2015

10 Tips for Effective Brief Writing

Douglas E. Abrams
University of Missouri School of Law, abramsd@missouri.edu

101

BY DOUGLAS E. ABRAMS

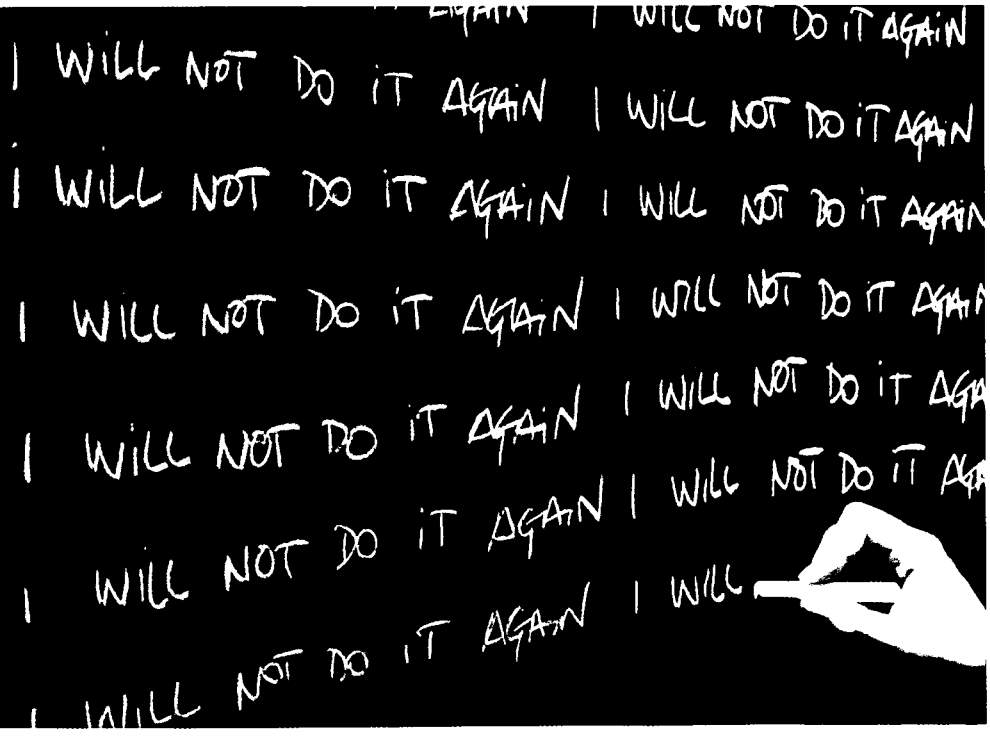
How-to content on just about any topic a legal professional needs to know

10 Tips for Effective Brief Writing

The audience is often the best critic, and rarely more so than when the writer is an attorney and the reader is a judge considering the attorney's brief in a case before the court. Here are several judges' suggestions for writing briefs that will help your case. The first tip? Leave the venom at home!

By the time Chief U.S. Bankruptcy Judge Terrence L. Michael (N.D. Okla.) considered whether to approve a compromise in *In re Gordon* in 2013, the Chapter 7 proceeding had descended into recrimination and acrimony.[1]

To support its motion to compel discovery from the bankruptcy trustee, the lawyer for creditor Commerce Bank alleged that the trustee and the United States had engaged in "a pattern ... to avoid any meaningful examination of the legal validity of the litigation plan they have concocted to bring ... a series of baseless claims."[2] "[T]hey know," the bank's lawyer wrote, "that a careful examination of the process will show the several fatal procedural flaws that will prevent these claims from being asserted."[3] "Only by sweeping these issues under the rug will the trustee be able to play his end game strategy of asserting wild claims ... in hopes of coercing Commerce Bank into a settlement (which the Trustee hopes will generate significant contingency fees for himself)."[4]



The trustee responded that the bank's lawyer had impugned his character with accusations that he had compromised his fiduciary obligations for personal gain. Judge Michael denied the trustee's motion for sanctions on procedural grounds, but criticized the lawyer's personal attack: "If Commerce and/or its counsel have evidence of ... grossly improper conduct, they have a duty to inform the United States Trustee and, possibly, the State Bar of Oklahoma. ... Such personal and vitriolic accusations have no place as part of a litigation strategy."[5]

