

**AN APPELLATE JUDGE'S SUGGESTED DOS AND DON'TS
FOR APPELLATE LAWYERS**

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At the invitation of the Appellate Lawyers Association, I gave a presentation on what the appellate court looks for in briefs and oral arguments. This article is taken from that presentation. I wish to emphasize, as I did in that presentation, that the views expressed in this article might best be described as "purely personal prejudices." While I think my colleagues on the Fourth District Appellate Court would be in agreement with most, if not all, of these views, I do not claim to be speaking on behalf of anyone other than myself.

I. SOME GENERAL TIPS ON BRIEF WRITING

As appellate lawyers begin the preparation of their brief, they should keep in mind the following general points:

1) Who is your audience?

To be truly effective, writing which is supposed to persuade a particular audience ought to be written with that audience in mind. In the Fourth District Appellate Court, your audience is composed of any three of seven experienced judges, who also have lengthy experience as trial court judges or lawyers. You should concern yourself with how *this* audience will respond to what you write; you should not concern yourself with how your client, opposing counsel, your colleagues, or anyone else may respond. If portions of your brief were written to appeal or assuage any of these other persons, those portions may interfere with the message you wish to convey to the audience that matters.

2) Where is your brief being read?

I do much of my brief reading at home, where my law library beyond a few volumes of recent Illinois cases, is non-existent. Accordingly, your brief should be written so that I do not need a complete law library in order to follow some point you are trying to make. In other words, if you are going to use the Restatement of Torts, *don't merely refer to it*; instead, *quote* those portions of it which are relevant to an understanding of your argument.

3) How much time and attention is your brief going to be given?

The quick answer to that question is, "No more than it deserves." The longer answer is to point out that in a given year, appellate judges read hundreds of briefs and hundreds of draft dispositions being circulated within the court. The burdens of the job require that the briefs we read be succinct and well organized if they are to hold our attention and be effective. As you prepare your brief, do so as if you are hearing the appellate court muttering over your shoulder, "Get to the point!"

4) What presumptions, if any, are the appellate judges operating under as they read your brief?

Speaking again only for myself, in every appeal I consider, I always presume that the trial court was correct in its rulings. This in no way suggests that I will not reverse rulings I find to be erroneous; it simply means that the appellant *must show me* where and how those rulings are erroneous. In the absence of that showing, those rulings will be affirmed. Furthermore, this presumption applies no matter the nature of the case nor the identity of the particular appellant.

5) Are the appellate courts concerned about "Doing Justice?"

While we appellate judges like to think we are "doing justice," our decisions nonetheless are almost always based upon technical analyses of questions of law. Therefore, your briefs should be, too.

II. DOS FOR BRIEF WRITING

- Strive to be technically correct under Supreme Court Rules in the preparation of your brief, setting a tone of professionalism and competence that, you hope, will carry through the substance of the brief, as well.

- Make sure your citations are complete. You do not know where your brief is going to be read or which authorities will be available at the moment to your reader.

- In the Statement of Facts, "Tell me a story." State only those facts necessary to give the reader a general overview of what the case is about. Do so by relating the most salient facts in a method that would grab the court's attention. View that description as what you would say to a lawyer friend you happened to meet on an elevator. Your friend asks, "Working on any interesting cases lately?" As the elevator doors close, you tell him "Yes," and begin your description of the case, ending as you reach the 40th floor. As an appellate judge, that's the kind of story I want to learn from your Statement of Facts. Keep in mind that additional factual details necessary to put a particular legal argument in context are always welcome in the argument section of the brief.

- When testimony is critical, quote it in the Statement of Facts. With regret, I inform appellate lawyers that we appellate judges have learned that the representations lawyers make in their Statement of Facts cannot be relied upon when the precise wording of a question or answer is critical. Accordingly, if you wish to impress me with testimony on some critical point, quote it and be sure to include a specific reference to the transcript wherein it appears.

- Present your argument in a carefully outlined manner, breaking it down into separate integral parts where possible. If you are the appellee, try to respond to the appellant's arguments by using the same outline used in the appellant's brief. I always read all the briefs in a given case at one sitting. Sometimes, when I read argument II.C. of an appellant's brief and find it particularly compelling, I immediately pick up the appellee's brief, expecting to find a section

II.C. therein in which appellee's response to appellant's compelling argument can be found. If appellee's brief is organized differently than appellant's, I may not be able to find appellee's response, thereby leaving appellee at a serious tactical disadvantage.

- Headings for the argument section should be short, declarative sentences when possible.

- Even though the Appellate Court is already supposed to know the standard of review applicable to your case, it is still a good idea early in your brief, to explicitly state that standard and to provide appropriate citations therefor. Note that Supreme Court Rule 341 also requires you to do so.

- As an appellant, you should lead with your best argument, and except in unusual cases, argue for reversal on, at most, a handful of grounds. Multiple claimed grounds for reversible error causes appellate judges to be skeptical that any of the grounds have validity.

- Describe the terrible consequences (which may at first go unnoticed) which are sure to result if your opponent's argument on the law is accepted. Making the "slippery slope" stick to your opponent's arguments can be a very effective technique.

