

# A Judge Lays Down the Law on Writing Appellate Briefs

By Raymond M. Kethledge

**W**hen I read a brief, the first thing I'm judging is the person who wrote it. How careful is this lawyer? How competent? How candid? The answers to these questions will enhance or diminish the force of the lawyer's arguments. For in judging, as in other areas of life, it makes sense to consider the source.

Every seven weeks, as I prepare for my next sitting, I read a stack of briefs perhaps three feet high. I read them not merely from a sense of duty, but also because I have a problem: I need to figure out the right answer for each case. A lawyer who makes an impression as credible, competent, and civil is one whose thoughts I'll take seriously as I work my way through a case. What follows is one judge's perspective on how to make that impression in your brief.

## CREDIBILITY

**Address your most difficult issues head-on.** I once asked Justice Anthony Kennedy: If you could give a young lawyer a single piece of advice, what would it be? Without missing a beat, he answered: "Level with the court."

Justice Kennedy's point was not simply ethical. Cases that are totally one-sided usually don't make it to the court of appeals. In cases that do, almost all parties—plaintiffs or defendants, appellants or appellees—have some weakness in their position, some point they'd

rather not discuss but would be foolish not to. And that was precisely Justice Kennedy's point. If your position has a weakness, the chances that three or more judges, and each of their law clerks, will all overlook that weakness are exceedingly slim. The smart move, and the one that will enhance your credibility with the court, is to acknowledge the weakness—directly, candidly, without spin—and then explain why you should prevail anyway.

**Make your brief flawless in form.** A lawyer who is careless about typos or formatting is usually careless about substance as well. Filing a brief with these mistakes is like walking up to the podium with stains on your shirt. The court will be reluctant to trust your judgment. Conversely, a flawless brief enhances your credibility as a professional.

**Avoid overstatement.** This rule is one that most lawyers purport to agree with but keep violating anyway. The reason is understandable: As people make arguments, they often become passionate about them and thus make them in stronger terms. But with every extreme modifier in a brief, the lawyer's credibility is increasingly jeopardized. A brief littered with "clearly" is one whose reliability most judges will discount. One way to avoid this tendency is to edit your brief a week or so after you've written it, when your passions have cooled. But lawyers often don't have that kind of time. A simpler approach—if you have

the discipline to follow it—is to avoid extreme modifiers altogether. Words such as “certainly,” “obviously” (which tends to impugn your opponent’s intelligence), and “beyond all peradventure” (which is awful writing to boot) have little place in a brief. The same is true for the most overused extreme modifier of all: “clearly.” Use this word only if you need to when reciting or applying your standard of review (e.g., “the district court’s finding was clearly erroneous”). Modifiers such as these not only diminish your credibility and make you sound like a blowhard, they also set the bar higher than necessary for the court to agree with your argument. You only need to convince the court that your argument is correct—not that it is “clearly” so.

existence from her for more than seven months after that date. In another case, a major corporation argued that we should disregard the undisputed plain meaning of its contract with an insurance company and instead apply an equitable doctrine reserved for individual claims in uninsured-motorist cases. Lawyers who make these kinds of arguments only damage their credibility and make it easy for opposing counsel to enhance their own.

#### COMPETENCE

**Take writing seriously as a craft in its own right.** Most legal writing is bad writing, so to encounter a superbly written brief makes the judge nearly overflow with gratitude. To any competent

in your brief—rather than excerpt them into your own prose. Finally, if (apart from this exception) you think for some reason that you simply must use a block quote, be sure to use a lead-in that indicates why this block quote is actually worth reading (e.g., “Holmes put it best: . . .”).

**Avoid acronyms.** Reading a brief should not be a short-term memory test, and just because “UMTRI” is defined on page three of a brief does not mean that a judge will remember what it means on page nine. Nor do most judges have the time or patience to be flipping back and forth through briefs to figure out what a bunch of acronyms mean. Indeed, some courts—notably the D.C. Circuit—have rules barring the use of most acronyms. The basic rule here is simple: *Don’t use an acronym whose meaning the reader does not already know.* Thus, FBI, EPA, and NATO are fine—you don’t even need to define them—but “USFS” (for “United States Forest Service”) is not. Just say “the Service” instead. In like fashion, you usually can use just a word or two from the entity’s formal name—“the Commission,” “the University,” “the Institute” (rather than UMTRI)—to refer to the entity. As with all writing, the touchstone is common sense: Will the reader readily grasp your meaning, or not? If the answer is yes, don’t worry about whether your approach differs from that of other legal writers.