Leave the Venom at Home

In his 15 years on the bankruptcy court bench, Judge Michael had read his share of briefs and other filings. Experience led him to write "Ten Tips for Effective Brief Writing," and to post them on the court's website to guide counsel.[6] He directed the *Gordon* parties to Tip 9, "Leave the Venom at Home."[7]

"Whether you like (or get along well with) your opposition," the tip advised, "has little to do with the merits of a particular case. The most effective attack you can make is to persuade . . . me that the other side is wrong. Remember, if you win, they lose."[8] Tip 9 concluded with an illustrative list of words not to use in brief writing: ridiculous, scurrilous, ludicrous, preposterous, blatant, self-serving, and nonsensical.[9] Seasoned advocates could add others.[10]

Tip 9 makes good sense. "It isn't necessary to say anything nasty about your adversary or to make deriding comments about the opposing brief," says Justice Ruth Bader Ginsburg. "Those are just distractions. You should aim to persuade the judge by the power of *your* reasoning and not by denigrating the opposing side.... If the other side is truly bad, the judges are smart enough to understand that; they don't need the lawyer's aid."[11]

"All advocacy involves conflict and calls for the will to win," explained New Jersey Supreme Court Chief Justice Arthur T. Vanderbilt, but advocates "must have character" marked by "certain general standards of conduct, of manners, and of expression."[12] More than 70 years ago, legendary Supreme Court advocate John W. Davis advised that "controversies between counsel impose on the court the wholly unnecessary burden and annoyance of preserving order and maintaining the decorum of its proceedings. Such things can irritate; they can never persuade."[13] The Chief Justice of the Maine Supreme Court confides that "[a]s soon as I see an attack of any kind on the other party, opposing counsel, or the trial judge, I begin to discount the merits of the argument."[14]

Another leading Supreme Court advocate concurred: "The argument *ad hominem* in a brief is always unpardonable, not simply because it is something no decently constituted brief-writer would include, but because, like all other faults, it fails of its purpose: appellate courts have a hard enough time deciding the merits of the cases presented to them without embarking on collateral inquiries as to the personality or conduct of the lawyers involved. They recoil from any attempt even to ask them to consider such matters, and are always embarrassed by the request."[15]

The rest of this article profiles the Judge Michael's other nine helpful "Tips for Effective Brief Writing." All 10 tips warrant careful consideration from lawyers who prepare submissions for trial or appellate courts.

1 Your Goal is to Persuade, Not to Argue

"Guests on the Jerry Springer show argue. Lawyers persuade," says Judge Michael. "The idea behind an effective brief is to have the audience (the judge and/or the law clerk) read the brief and say to themselves, 'why are these parties fighting over such an obvious issue?'"[16]

Judge Hugh R. Jones of the New York Court of Appeals posited the advocate's dual objectives this way: "First, you seek to persuade the court of the merit of the client's case, to create an emotional empathy for your position. Then you assist the court to reach a conclusion favorable to the client's interests in terms of the analysis of the law and the procedural posture of the case."[17]

Lawyers, judges, commentators, and court rules commonly label courtroom presentations as arguments. But neither objective defined by Judge Jones leaves much room for lawyers who argue (that is, bicker) in the lay sense of the word. Written and oral "persuasion" more accurately describes the advocate's goal.

2 Know Thy Audience

"The first thing anyone should do when they begin writing a brief," Judge Michael continued, "is find out whether the judge that will decide their case has already written on the issue. ... It is extremely frustrating ... to have counsel in either written or oral argument raise an issue and be completely ignorant of the fact that we decided that issue in a published opinion last week, last month or last year."[18]

Knowing the work product of the judge or the court is easier today than ever before thanks to court websites, Westlaw and Lexis, and similar search engines that place currency only a mouse click away. Federal and state judicial directories can help lawyers get a feel for the bench they will seek to persuade, and so can informal discussion with cooperative friends and acquaintances in the local bar.