- In the argument portion of the brief, use the active voice when possible, and try to write clearly and precisely. When you have completed the writing and editing of your brief and are satisfied that it cannot be improved upon, ask two other people to edit it independently of each other, being vicious as they go about their tasks. Then modify your brief in accordance with their editing.

- An effective approach for appellees or appellants in reply briefs is to fairly characterize the opponent's argument on a given point and then demonstrate why the authority or reasoning cited in support of the opponent's argument is flawed.

III. DON'TS ON BRIEF WRITING

- Never, ever use footnotes. If something is important enough to mention, put it in the body of the brief. If it is not sufficiently important to be placed there, do not mention it at all.

- Do not cite every case that ever discussed the point of law at issue. Instead, cite only the most recent and authoritative cases, and, if possible, include short quotations.

- Never mischaracterize the holding of a particular case. If you are discovered (as almost certainly will be the case), the credibility of the entire brief will drop dramatically.

- Do not editorialize or become argumentative in your Statement of Facts. Such rhetoric sacrifices the tone of professionalism you should want to set.

- Do not take cheap shots at your opponent or engage in name calling. Doing so may

make you feel better, but it gets in the way of the substance of the brief and is bothersome to the reader.

- Do not ask rhetorical questions.
- Do not add weak or frivolous arguments to your brief--their presence simply diminishes the impact of the "good stuff."

IV. DO'S FOR ORAL ARGUMENT

- Make sure that shortly before oral argument you have reread all of the briefs and the key cases that counsel and the court are likely to discuss. It is always embarrassing when the court is more familiar with the facts of the case or the holding of cited authority than counsel making the argument.

- Be prepared to respond to your opponent's strongest argument or be prepared to lose.

- Listen carefully to your opponent's oral argument, particularly to questions your opponent is asked or hypotheticals the court raises. You may be asked the same question, and even if you are not, responding to that question or hypothetical when you get a chance may prove to be extraordinarily effective.

- At the beginning of your oral argument, tell the court precisely what issues you are going to discuss and in what order.

- Try to achieve eye contact with the court and engage in a conversational presentation, as if neither you nor they had anything in writing in front of you. The more you look away from the judges during your argument, the more likely you are to lose the "moment."

- Listen carefully to the questions being asked from the bench and do your best to answer them directly and completely. Always keep in mind that the questions from the bench are far more important to the ultimate outcome of your case than the oral argument you had planned to make.

- As a given question is asked from the bench, try to analyze why the judge is asking it. That question may disclose an area of your case about which the judge is concerned and where you should attempt to assuage him.

- Be sure to tell the court precisely what relief you are seeking. Keep in mind that on the Fourth District Appellate Court, we hear six separate arguments each day we sit for oral arguments. You want to make sure that we have not inadvertently confused some portion of your case, such as the relief you are seeking, with another case.

- Keep in mind that no matter how dumb a question may appear to you, it is the dumb question of someone who has a one-third vote in deciding the outcome of your case. Treat it accordingly.

V. DON'TS FOR ORAL ARGUMENT

- Never, ever read your oral argument. At most, you should have a very few notes that generally outline the areas you wish to cover in your oral argument.
- Do not expect to argue all of the issues raised in your brief. Instead, pick one or two issues, pursue them diligently, and indicate to the court your willingness to answer any questions the court may have about the issues discussed in your brief but not argued orally.
- Wherever you may be in your argument when a question comes from the bench, answer the question; never tell the judge that, "You'll get to that point in just a minute."
- Do not bring copies of cases or statutes to the podium to quote during oral argument if the material being quoted is more than 20 words in length. Even then, you should be quoting the material only because you believe the quote to be absolutely essential.
- If you are the appellant, do not waste your time with a lengthy Statement of Facts. In the Fourth District, we are already familiar with the case. Discuss the facts only to the extent necessary to put your legal arguments in context.
- If appellee, do not waste time rebutting the appellant's version of the Statement of Facts, however inaccurate it may be, except to the extent that a misstatement of fact could seriously be adverse to the court's understanding of your legal position. Even then, make the correction short and to the point.
- Do not argue to the Appellate Court as if it were a jury. None of us is likely to become inflamed, no matter how fiery your rhetoric becomes. Histrionics merely get in the way of legal analysis and cause us to suspect that your legal position may be weak.
- Never interrupt a judge's question from the bench.
- If you do not understand a question asked (which is entirely likely, given our frequently garbled syntax), just say so as courteously as you can. Do not guess as to what you have been asked and then proceed with an answer which may be of no interest to anybody.
- Do not "dance around," trying to avoid answering a difficult question from the court. It is a very ineffective tactic, which will only show up the weakness of your case.
- If you do not know the answer to a question, simply say so, no matter how embarrassing you think that may be. In fact, it may not be nearly as embarrassing as you fear.
- Avoid dividing argument time between two lawyers. Generally, that makes the overall argument less effective than it would have been had it been made by just one lawyer.

Following these suggestions does not guarantee success before the appellate court, but it does guarantee that your case will be presented as effectively and persuasively as it can.

