32-FEB Pa. Law. 40

Pennsylvania Lawyer
January/February, 2010

Special Writing Seminar
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20 TIPS ON HOW NOT TO WRITE AN APPELLATE BRIEF

***41** As a judge and a law clerk who have seen thousand of appellate briefs, we would like to share with you 20 tips on writing an effective appellate brief. Here they are.

1. Do not read the Rules of Appellate Procedure. Reading them might stifle your creativity. Besides, it is petty to worry about sections like the Statement of Jurisdiction or the Summary of Argument. If your case gets thrown out because you did not comply with the rules, you can always tell your client he or she is just the victim of nitpicking judges.

2. Make sure you discuss at least a dozen issues. Who knows? If you throw enough stuff against the wall, some of it might stick. Never mind what Judge Ruggiero Aldisert of the 3rd U.S. Circuit **Court** of Appeals wrote:

> I have said in open **court** that when I read an appellant's brief that contains 10 or 12 points, a presumption arises that there is no merit to any of them. I do not say that it is an irrebuttable presumption, but it is a presumption nevertheless that reduces the effectiveness of appellate advocacy. Appellate advocacy is measured by effectiveness, not loquaciousness.

3. Use all 70 pages allowed by Pa.R.A.P. 2135(a)(1). This is a corollary of Tip #2 above. Use all 70 pages, even if it is a one-issue auto accident case. Judges and law clerks like to read, even if it has nothing to do with the issues. Write pages and pages about the facts of the case, making it almost as long as the transcript, whether or not they have anything to do with the issues on appeal. That way the judges and law clerks won't have to read novels in their spare time, since they won't have any spare time.

4. Don't bother explaining what the case is about. Jump right into your legal arguments. So what if the appellate court judges were not at the trial? They have your three boxes of transcripts, don't they? Isn't that why they have law clerks, to check on the things you don't clearly articulate?

5. Retry the case in your appellate brief. Don't just tell the appellate court exactly what the trial court did wrong or the relief you are looking for. Many appellate judges once were trial judges and they may have nostalgia for the good old days. Talk about your client's "severe injuries" even if the only issue is liability. Maybe you can curry sympathy for your client and the judge will reverse the trial judge's credibility determinations and use of discretion.

6. Slant and distort the Statement of the Case. You *are* a lawyer, aren't you? Why be even-handed? You have a 50-50 chance of not being caught. Hopefully, opposing ***42** counsel will be put to sleep by your 70 pages so will not notice that you lied -- err, skewed the facts -- in your Statement of the Case. Of course, there is a chance the judge and law clerk will realize you are blowing smoke and not believe anything else you say, but most judges are dumb and won't notice, anyway.

7. Make sure that your sentences are at least 40 words long. If you forget to put a modifying clause in the same sentence as the basic idea, it might not work to modify it. Who knows what will happen if you put in a period and start a new sentence with something like, "The foregoing does not apply if ..."? Take your example from the Infernal Revenue Code. Isn't that a classic example of plain English writing?

8. Use legalese, preferably Latin or French, whenever possible. Nothing makes you seem more knowledgeable than using an obscure Latin phrase. Sprinkle your argument with "res ipsa loquitur," "a fortiori," "e pluribus unum" and other high-sounding phrases.

9. Never use a short word when a long word will also work. For example, it's never "tell," always "apprise," and never "car" or "auto," always "vehicle."

10. Make sure your paragraphs are at least one page long. It will make the reader work harder to figure out what you are saying, so he or she will spend the time to get your point.

11. Never use proper names such as "Smith" and "Jones." Always use "movant" or "appellant." Ignore Pa.R.A.P. 2131, which specifically says you should not do that. Make the judge or law clerk work to figure out to whom you are referring. Remember, if you can't convince them, confuse them.

***43 12. Never make reference to the page number in the notes of testimony or place in the record where something can be found.** Pa.R.A.P. 2132 is another rule to ignore. To get a full appreciation of the case, the judge and law clerk should plow through the whole record to find what you are referring to so they will get a good feel for the case. Moreover, if you refer to a specific page in the record, it is a lot harder to misquote something to slant it your way. Do you think anyone will check? So what if you get caught and lose all credibility by misquoting? You

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might like practicing in a different jurisdiction. Similarly, don't bother paginating the reproduced record. The **court** knows how to count. And you can always tell them that the document to which you are referring is three-eighths of an inch past the cover.