3 Know Thy Circuit

"We are bound by published decisions of the United States Court of Appeals for the Tenth Circuit," said Judge Michael in the Northern District of Oklahoma bankruptcy court. "If they have disposed of an issue, we must follow their lead. ... I can't [ignore that disposition], even if I wanted to."[19]

First-year law students learn the distinction between binding and persuasive precedent, and the sources of that distinction in the federal and state courts' hierarchies and jurisdictional rules. "Authority based on precedent is content-independent," says Prof. Michael E. Tigar, "in the sense that the obligation to follow it does not depend upon logic or persuasiveness, but upon the authority's

Douglas E. Abrams is a law professor at the University of Missouri and is a frequent author. He has written or co-authored five books, and four U.S. Supreme Court decisions have cited his law review articles. This article previously appeared in *Precedent*, the Missouri Bar's quarterly magazine.

abramsd@missouri.edu

position as binding."[20] Speaking about his Supreme Court colleagues, Justice Robert H. Jackson explained, "We are not final because we are infallible, but we are infallible only because we are final."[21]

If the case does not appear controlled by binding precedent, or if a precedent's application to the facts remains open to reasonable question, persuasive precedent can influence the decision. Persuasive force depends on the precedent's logic and reasoning, and on its likely harmony with binding doctrine. Persuasiveness is a judgment call, first for the advocates and ultimately for the court.

4 Know the Facts of the Cases You Cite

"Real disputes are fact driven," Judge Michael wrote. "For me, the facts of a case are at least as important as the legal analysis. Be wary of the case which is factually dissimilar to yours, but has a great sound bite. Be sure ... to explain why the factually dissimilar case is applicable to your situation."[22] Judge Michael also advises lawyers to remain "cognizant of the difference between the holding of a case and the dicta contained therein. Most judges ... find little value in dicta unless we already agree with it."[23]

"Facts," said Justice Benjamin N. Cardozo, "generate the law."[24] In one of his classic essays on advocacy, Justice Jackson confided that "most contentions of law are won or lost on the facts. The facts often incline a judge to one side or the other."[25] After arguing dozens of appeals in the Supreme Court, Davis agreed: "[I]n an appellate court the statement of the facts is not merely a part of the argument, it is more often than not the argument itself."[26]

Judge E. Barrett Prettyman of the U.S. Court of Appeals for the District of Columbia Circuit said this about the perils of citing precedent without appreciating the constraints imposed by the prior decision's facts: A precedent is "authority for the decision there rendered upon the question there presented in the light of the facts there involved, and it is persuasive for the validity of the reasoning used.... Sentences out of context rarely mean what they seem to say."[27]

5 Shorter Is Better

Judge Michael recounted that "Thurgood Marshall once said that in all his years on the Supreme Court, every case came down to a single issue. If that is true, why do most briefs contain arguments covering virtually every conceivable issue (good, bad or indifferent) which could arise in the case. Weak arguments detract from the entire presentation."[28]

"I have yet to put down a brief," reports Chief Justice John G. Roberts Jr., "and say, 'I wish that had been longer.' ... Almost every brief I've read could be shorter."[29] Justice Stephen Breyer similarly says that most briefs are too long, and he urges advocates, "Don't try to put in everything."[30]

A few months before ascending to the Supreme Court bench more than 70 years ago, Judge Wiley B. Rutledge advised advocates to be "as brief as one can consistently with adequate and clear presentation of the case."[31] Supreme Court advocate John W. Davis said that the most effective briefs are "models of brevity,"[32] and he praised the "courage of exclusion"[33] because "the court may read as much or as little as it chooses."[34]

Justice Benjamin N. Cardozo warned that unduly prolix briefs threaten to distract the court because "[a]nalysis is useless if it destroys what it is intended to explain."[35] Justice Jackson advised that, "Legal contentions, like the currency, depreciate through over-issue. The mind of an appellate judge is habitually receptive to the suggestion that a lower court committed an error. But receptiveness declines as the number of assigned errors increases. ... [M]ultiplying assignments of error will dilute and weaken a good case and will not save a bad one."[36]

6 Quality Is Job One

Judge Michael turned to candor and due care. "Check your cites. Make sure they are accurate and that each case you are relying on is still good law. ... There is nothing more frustrating than being unable to find a case because the citation contained in the brief is wrong. There is nothing less persuasive than finding out that a case you have cited to us has been overruled or misquoted. These flaws weaken your entire presentation."[37]

Similar advice comes from Judge Prettyman: "Whatever else you are in your brief, be accurate. Be accurate in your references to the record. Be accurate in your references to the authorities. Be accurate in your references to statutes. Be accurate in your quotations, of whatever sort they may be."[38]

