

The Ten Commandments of Writing an Effective Appellate Brief

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The First Commandment: Know Why Your Client Should Prevail

It is basic, but critical, to persuade the court that the result you seek is the right result. The court has to feel good about ruling in favor of your client. As Judge Gurfein of the Second Circuit aptly stated, “It is still the mystery of the appellate process that a result is reached in an opinion on thoroughly logical and precedential grounds while it was first approached as the right and fair thing to do.”

The statement of the case, or statement of facts, is critical in this regard. You are most likely to prevail if your properly presented statement of facts — without argument — makes the reader believe that your client should prevail. To do this, you should not set out the facts in the same way in every brief; sometimes, you may need a chronology of facts, and other times you may not.

This does not mean ignoring bad facts or slanting facts your way even though you were the losing party below. It means marshaling your facts, within the standard of review the court will be applying, in a manner that inexorably leads the reader to conclude that your client should win.

Consider the broader ramifications of a legal ruling in your client’s favor: Is the ruling good or bad as a general, jurisprudential principle? For example, if your argument is that error wasn’t preserved, you should remind the court why the preservation rule is a good rule of judicial efficiency and fairness.

Remember: The first thing the court reads should be a straightforward explanation of what the issue is and why you prevail on that issue.

The Second Commandment: Know Your Standard of Review

This is what separates appellate lawyers from trial lawyers.

If you won below, you can and should take great advantage of the standard of review. If you lost, you must evaluate your appeal in the light of the standard of review that will be applied by the appellate court.

No matter how mad you (and your client) may be about what the trial judge did, you have to focus on the standard of review.

Start by objectively and coldly deciding what issues are likely to be dispositive to prevail on appeal. Then select your best chance on appeal, bearing in mind the standard of review for the issues you are evaluating.

When you write your brief, force yourself to write within the standard of review. Do not ignore it. There is a reason why courts often affirm by simply asserting a failure to establish reversible error.

The Third Commandment: Prepare an Outline to Organize the Structure of Your Brief

Do not just start writing or cutting and pasting from the trial brief.

Prepare an outline.

This forces you to be disciplined and stay on track when you begin to write.

We often hear people say, “I can’t outline.” That tells us that they cannot think logically because logical thinking is what outlining forces you to do. Your ability to organize your written advocacy is a reflection of your ability to think logically.

Analytical writing is a lot like a flow chart. Each thought should logically flow from the last.

The outline therefore becomes your table of contents, which may be the first thing read by the appellate judges.

The outline should present your case in a logical, persuasive fashion.

Break your analysis into parts. Readability is enhanced by headings and subheadings that tell a logical story. Use your outline to make topic headings for each major point in your brief.

Headings should be explanatory in advancing your position. For example, do not say, “The court correctly granted summary judgment.” Instead, say, “There is no private right of action under the Food and Drug Act.”

Use your outline to narrow your points on appeal. Eliminate the weak points. Try to order your points from strongest to weakest. If this order does not work, rethink whether you really want to raise the weak point. Consider whether you can work it in as a fallback argument at the end of your stronger point.

The Fourth Commandment: Use a Mapping Technique

By this, we mean to tell your reader at the beginning of the brief where you are going and how you will get there. Provide a roadmap to the reader in advance through an introduction or a few opening paragraphs. Don't bury your lead point.

Remember: You are steeped in your record and your research. You know your case and all its nuances. To the reader, it is a mystery, and you don't want the reader only to realize the answer to the mystery on the last page.

Educate the reader from the start. Mapping gives an overview of where you and your reader will be going.

Your map should be a framework that will help the court solve the issue in your case and others like it. After you have laid out this framework, then you can address the arguments made by the other side. In doing so, you can refer back to the framework you have already developed, using the other side's arguments as a test of the soundness of the arguments you have advanced.

Remember: Appellate judges usually are the last generalists in the practice of law. They know something about almost everything, but few are experts in any area. Do not expect your judges to know your subject. Some education inevitably is necessary, and you need to start doing so at the start of your brief.

Also remember, the judges may not read the briefs in order. Some start with the reply brief to get a feel for the ultimate issues in the case.

The Fifth Commandment: Know Your Order of Authority

Here I am not referring to who is chief justice of the court. I'm referring to what authorities govern your analysis.

If your point on appeal rests on a statute, quote the statute first and put a copy of the statute in your appendix or attach it to your brief. That is what governs in the first instance. Case law merely provides construction of the language of the statute.

If your point on appeal rests on Florida common law, start with Florida cases. If there are no Florida cases on point, acknowledge this before discussing cases from other jurisdictions.

When discussing case law, analyze it. Don't just "string cite" cases or regurgitate what an opinion says. Explain why the cases you rely on should control the case rather than the cases your opponent (or the lower court) cites.

