

## The Ten Commandments of Writing An Effective Appellate Brief

Sylvia H. Walbolt and D. Matthew Allen<sup>1</sup>

### 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. Judge Gurfein (2<sup>nd</sup> Cir.): “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 Case and Facts is critical in this regard. You are most likely to prevail if your properly presented statement of the facts -- without argument -- makes the reader believe that your client should prevail. In order 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, 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.

Even, 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.

Consider the broader ramifications of a legal ruling in your client's favor: Is the ruling good or bad as a general, jurisprudential principle?

Remember – the first thing the court reads should be what the issue is and why you prevail on that issue.

---

<sup>1</sup> Sylvia Walbolt is the chair of the Carlton Fields Appellate Practice Group. She is a past President of the American Academy of Appellate Lawyers, as well as a Fellow of the American College of Trial Lawyers. Matt Allen is a shareholder of Carlton Fields and chairs its Associate Training Committee. They have “borrowed” generously from 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, Poisoned Pen Press (2004) at p. 19.

## The Second Commandment: Know Your Standard of Review

This is what separates appellate lawyers from trial lawyers.

If you won below, you can 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] are 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 in order 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, asserting harmless 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 thinking logically is what outlining forces you to do. Your ability to organize your writing 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 becomes your table of contents, which may be the first thing read by the appellate court.

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

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

Headings should be “argumentative” and explanatory. For example, do not say, “The Court correctly granted summary judgment.” Instead, say: “There is no private right of action under the Food & 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, re-think whether you really want to raise the weak point. Consider whether you can work it in as a fall-back argument at end of your stronger point.

#### The Fourth Commandment: Use a Mapping Technique

By this we mean 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 opening paragraphs. Don’t bury your lead point.

Remember: you are steeped in your record and your research. You know your case. To the reader, it is a mystery, and you don’t want the reader to only 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 are going.

Your map should be a framework that will help the court solve the problem 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 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 is inevitably 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 what the case is about.

#### 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 governs 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 attached to your brief. That is what

governs. 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, 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 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 result. The worst type of case to cite is dicta – although if it 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.

### The Sixth Commandment: Focus on Transition

Use transition 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 sentence 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 sub-headings do so as well.

Each step should flow naturally and should not stop the reader. One exercise for determining if you have 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 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 argument. Do the paragraphs, themes, and thoughts flow from one to 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 counter arguments 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 never, well hardly ever, be more than 3-4 (short) sentences. Small bites are more clearly understood and followed.

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

Does each paragraph have a topic sentence?

Do all paragraphs fit within the heading? Do you need more or different sub-headings?

- 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 correct. The court will know whether it was a blatant lie or not.

Eliminate alphabetical short forms.

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 really 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 trying to make 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 are agreeing 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 eliminated by eliminating the “because” or by moving the dependent clause within the sentence.

Eliminate all footnotes that are extraneous. Move them into text, if the thought is really needed, unless it is a true footnote.

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.

If you have more than three prepositions in a sentence, you probably have too many words in the sentence and need to 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 noticed 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. That will help you detect awkward phrases and lack of flow.

### The Eighth Commandment: Keep It Simple And as Short as Possible.

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

You are trying to persuade, not show how smart you are. Make it simple enough that a lay person 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 tell 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 into 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 more fresh in your mind and not as familiar. You will catch things you missed as you were reading the brief over before.

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 cut away every nonessential word, sentence, paragraph? Can you shorten? You do not have to use all the pages you are allowed. No judge ever complained that the brief was too short.

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

Have someone cold to the case proof read 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, the law should be changed, etc.).

Disclose your bad facts (preferably in the middle). 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 re-think 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.

## Selected Bibliography

John Minor Wisdom, *Wisdom's Idiosyncrasies*, 109 *Yale Law Journal* 1273 (April 2000).

John C. Godbold, *Twenty Pages and Twenty Minutes – Effective Advocacy on Appeal*, 30 *SW LJ* 801 (1976).

Mark Herrmann, *How to Write: A Memorandum From A Curmudgeon*, *ABA Litigation Magazine*, 24 No. 1 *Litigation* 3 (1997).

Appellate Practice Manual, ABA Section of Litigation (1992).

Stephen V. Armstrong and Timothy P. Terrell, Thinking Like a Writer: A Lawyer's Guide to Effective Writing and Editing. (Clark Boardman Callaghan 1992).

Tom Goldstein and Jethro K. Lieberman, The Lawyer's Guide to Writing Well, (University of California Press 1989).

Philip V. Padovano, Florida Appellate Practice (West 1988).

Judge Ruggero "Rick" J. Aldisert, Winning on Appeal: Better Briefs and Oral Argument, (Clark Boardman Callaghan 1993).

The Bluebook: A Uniform System of Citation – 15<sup>th</sup> Ed.

William Strunk, Jr., and E.B. White, The Elements of Style (Macmillan, 3d rev. ed., 1981).