**Avoid repetition.** Sometimes it’s important to inculcate a critical point in your brief, and thus you need to make it more than once. But avoid repeating yourself verbatim, which only encourages the reader to start skimming your brief—and if they start skimming, they might not stop.

**Minimize boilerplate.** Include only the boilerplate that you’ll actually use in your analysis. Thus, if your case comes to the court on summary judgment, and the issue is strictly one of statutory interpretation, there is no reason to say anything about the quantum of evidence necessary to create a genuine issue of material fact. Likewise, if your case involves the application of a seven-factor test, and everyone agrees that only one factor governs the outcome in your

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**Carefully choose your questions presented.** I once began an opinion with the line, “When a party comes to us with nine grounds for reversing the district court, that usually means there are none.” Think twice about arguing more than three grounds of error on appeal. True, cases of epic scope and complexity might fairly present six or more questions on appeal. But there are few such cases. And a brief that wastes the court’s time with junk-drawer issues is usually regarded itself as junk.

**Be reasonable.** This point is related to the last one. Avoid tendentious arguments in support of your position. Once, in an immigration case, the government argued that the immigrant’s petition was untimely because she had filed it more than 30 days after the date of the order she challenged—even though the government had concealed the order’s

appellate advocate, William Strunk Jr. and E.B. White’s *The Elements of Style* and Bryan A. Garner’s *The Elements of Legal Style* should be old friends. Even Judge Frank H. Easterbrook—indisputably one of the finest writers in the entire federal judiciary—re-reads these books once a year. That means the rest of us should be re-reading them at least that often. I would also add George Orwell’s essay “Politics and the English Language” to this list.

**Avoid block quotes.** Judges usually don’t read block quotes. It’s a learned behavior: Most block quotes are filled with more chaff than wheat, which the writer is too lazy to separate. There is, however, an important exception to this rule: If your case requires the court to interpret sections of a statute, regulation, or contract, you should block-quote these sections—preferably early

case, there is typically no need to recite the other factors.

**Treat your summary of argument like the precious asset it is.** The summary of argument is the most important section of your brief, and the summary's first sentence is the most important sentence in the brief. Don't waste that sentence by telling me that "[t]his is a breach of contract case in which the district court granted summary judgment to the defendant." I already know that by the time I open the brief. Instead, think of one point, above all, that you want the court to remember from your brief—and then put it in that first sentence. The sentence should be thematic, expressing an original thought that transcends the particular doctrines at issue. Two examples:

- In a case where one lawyer followed the district court's rulings during trial and the other violated them throughout: "This case was tried according to two sets of rules."
- In a case where the prosecution sought and obtained admission of evidence that warranted reversal of the defendant's conviction on

appeal: "Sometimes the prosecution should be careful what it asks for."

Finally, write your summary of argument (or any introduction) last, when your mastery of the material is greatest. By then, you're likely to have distilled an original thought or two about your position.

### CIVILITY

One of the most foolish things a lawyer can do in a brief is to attack the integrity or competence of opposing counsel. (A brief in support of a sanctions motion is an exception, but even then, use some decorum.) Reading a brief filled with *ad hominem* attacks is like listening to my kids fight, except that I have to wait until we're in the courtroom to tell the attacking lawyer what I think about it. Judges are interested in the merits of your case, not in personal attacks on opposing counsel. Lawyers who write that opposing counsel has "shamelessly misrepresented" the holding of a case, or that an opponent's argument is "ridiculous"—to cite two examples from my own cases—often come to rue these words before the court is done with the case. Even if the other lawyer has acted badly, the better practice

is to lay out the relevant facts and let the court reach its own conclusions. Finally, if another lawyer directs this sort of attack at you, don't respond in kind. Instead view the situation as an opportunity. One of the most admirable pieces of advocacy I've seen as a judge came from the lawyer who was the target of the "shamelessly misrepresented" line. In a footnote on the opening page of his reply brief, the lawyer simply recited the worst things the other lawyer had written about him, and then stated that, "in the interests of professionalism," he would not respond to these things, but that he "wished to note his disagreement with them." In that exchange, the targeted lawyer came out far ahead.

### CONCLUSION

Every brief provides its author with the opportunity to make an impression as a lawyer worth listening to. A brief that is measured, careful, and professional will make that impression for you. ■

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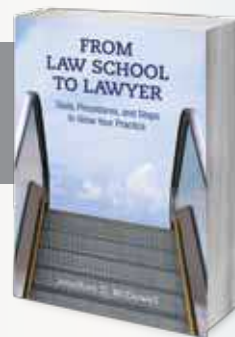
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