13. Do not coordinate the sections of your argument with your Statement of Questions Involved. Again, forget about Pa.R.A.P. 2119(a). Remember, it is your job to make the judge or law clerk work hard to earn his or her pay. Even better, do not bother with any headings or subheadings. It might break up the flow of your prose. Hopefully, the reader will ultimately recognize that you are talking about a different issue. And if you are the appellee, be sure you restate and reorder the questions to make it harder to figure out to what you are referring.

14. Ignore Pa.R.A.P. 2116(a) that limits the Statement of Questions Involved to two pages. Who cares if the **court** does not bother to address the questions on the extra page and says that at oral argument? It will make the crowd in the courtroom think you are being picked on. Particularly since the rule has recently extended the number of pages from one to two, it shows nobody cares how many redundant issues you raise or how long your statement is.

15. Do not worry much about citations. If you follow the other tips, the law clerk and judge will spend so much time on your case that they will not bother to check your citations. If you transpose the number of the volume or the page number in a citation, they will not bother to try and find the case on their own. Always use lengthy string cites, especially when discussing boilerplate law and standards of review. On more important issues, when you “string cite,” the **court** will never check to see that the cases do not really hold what you say they hold. It also is a waste of time to check to see if a case you cite has been overruled or modified. Likewise, ignore typos and required formatting. Do you think the judge or law clerk will notice?

16. Attach the reproduced record to the brief, even if it is well over 100 pages. The judges are sitting most of the time and can use the exercise of carrying your 400-page brief and record as well as 44 other briefs home to read to prepare for argument.

17. Do not attach the trial court opinion to the brief, no matter what Pa.R.A.P. 2111(b) says. When the appellate **court** judge goes home to prepare for argument and tries to start with the trial **court** opinion and does not find it, he or she will then totally rely on your brief and not get confused with the trial judge's reasons for his or her decision. And if you are the appellee and the appellant does not attach the brief, why should you do it? It is not your job to make the judge's life easier.

18. Do not check the certified record to make sure everything that is needed is there. When do the trial **court** clerks ever make mistakes? It is too much of a pain in the neck to go to the office of the prothonotary to check. It is possible, although not likely, that the judges will ignore the fact that important documents, like notes of testimony, are not in the record.

19. Just toss off the Summary of Argument. Why would anyone bother to read the summary when they can read your 50-page discussion of the issue? Just because the judges may have 45

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cases to review on a panel, they will be happy to read every pearl of wisdom you put forth, even if they have nothing to do with the issues in the case. Why make it easy for them to see where you are going? Likewise, never write a conclusion other than something like, "For the above reasons, your appellant prays for the relief requested."

20. Do not worry if the numbered headings are not consistent and in order. After all, would you have been bothered if we had only 19 tips instead of 20?

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Legal Writing Starts with Knowing the Rules of Procedure

Being a good legal writer and editor is as much about being a competent lawyer as it is about being a technically sound and persuasive writer. In order to avoid delays in litigation or adverse results for clients, a good legal writer must first know the procedural requirements of the document or pleading he or she is writing. Absent compliance with the rules, the author is just a writer, not a *legal* writer.

This basic but extremely important topic will be covered when the **Pennsylvania** Bar Institute presents the course Fundamentals of Civil Practice & Procedure on Feb. 4, live from Philadelphia and simulcast to Chambersburg, Erie, Greensburg, Lebanon, Mansfield, Meadville, Mill Hall, New Castle, Reading, Stroudsburg, Uniontown, West Chester and Wilkes-Barre. The course will also be presented live in Mechanicsburg on Feb. 23 and in Pittsburgh on Feb. 24.

If you are a longtime practitioner, take advantage of this opportunity to be brought up to date on the rules. If you are new to the practice of law, learn about the fundamentals you need to know in order to write competently.

For more information on these and other related seminars, visit the PBI Web Site, www.pbi.org.

Footnotes

a1 After 28 years on the trial bench and eight years on **Superior Court**, Judge **Richard** B. **Klein** retired Dec. 31 to do private mediation and arbitration with the Dispute Resolution Institute in Philadelphia. Lisa Nobile Pettit served as his deputy judicial clerk.

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