CARLTON FIELDS

8 Questions Clients Must Ask About Draft Briefs to Help Win Appeals

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Clients should not be cheerleaders when they review drafts of appellate briefs. They should take steps to make the brief more effective from the judges' viewpoint. Asking the following questions as they review their lawyers' drafts is a good start to helping win the appeal.

1. **Is the brief front-loaded for the judges?**

   Does the very beginning of the brief give the court the argument in a nutshell – through an "Introduction" or the like – so the facts that follow provide the foundation and context for the legal arguments? The judges should be substantively engaged from the very start of the brief. Don't make them wade through boilerplate and identification of parties and claims before they get to the meat of the arguments.

   If an argument rests on a statute, regulation, or contract provision, it should be set forth before the facts. Then, the judges will understand the relationship of the recited facts to the issue to be resolved, rather than thinking "so what" as they read them.

   The nature of the requested relief also should be clear from the outset of the brief. The court has to know that in order to properly evaluate the facts and arguments.

2. **How can the brief be shortened?**

   Ask this question even if the draft is within the required page or word limits. Shorter always is better. Rigorous editing can make the brief stronger just by making it more concise and direct.

   In particular, watch for repetition: "In other words," Judge, in case you didn't get it the first time (stupid), here it is again stated even more simply. Instead of repeating the point, the point needs to be stated as simply as possible the first time. Saying the same thing twice irks rather than persuades.

3. **Has important case law been buried in string cites?**

   Pay particular attention to cases cited with nothing more than a cursory parenthetical. That may be okay for a boilerplate proposition, but it is not effective advocacy if the case is controlling on a significant point or otherwise constitutes persuasive authority on the appellate issue.

   Make sure the court will appreciate that the cited decision is important to the argument. That usually can be done in one or two short paragraphs, with a good, pithy quote (see next question). Only then should other cases be grouped as a string cite. And, that string cite need not be lengthy. If you cannot prevail with your best three cases, a couple more won't get you home.

4. **Have good quotes been maximized?**

   It is so easy to paste a quote from a case (or statute or contract) into the brief that often the writer forgets to consider readability. Sometimes what could be a powerful quote loses its punch because there is no lead-in to alert the court to the force and effect of the quote as applied to the case before it. Sometimes the quote is just too long to absorb and so the judges' eyes will skip over it. Cutting the quote into pieces, with lead-in sentences, can make it more effective.

5. **Is there hyperbole or emphasis supplied that needs to be deleted?**

   Even the best lawyers sometimes lapse into hyperbole or excessive bolding and italicizing. It makes them feel better and often they think their clients will see that as forceful advocacy.

   It is not. Just the opposite. Insist it be eliminated.

6. **Are the arguments faithful to the standard of review?**

   Whether the standard of review is your friend (as appellee) or your foe (as appellant), it is what it is and the court will see it as gospel. The appellate brief must be crafted to accommodate the standard of review. Do not assume the court will ignore it based on the strength of your arguments. Deal with it.

7. **Has the draft brief stood the test of cold eyes?**

   Even if the draft has been reviewed by numerous persons, has it been reviewed by someone completely cold to the case? That person will not be invested in the case and will read the draft more like the judges will do.

   This “cold eyes” review need not take long. Its purpose is not to re-do the brief or the underlying research. It is to point out things that are not clear to someone new to the case and to raise questions that are not answered in the draft. It is to assure that the brief is both readable and effective for the other sets of cold eyes that will read the brief.

   Mock oral arguments before persons cold to the case frequently are held just prior to the actual argument. But the briefs have been filed by that time. Their comments and questions about the arguments could have been used in the first instance to make the briefs more effective. Once the briefs are filed, however, those matters may have to take up scarce oral argument time. Or worse, they won’t get addressed at all if the appeal is resolved without oral argument.

8. **Are those footnotes necessary?**

   Footnotes are distracting and often are ignored altogether, especially by judges and law clerks reading the brief on a screen. If the court truly needs to appreciate the point, move it to text. If not, the rule of thumb should be to delete the footnote.

   Ask these hard questions as you review the drafts of briefs. This will help you win appeals.