Judge John C. Godbold of the U.S. Court of Appeals for the Fifth Circuit called accuracy the advocate's "uncompromising absolute," not only because inaccuracy diminishes persuasion, but also because the lawyer's professional credibility may take an enduring hit.[39] "Judges do not always call lawyers on what they think may be purposeful misstatements," explains Prof. James W. McElhaney, "because intent is always hard to prove. But judges talk with each other – their club is a small one."[40]

7 Present the Facts of Your Case Accurately

Judge Michael warned that "[i]f you are submitting a pre-trial brief, don't allege facts that you cannot prove. As a corollary, don't forget at trial to prove up the facts you promised to prove up in your brief. If you are submitting a post-trial brief, make sure the facts are in the record."[41] "Nothing, perhaps, so detracts from the force and persuasiveness of an argument," said Justice Rutledge, "as for the lawyer to claim more than he is reasonably entitled to claim."[42]

8 Tell Me Exactly What You Want

"Every brief (and motion, for that matter)," said Judge Michael, "should conclude with a statement telling the judge exactly what you want done in the particular case. We need to know."[43]

Judge Jones advised appellate advocates

to conclude with "a succinct, precisely phrased request for the exact remedial relief that you seek,"[44] rather than "leave it to the court in the first instance to fashion the remedy."[45] "Do not simply say, 'Therefore, for the foregoing reasons, the judgment of the lower court should be affirmed (or reversed).' Almost always, you want some particular remedy within an affirmance or reversal."[46]

10 Seek Reconsideration Sparingly

The first part of this article discussed Judge Michael's Tip 9, Leave the Venom at Home. Tip 10 concerns do-overs.

"If we spend 50 or more hours researching and writing an Opinion (which is not uncommon)," Judge Michael reasoned, "why would one expect us to change our mind unless there is an obvious and egregious error? Most motions to reconsider are a waste of everyone's time. If you don't like the decision, appeal."[47]

Court rules permit motions for reconsideration, but one leading Supreme Court advocate disparages these motions as "the losing lawyers' last gasp and, most often, little more than that. The vast majority have no chance of success and little reason for being filed except for the belief that nothing will be lost by a final effort to avoid defeat."[48] Professor Tigar advises that before pursuing a vain attempt, counsel should make a "searching inquiry into whether it would waste the client's money and – in an extreme case – subject the lawyer to sanctions for dilatory tactics."[49]

Comprehensive Briefs and Powerful Arguments

As Justice Louis D. Brandeis ascended to the Supreme Court bench in 1916, he observed that "[a] judge rarely performs his functions adequately unless the case before him is adequately presented."[50] Justice Felix Frankfurter later concurred that "the judicial process [is] at its best" when courts receive "comprehensive briefs and powerful arguments on both sides."[51] Adequate presentation depends on comprehensive, powerful, yet dignified give-and-take about the procedural and substantive law that determines the outcome. **WL**

