CARLTON FIELDS

Three Ways to Annoy an Appellate Court Clerk – and Jeopardize Your Appeal

October 31, 2018

Appellate advocates should write briefs that make life easier for law clerks and judges. That will increase their chances of prevailing on appeal. With that in mind, we recently conducted an informal survey of our firm's former appellate clerks. We asked them to name their greatest pet peeves regarding the briefs they reviewed during their clerkships. Here's what they told us.

1. Bad or Lazy Citations — to the Record or to Cases

The No. 1 pet peeve related to record citations. A clerk must be able to assure the court that there is record support for factual statements in a party's brief. Our former clerks frequently found that even though a record citation was included to a factual proposition, they could not find that proposition when they reviewed the cited page. A cite to the record that was even a few pages off frustrated them, wasting their time searching for it.

Sometimes, moreover, it was unclear whether any record page supported the lawyer's proposition. In these cases, the clerk might decline to try to divine what the lawyer had in mind, leaving the statement without record support from the court's perspective. Our former clerks also hated seeing a record cite to an entire document or long provision when the relevant proposition only appeared on a single page within the cited range. That forced the clerk to do the lawyer's work and hunt through the whole span of pages.

Bad or lazy case citation was a close second on our former clerks' lists of pet peeves. A clerk expects to find the cited proposition when she reads the case. By the same token, when a case is cited as "controlling" precedent, it should actually be controlling in the case at issue. Too often, our clerks found lawyers ignored an exception to the holding or some aspect of the cited case that made it inapplicable or at least not controlling.

Be punctilious about providing precise record citations for precise points. Do not say a case "holds" something that is actually only dicta.

2. Unhelpful statements of fact.

The survey responses of our former courts created bookends for persuasive statements of fact. On the one hand, they urged lawyers to be mindful that appellate judges are not only generalists, but also new to the case, hence, they do not know it nearly as well as the lawyers do. Consequently, lawyers should provide the salient facts needed to put the appellate arguments that will follow in context. Appellate judges "are not like pigs, hunting for truffles buried in briefs." *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991).

On the other hand, our former clerks hated rambling statements that recited myriad facts, whether relevant to the discrete issues on appeal or not. Especially irksome was a statement of facts by an appellee that managed to be both repetitive of the statement in the initial brief and full of irrelevant facts as well.

To guard against these failings, be overinclusive of facts in your first draft, and then rigorously edit them once you have written the legal argument.

3. Unnecessarily long briefs.

Many of our former clerks had become so inured to the problem of lengthy briefs that they did not even name it as a pet peeve. At the same time, they noted that many 50-page briefs appeared to be that length just because that was the permissible page limit. This was obvious in situations where even minimal editing would have eliminated much unnecessary fat.

Law clerks (and judges) do not award brownie points for using as many pages (or words) as the rules permit. Just the opposite. Briefs that make points succinctly and then stop are the most persuasive. You will help law clerks, judges, and your client by doing a final edit that assumes the draft exceeds the given word or page limit and shortens the brief accordingly.

Authored By

Sylvia H. Walbolt

Related Practices

Appellate & Trial Support