Explain what the issue in the case was, what the trial court ruled, and what the appellate court held — and then draw out what is important to your point. Group common themes together. Think carefully about the persuasive force of the decisions you cite as a whole.

The best type of case to rely on is a case with the result you seek. Failing that, use a case with good language that is distinguishable as to the result. If dicta is all you have, you must use it and demonstrate why reasoned, principled dicta should be followed by the court to reach the right result — i.e., your client wins!

Do not use long string cites — use your best three cases. If you cannot prevail on your best three cases, having other cases won't do you any good. And don't bury a great case in a string cite. Develop it in the text to show exactly how it applies in your case.

The Sixth Commandment: Focus on Transition

Use transitions to let the reader know you are moving to a new point.

The brief should march across the page. It won't unless your transitions are clear.

Topic sentences at the start of each paragraph should provide both transition and mapping. (A topic sentence is a sentence that sets out the meaning or main idea of the paragraph.) Headings and subheadings do so as well.

Each step should flow naturally and should not stop the reader. One exercise for determining if you have a proper transition is to jumble the pages/paragraphs of your argument without any page numbers and give them to someone to try to put them back together. If your transition is good, they will be able to do so quickly.

The Seventh Commandment: Edit

Even experienced writers cannot produce a polished product on the first draft. Editing is essential!

We cannot emphasize this enough. You must plan your time to leave ample time to edit.

When you are editing, don't fall in love with your own prose. You are not preparing a literary masterpiece — you are preparing a tool to help someone cold to the case figure out an answer to a dispute as concisely and quickly as possible. Be brutally objective about your own work.

How do you go about editing? This is something that should be done on paper, not on a computer. Print the brief out and read it, with a sharp red pencil, in the following way:

1. First, focus on the organization — the flow of the brief as a whole. Have you developed your arguments first — that is, demonstrated why you should win as opposed to what's wrong with the other side's arguments? Do the paragraphs, themes, and thoughts flow from one to the next?

Are your thoughts in sequence? Is the transition clear?

Does your central point emerge clearly and quickly? Is your logic explicit and sound? Have you considered and anticipated to the extent necessary possible counterarguments or alternatives to your arguments and framed your arguments in the light of them? Is your tone appropriate? Could you be bolder in your thesis? Or have you overstated it?

2. Look at the paragraphs next. Are they too long? Never keep a paragraph that takes up a whole page (this is one of many reasons why you cannot edit on the computer). Paragraphs should rarely be more than three to four (short) sentences. Small bites are more clearly understood and followed by the reader, especially a reader on the screen.

The general rule is to use one thought or theme in a single paragraph.

Does each paragraph have a topic sentence?

Do all paragraphs fit within the heading? Do you need more or different subheadings?

3. Then focus on each sentence — one thought to a sentence.

Use short sentences. Break long sentences in half.

Eliminate rhetoric, hyperbole, and overstatement. Avoid metaphors and hypotheticals. Be careful that any quotations are correct — it is a “little learning,” not a “little knowledge.”

Eliminate any negative references to counsel or the lower court. Don't say that counsel “falsely told” the court something. Just show why the statement is not correct. The court will decide whether it was a “blatant lie” or not.

Generally, eliminate alphabetical short-form references. They usually are going to stop most readers who are not immersed in the case.

Eliminate repetition and redundancy. If you have a sentence starting “in other words,” that is a signal of (1) redundancy and (2) lack of clarity in the prior sentence. Make the prior sentence clear.

Eliminate indented quotes if at all possible. If the quote is truly essential to make the point, explain the substance of the quote in the sentence leading into the quote, so the court will know the point you are making by using the quote.

Beware of the placement of dependent clauses within, or particularly at the end of, a sentence where it is unclear what words the clause modifies, and as a result, the sentence can be read more than one way. Do not say, “The court granted summary judgment because the causal link was not established.” That suggests you agree the causal link was not established when you really mean the court erred in finding no causal link was established. Better is: “Ruling as a matter of law that the causal link was not established, the court granted summary judgment.” The problem can sometimes be rectified by eliminating the “because” clause in the sentence altogether and making it a separate sentence or by moving the dependent clause within the sentence.

Eliminate all footnotes that are extraneous. Move them into the text if the thought is really needed, unless it is a true footnote. If they don’t fit in the text, consider whether they really are necessary.

Turn any passive tense to active tense.

4. Now focus on every word. Get rid of adjectives and adverbs. Get rid of legal jargon. Get rid of redundant words. Get rid of any overstatement. Do not overwrite. Use the simplest word, not the fanciest word. Get rid of tired clichés (“red herring”).

Is the word the right word? Judge Wisdom reminds us not to use “claims” when you mean “contends.” “While” does not mean “although.”