ENDNOTES

[1]484 B.R. 825 (N.D. Okla. 2013).
[2]*Id.* at 827.
[3]*Id.*
[4]*Id.* at 827-28.
[5]*Id.* at 828.
[6]Terrence L. Michael, Ten Tips for Effective Brief Writing (At Least With Respect to Briefs Submitted to Judge Michael), http://www.oknb.uscourts.gov/sites/default/files/JMFiles/briefwritingtips.pdf (last visited Jan. 13, 2015).
[7]*In re Gordon*, 484 B.R. at 830-31.
[8]*Id.* at 830.
[9]*Id.* at 830-31.
[10]*E.g.*, James W. McElhaney, Twelve Ways to a Bad Brief, in II *McElhaney's Litigation* 142, 144 (2013): (adding "manifestly, clearly, fatal, clear beyond peradventure, logic that is fatally flawed, egregious, contumacious, mere gossamer, must necessarily fail, totally inapposite").
[11]*Interviews with United States Supreme Court Justices: Justice Ruth Bader Ginsburg*, 13 Scribes J. Leg. Writing 133, 142 (2010) (quoting Justice Ginsburg).
[12]Arthur T. Vanderbilt, *Forensic Persuasion*, 7 Wash. & Lee L. Rev. 123, 130 (1950).
[13]John W. Davis, *The Argument of an Appeal*, 26 A.B.A. J. 895, 898 (1940).
[14]Leigh Ingalls Saufley, *Amphibians and Appellate Courts*, 14 Maine B.J. 46, 49 (Jan. 1999).
[15]Frederick Bernays Wiener, *Briefing and Arguing Federal Appeals* § 83, at 258 (1961); *see also, e.g.*, John C. Godbold, *Twenty Pages and Twenty Minutes - Effective Advocacy on Appeal*, 30 Sw. L.J. 801, 817 (1976) ("Reflections on the adversary throw a shadow on a spokesman's own standards and on the strength of his presentation. ... [F]irmness, and preservation of one's own points and rights, seldom necessitate strident accusations or even discourtesy.").
[16]Michael, *supra* note 6.
[17]Hugh R. Jones, *Appellate Advocacy, Written and Oral*, 47 J. Mo. Bar 297, 298 (1991), reprinted in 7 Precedent 20 (Winter 2013).
[18]Michael, *supra* note 6.
[19]*Id.*
[20]Michael E. Tigar, *Federal Appeals: Jurisdiction and Practice* § 1.05, at 12 (2d ed. 1993).
[21]*Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J.) (opinion concurring in result).
[22]Michael, *supra* note 6.
[23]*Id.*
[24]Lloyd Paul Stryker, *The Art of Advocacy* 11 (1954) (quoting Cardozo).
[25]Robert H. Jackson, *Advocacy Before the Supreme Court: Suggestions for Effective Case Presentations* 37 A.B.A. J. 801, 803 (1951).
[26]Davis, *supra* note 13, at 896.
[27]E. Barrett Prettyman, *Some Observations Concerning Appellate Advocacy*, 39 Va. L. Rev. 285, 295 (1953).
[28]Michael, *supra* note 6; *see also, e.g.*, John W. Davis, *supra* note 13, at 897 ("More often than not there is in every case a cardinal point around which lesser points revolve like planets around the sun, or even as dead moons around a planet; a central fortress which if strongly held will make the loss of all the outworks immaterial.").
[29]*Interviews with United States Supreme Court Justices: Chief Justice John G. Roberts, Jr.*, 13 Scribes J. Leg. Writing 5, 35 (2010) (quoting Chief Justice Roberts).
[30]*Interviews with United States Supreme Court Justices: Justice Stephen G. Breyer*, 13 Scribes J. Leg. Writing 145, 167 (2010) (quoting Justice Breyer).
[31]Wiley B. Rutledge, *The Appellate Brief*, 28 A.B.A. J. 251, 254 (1942).
[32]Davis, *supra* note 13, at 895.
[33]Quoted in George Rossman, *Appellate Practice and Advocacy*, 16 F.R.D. 403, 407 (1955).
[34]Davis, *supra* note 13, at 897.
[35]Benjamin Cardozo, *The Nature of the Judicial Process* 127 (1921).
[36]Jackson, *supra* note 25, at 803.
[37]Michael, *supra* note 6.
[38]Prettyman, *supra* note 27, at 295.
[39]John C. Godbold, *Twenty Pages and Twenty Minutes — Effective Advocacy on Appeal*, 30 Sw. L.J. 801, 816-17 (1976).
[40]McElhaney, *supra* note 10, at 143.
[41]Michael, *supra* note 6; *see also, e.g.*, Raymond S. Wilkins, *The Argument of an Appeal*, 33 Cornell L.Q. 40, 42 (1947) ("Nothing will forfeit the confidence of the court more effectively than the misstatement of the record or the statement of a fact off the record.").
[42]Rutledge, *supra* note 31, at 254.
[43]Michael, *supra* note 6.
[44]Jones, *supra* note 17, 47 J. Mo. Bar at 304.
[45]*Id.* at 300.
[46]*Id.*
[47]Michael, *supra* note 6; *see also, e.g.*, Robert L. Stern et al., *Supreme Court Practice* §§ 15.5-15.6, at 726-27 (8th ed. 2002) ("[T]he Supreme Court seldom grants a rehearing of any kind of order, judgment, or decision. ... [A] rehearing attempt by the losing party to present the same arguments anew, even in improved fashion, has hardly any chance of success.").
[48]Robert L. Stern, *Appellate Practice in the United States* § 16.1, at 441 (2d ed. 1989).
[49]Tigar, *supra* note 20, § 11.01, at 418 & n.15.
[50]Louis D. Brandeis, *The Living Law*, 10 Ill. L. Rev. 461, 470 (1916).
[51]*Adamson v. California*, 332 U.S. 46, 59 (1947) (Frankfurter, J., concurring). **WL**