportunity to again summarize your argument and tell the court why your client was unfairly treated below.

VI. Respondent's Brief

You're the winner at this stage—the good guy in the white hat. Support the trial court and don't overlook your tremendous advantage—the appellate court wants to affirm. Don't be pulled into the appellant's presentation by only responding to the appellant. Affirmatively support the trial court.

- A. Have a detailed understanding of the correct standard of review that applies to the issues presented. If the appellant has misstated the standard of review, bring this to the attention of the court. Remember, very few issues on appeal are entitled to de novo review. Quote the trial judge when appropriate.

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- B. There is no need to provide your own statement of the case so long as appellant’s statement is adequate.
 - C. Very seldom can you rely on the appellant’s statement of facts without adding to the facts and pointing out that they are incomplete.
 - D. Issues sometimes need to be restated, but don’t fail to respond to all of the appellant’s contentions.
 - E. Focus on the record.
 - F. Factual determinations made by the trier of fact are entitled to deference on appeal.
 - G. The determinative issues were properly decided by the trial court and any ancillary issues, although not correctly decided, are not determinative of the outcome.
 - H. The facts can be clearly distinguished from other precedent.

VII. Reply Brief

Generally, a reply brief must be confined to new matters raised by the respondent. If you address and rebut those new matters, your reply brief has served its purpose.

VIII. Conclusion

Effective and persuasive brief writing is the most important asset of the appellate lawyer. Judges care about the content, tone, and format of appellate briefs. The time you invest in writing and rewriting is crucial to the success of your appeal. In many courts, you will not get an opportunity to orally argue unless you persuade the court that your case is worthy of oral argument.

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