Is the word the strongest word to make your point? There is a big difference, for example, between whether a case “illustrates” or “establishes” a point. And between whether a particular result is “warranted” or “required.”

If you have more than three prepositions in a sentence, you probably have too many words in the sentence and need to cut some words.

5. Eliminate emphasis that has been added as you wrote.

There may be a particular point in the brief you wish to bold or underline, and it will be more notable and noticeable if there is not a lot of other emphasis throughout the brief. Overuse of emphasis dilutes and irritates. Do not “shout” at the court.

6. Test the cadence — read aloud.

This will help you detect awkward phrases and lack of flow. It also will help you proofread for errors.

The Eighth Commandment: Keep It Simple and Short

This commandment is easy to say but hard to do. But it is essential.

You are trying to persuade busy judges, not show how smart you are. Make it simple enough that a layperson would understand.

Give it to someone who (like your judge) knows nothing about the case. Use that person’s comments as a reality check. Do so early enough to have time to reorganize or otherwise revise the brief if need be.

If an intelligent person tells you he doesn’t understand something, don’t think he is stupid — fix it. It is not a debate if someone says something is not clear to him. If he doesn’t understand, the judge reading quickly, without the benefit of your knowledge, may not understand either. If a reader only understands the point with an oral explanation/background that you give, you need to add that information to the brief.

Could the court take the arguments laid out in your brief and make them the court’s opinion? After all, that is the goal: to have the court agree with your arguments and accept them as its decision.

The Ninth Commandment: Edit Again

Be self-disciplined enough to finish your draft several days before it is due.

Set the brief aside for a while. Then edit again. That way, the writing will seem fresher in your mind and not as familiar. You will catch things you missed when you were reading the brief before.

This also is a good time to make sure your brief is readable on a small screen.

Topic sentences are key here. Shorter is key here for everything — paragraphs and sentences, as well as quotes.

Then look at the brief as a whole. Does it communicate your arguments and themes in a concise, understandable way?

Is the tone proper? Is it courteous and in appropriate moderation?

Have you eliminated every nonessential word, sentence, and paragraph? Can you shorten it? You do not have to reach the page or word limit. No judge ever complained that a brief was too short.

Are there any typos or grammatical errors? Check your use of “which” and “that.” Un-split your infinitives. Spell check.

Have someone cold to the case proofread the brief.

The Tenth Commandment: Be Honest With Your Court

This is the only true commandment. The others are all suggestions.

Don't let the court be surprised and believe it was misled by you after it reads the lower court's order or the other side's brief.

Confess error below if you have to. Then explain why the error doesn't change the result you urge (that is, it was harmless error, the issue was not preserved by the other side, the law should be changed, etc.).

Disclose your bad facts. Never let the other side bring them up first.

Make sure all the facts you cite are in the record.

Disclose bad precedents. Do not let the other side bring them up first. If you cannot effectively distinguish or otherwise address bad case law, it is better to rethink whether you want to raise the issue.

It goes without saying, but we will say it anyway: Never, never, never misrepresent the record or the law.

Additional Suggestions for Brief Writing for Today's Judiciary

We believe these appellate writing tips remain effective today. But the times and courts are changing, and some additional thoughts may be helpful for today's appellate lawyer. For example:

1. Keep up with new briefing practices, such as the shorter “cleaned up” signal in your citations. That does not mean you necessarily have to use the “word *de jour*.”
 2. Keep up with new proofreading techniques in our computer era. See attached bibliography.
 3. Be wary, at least in certain courts, of only citing old precedents. Your court may be perfectly willing not to apply *stare decisis* and to change the law in your case. Was a change in the law sought below? If not, say no.
 4. Write with a nod to the new judiciary. If you have a statutory interpretation question, try to support your view with citations to Scalia & Garner (*Reading Law*) or, better yet, to controlling decisions citing Scalia & Garner.
 5. Read and make use of the typographical tips suggested by Matthew Butterick in *Typography for Lawyers*. Appearance never will take the place of the substance of the brief, but the way a brief looks does matter, especially if the brief looks polished and easy to read. As he explains, “Good typography can help the reader devote less attention to the mechanics of reading and more attention to your message.” Read this admirable book and make the tips you like a habit.
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Sylvia Walbolt is a past president of the American Academy of Appellate Lawyers, as well as a fellow of the American College of Trial Lawyers and chair of Carlton Fields' Appellate and Trial Support Practice. Matt Allen is a shareholder at Carlton Fields and chair of its national Class Actions Practice. They have "borrowed" generously from the writings of other members of the firm, as well as from Judge John Minor Wisdom, Judge John Godbold, and others. "To quote from one source is plagiarism, to quote from several is scholarship." Martin Edwards, "The Coffin Trail" (2004).

Authored By



Sylvia H. Walbolt



D. Matthew Allen

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