

The Drafting Process: The Top 5 Do's and Don'ts of Appellate Brief Writing

Guiding principles for each stage of the drafting process to assist in writing an effective appellate brief.

By Jennifer B. Zourigui

Most appeals are won or lost based on the briefs. A carefully planned, well written, and thoroughly organized brief will provide a distinct advantage on appeal. While particular nuances and precise issues can be addressed at oral argument, a clear and effective brief is your best path to victory. The overarching goal as you craft your brief should be to persuade a reader who likely has little time to read and digest your brief. You may have a strong legal argument and excellent facts on your side, but execution and delivery are key. At each stage of the drafting process consider the following principles to assist in writing an effective appellate brief.

The Preparation

Do start with a detailed outline. Always start with an outline. Use your outline to sketch the arguments and issues that will need to be addressed. This process will afford you an opportunity to not only map out the ground you will need to cover but assess strengths and weaknesses and analyze how best to organize and order your arguments to create an effective

flow. It is worth taking the time to organize a detailed outline and continue to update as you research and add details regarding case law and noteworthy quotes on which you intend to rely. This will keep you focused during the drafting process. And the headings and subheadings in your outline can ultimately form your table of contents—the first item the appellate court will read.

Don't wait until the last minute. Brief writing is a process. From outlining to researching to drafting to editing—this process will take time. Do not wait until the last minute believing it will be as simple as converting your brief from the court below into a well-crafted appellate brief. Block off time for both researching and writing. This is unlikely to be your only matter or your only task. You will need to be able to step away from the writing process and jump back in. Having a comprehensive outline and a detailed plan for the execution of each stage of the process will better allow you to complete discrete aspects of your brief and then return to it sometime thereafter to continue.

The Facts and the Law

Do know your standard of review. Always start by checking



Shutterstock

the standard of review for each issue on appeal. Many lawyers make the mistake of ignoring these key criteria and skipping right to the arguments. But the standards of review should be identified at the beginning of the process to guide your approach to each argument. You will need to consider the applicable standards of review at the outset in order properly to determine whether there are viable appeals of the issues you are considering. Thus, identifying the applicable standard of review is essential to preparing a successful strategy and will inform your approach to the arguments in your outline and, ultimately, your brief.

Don't exaggerate your position. Nothing will undermine your position quite as much as misrepresenting the facts or the law in

your brief. Do not omit key words or phrases when citing to or quoting from an authority. It will ruin your credibility when ultimately discovered by an astute judge or clerk. Likewise, do not ignore “bad” law and hope no one will find it. This is likely to backfire and leave an opportunity for your opponent to persuade the court to doubt your credibility. You also do not want to be in a position of addressing these tough issues for the first time at oral argument when your time is limited. Similarly, do not distort the facts. You should certainly tell a compelling story. Use subheadings in your facts section to provide a solid organizational structure and also provide information to catch the reader’s eye. But do so truthfully with a citation to the record for every fact stated. As with the law, misrepresenting the facts will merely damage your credibility.

The Drafting

Do be concise. Get right to the point. In each section, let the reader know from the start where you are going and why your client should win on that point. You can then go through the more detailed analysis and support but make things clear upfront by providing a roadmap of the argument. Write in plain English as much as possible, avoiding legalese. Write simply and directly, using short sentences that better allow the reader to digest the information. Avoid repetition and do not waste the reader’s time. Instead state your point clearly the first time. Consider using bullet points for clarity and emphasis when appropriate.

Don’t make arguments in footnotes. Refrain from putting legal arguments in footnotes. You may think of this as a good

space-saving measure, particularly where there are page or word limit concerns. But judges are well aware why attorneys will relegate arguments to the footnotes and do not appreciate the tactic. While quick references to a select few of your opponent’s immaterial statements or arguments may be well-deserved in several sparing footnotes, generally you will be better served addressing legal arguments in the text of your brief in a cogent and concise manner.

The Boundaries

Do follow the rules. Take the time to check the court’s rules regarding page limits, font size, and margins. And then follow them. Far too many litigators fail to read the rules, let alone follow them. Get familiar with rules before you start drafting and keep them in mind throughout the process. You do not want to be in a position of drafting and finalizing your brief only to realize you need to cut 5 pages or 500 hundred words. Don’t adjust the margins or play with the fonts and font size. There are boundaries and limits and you simply need to work within them.

Don’t impugn the court below or opposing counsel. Do not insult the court—any court. No matter how enraged or puzzled you may be by the decision of the court below, insulting the integrity or wisdom of that court is not the way to go. Yes, you may say the court below was wrong or a decision was erroneous. But do not use unnecessary adjectives such as “irrational” or “rash” or “thoughtless” to describe what the court below has done. It is unnecessary to impugn the professionalism of one member of the bench to another. So too with respect to your adversary. Resist the urge for personal

attacks. It reeks of desperation. The appellate court is there to assess the law and the facts, not referee schoolyard antics.

The Editing

Do leave ample time for editing.

When you finish your drafting, go back and cut, cut, cut! Be sure your points are clear, without extraneous verbiage or arguments. Read your brief from beginning to end and make sure the arguments and analysis flow. Rearrange if necessary and add in any missing support or citations. It is always best to put your brief down for a day and come back with a fresh eye to ensure you have not missed anything.

Don’t forget to proofread! No one wants to read a brief filled with typos, misspelling and grammatical errors. Proofread your brief and make sure it is in good shape before final submission. You are human and a sole missed typo may not raise brows, but punctuation errors, spacing issues, and repeated misspellings demonstrate a degree of laziness that you do not want to suggest to the court. If you have made the efforts outlined above, it is well worth the time to finalize the brief so that you submit it in a clean and error-free state. This will not ultimately win the day so to speak, but a poorly drafted brief with numerous errors may lead the court to wonder what else you have written in error. A well-edited and proofread brief can only raise your credibility in the eye of the reader.

Jennifer B. Zourigui is a partner at Ingram in the firm’s commercial litigation group, residing in Westchester NY.