

Brief Writing in an Age of Virtual Oral Appellate Arguments

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No matter how good the technology is, a virtual appellate oral argument is different from a live one. No matter how good an oral advocate you are, your virtual argument likely will not be quite as effective as a live one. But even with a live presentation in a real courtroom, conventional wisdom has long been that appellate oral arguments rarely change the judges' minds. Usually, they have already decided the case on the briefs alone.

So as important as the written briefs always have been on appeal, they likely will be even more important in today's world. Some basic reminders about effective brief writing tips accordingly appear in order, regardless of how experienced an advocate you are.

1. Fewer points are better.

Appellate lawyers always have been advised to limit the number of points they raise in their briefs. If your first point or two is not going to get you home, it is unlikely that your fifth or sixth point is going to carry the day. That is especially apt advice today.

Among other things, questioning by judges at a virtual oral argument appears to be more problematic than at a live argument. Panels tend to allow the advocates to talk for a few minutes before questions begin to come. That limits even more than usual the number of questions that can be asked. The result is that we are seeing that only one or two points in a brief get covered at oral argument.

Moreover, without the visual cues available when you are at the lectern right across from the judges, it is more difficult to know when to move on from one point to another. If you leave a point while the court is still grappling with it, you may lose it altogether.

Consequently, the need to focus in your briefs on your very best ground(s) is even more critical today than ever.

2. Keep it simple.

The simpler your written argument is, with hyperbole and rhetoric rigorously edited out, the more persuasive it will be from the very outset. This also will eliminate the need for judges to use your precious short minutes for oral argument to force you to clarify statements in your briefs that should have been made clear in the briefs themselves. You want the light bulb to go on in the judges' heads when they read the briefs in the first place. In a virtual oral argument, there may not be an opportunity to make that happen for the judges.

The importance of making your key points for the judges absolutely clear to them in your briefs cannot be overstated. They need to get those points no matter how fast they read your briefs. You can use your headings to make those points so that even your table of contents reinforces them.

3. State your argument early on in a nutshell.

In this virtual world, it is even more important that you succinctly, but clearly, set your argument out for the judges at the earliest possible point in the brief. Make it easy for the judges to understand your argument and why it should be accepted by the court. Make sure the facts of your case will be read in the context of your legal argument.

4. Take advantage of good visual aids in your briefs.

Sometimes a picture truly is better than 1,000 words. Likewise, incorporating the actual language of key documents or charts of critical facts or timelines can speak volumes in the briefs, before you even begin to talk at the end of an oral argument. Then, when you do begin to talk, you can direct the court to those pages of your brief without the time and delay incurred in showing this on a “shared screen.”

Make sure you provide such quoted material in “chunks.” A full-page quote is harder for the judge to absorb than breaking it up, with a clear transition from thought to thought, and eliminating verbiage where possible. Here, again, less usually is more.

5. Don't cheat on your font or spacing.

Many lawyers try to cram more into their briefs by their font or spacing, or the use of numerous footnotes and long paragraphs. Reading briefs on computer screens strains the eyes enough. Using a larger font with spacious spacing and few, if any, footnotes will make your brief more readable. Edit it to have short paragraphs and short sentences. This will help focus the judge on the key points you want the judge to get.

6. Give careful thought to whether you need to anticipate and address problems within your arguments.

This always has been one of the trickiest strategic judgments facing appellate advocates in the brief writing stage. It is even more so today, given the inherent limitations of virtual oral arguments. If you do not address problems in your position in the briefs themselves, you may not be able to address them adequately at the oral argument.

This usually is an easy call if your opponent or the trial judge raised the problems below. Then you almost certainly must address them in order to advance your argument credibly on appeal. It is a harder call if no one spotted the problems at the trial court level or if the problems arise, for example, from the relief that was granted or always existed but the other side never picked up on them. The other side may now do so on appeal, or the appellate judges themselves may do so on their own, perhaps getting to the right answer themselves, but maybe not.

In that event, you may be thrown on the defensive at the oral argument, and you may have lost your best chance to deal with the problems credibly and persuasively. So don't just assume that no one will pick up on some hole in your argument. Think about how likely it is to be spotted and thus needs to be addressed head-on in your briefs. Which leads to point seven.

7. Have your draft briefs read by someone with cold eyes to the case.

You may be a highly experienced appellate lawyer, but as the old curmudgeon candidly once exclaimed: "I never read a brief I couldn't have improved with editing and I never wrote a brief that couldn't have been improved by someone else editing it." So true.

You, your trial counsel, and your client are reading the draft briefs with considerable knowledge about the case and perhaps legal or industry expertise the judges do not have. Someone reading the drafts cold to the case, as the judges will do, almost always will have questions that, if fixed in the briefs themselves, will result in a stronger, more effective oral argument.

It is common practice to have mock arguments before judges cold to the case. But having a mock judge read and critique the briefs before they are filed almost always will allow you to clear away confusion in the first place, to answer persuasively questions before they are asked by the judges at the oral argument, and to abandon weak points in your argument. Doing so always improves the brief. That always leads to a stronger oral argument.

These are good brief writing practices even if a live oral argument will be held. They are essential, however, if the argument will not be a live courtroom argument. Try them in your next brief!

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