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One Judge's 'Top Ten Tips for Effective Brief Writing' (Part I)

Douglas E. Abrams

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One Judge's "Top Ten Tips for Effective Brief Writing" (Part II)

By Douglas E. Abrams

Chief U.S. Bankruptcy Judge Terrence L. Michael (N.D. Okla.) has written "Ten Tips for Effective Brief Writing," and posted them on the court's website.[1] Part I of this article [Precedent Vol. 8, No. 2 (Spring 2014)] began with discussion of Tip # 9 ("Leave the Venom at Home"), which figured in *In re Gordon*, decided by Judge Michael.[2] The first part concluded with discussion of Tips 1-4. This final part discusses the remaining five tips. All 10 warrant careful consideration from advocates who prepare submissions for trial or appellate courts.

TIP # 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."[3]

"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."[4] 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."[5] Supreme Court advocate John W. Davis said that the most effective briefs are "models of brevity,"[6] and he praised the "courage of exclusion"[7] because "the court may read as much or as little as it chooses."[8] "The lawyer's greatest weapon is clarity," explained Judge E. Barrett Prettyman of the U.S. Court of Appeals for the District of Columbia Circuit, "and its whetstone is succinctness."[9]

Justice Benjamin N. Cardozo warned that unduly prolix briefs threaten to distract the court from the dispositive core of the case because "[a]nalysis is useless if it destroys what it is intended to explain."[10] Justice Robert H. 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."[11] Professor Michael E. Tigar advises that "an appellate brief freighted with subsidiary issues sinks of its own weight."[12]

TIP # 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."[13]

This 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."[14]

Judge John C. Godbold of the U.S. Court of Appeals for the 5th Circuit called accuracy the advocate's "uncompromising absolute," not only because inaccuracy "interferes with the objective of persuasion,"[15] but also because the lawyer's professional credibility may take an enduring hit. "The deadliest retort, from an opponent or judge," explains Professor Tigar, "is that a fact is misstated or exaggerated, or that an authority is miscredited or – worse yet – has been overruled. Credibility lost by such carelessness is not easily regained, it at all."[16]

"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. And that is why you want to earn the reputation for being scrupulously accurate."[17]

TIP # 7: "PRESENT THE FACTS OF YOUR CASE ACCURATELY"

Judge Michael warned that, "If 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."[18]

"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."[19] More than 50 years ago, a lawyer linked promises made and promises kept. "Do not overstate your case. State only those facts which you are sure you can prove. Promise no more. Understatement is, in itself, a powerful factor in the psychology of persuasion. . . . Exorbitant claims and denunciations . . . have a singularly unpersuasive power."[20]

TIP # 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."[21]

Judge Hugh R. Jones of the New York Court of Appeals advised appellate advocates to conclude with "a succinct, precisely phrased request for the exact remedial relief that you seek,"[22] rather than "leave it to the court in the first instance to fashion the remedy."[23] "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."[24]

Judge Jones urged counsel to "ask for the maximum relief. Do not fear that if you ask for maximum relief, you necessarily weaken your primary request. Courts are familiar with alternative arguments which may help your cause. The court may not be able to give all the relief you would like, but it may be able to give a partial remedy."[25]

TIP # 10: "SEEK RECONSIDERATION SPARINGLY"

Part I 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."[26]

Court rules permit motions for reconsideration, but one leading Supreme Court advocate disparages them 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."[27] 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."[28]

"COMPREHENSIVE BRIEFS AND POWERFUL ARGUMENTS"

As the U.S. Court of Appeals for the 7th Circuit acknowledges, "[o]urs is an adversarial system, and courts rely on lawyers to identify the pertinent facts and law."[29] "The law is made by the Bar, even more than by the Bench," said then-Judge Oliver Wendell Holmes in 1885.[30] Justice Louis D. Brandeis concurred as he ascended to the Supreme Court bench in 1916: "A judge rarely performs his functions adequately unless the case before him is adequately presented."[31] Justice Felix Frankfurter wrote later that "the judicial process [is] at its best" when courts receive "comprehensive briefs and powerful arguments on both sides."[32]

Adequate presentation begins with adherence to the fundamentals of good writing – precision, conciseness, simplicity, and clarity.[33] Advocacy proceeds to comprehensive, powerful, yet dignified give-and-take about the procedural and substantive law that determines the outcome.

ENDNOTES

1 Terrence L. Michael, http://www.oknb.uscourts.gov/sites/default/files/JMFiles/briefwritingtips.pdf.

2 484 B.R. 825 (N.D. Okla. 2013).

3 Michael, *supra* note 1; *see also, e.g.*, John W. Davis, *The Argument of an Appeal*, 26 A.B.A.J. 895, 897 (1940) ("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."); Alfred C. Coxe, *Is Brief-Making a Lost Art?*, 17 YALE L.J. 413, 417 (1908) ("in all probability the cause will ultimately turn upon one fundamental proposition and he will succeed who has the ability to discover and

present this proposition in the clearest light").

4 *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); *see also, e.g.*, *Interviews with United States Supreme Court Justices: Justice Stephen G. Breyer,* 13 Scribes J. Leg. Writing 145, 167 (2010) (most briefs are "[t]oo long. Don't try to put in everything") (quoting Justice Breyer).

5 Wiley B. Rutledge, *The Appellate Brief*, 28 A.B.A.J. 251, 254 (1942).

6 Davis, *supra* note 3, at 895 (1940).

7 Quoted in George Rossman, *Appellate Practice and Advocacy*, 16 F.R.D. 403, 407 (1955).

8 Davis, *supra* note 3, at 897.

9 E. Barrett Prettyman, *Some Observations Concerning Appellate Advocacy*, 39 Va. L. Rev. 285, 288 (1953).

10 Benjamin Cardozo, The Nature of the Judicial Process 127 (1921).

11 Robert H. Jackson, *Advocacy Before the Supreme Court: Suggestions for Effective Case Presentations*, 37 A.B.A.J. 801, 803 (1951); *see also, e.g.*, James W. McElhaney, *Twelve Ways to a Bad Brief*, II McElhaney's Litigation 142, 143 (2013) ("Of course, there are lawyers who figure they should throw everything they can against the wall and see what sticks. The results are almost always dismal – a brief that raises too many issues lacks focus and direction.").

12 Michael E. Tigar, Federal Appeals: Jurisdiction and Practice § 1.06, at 15, § 9.08 at 335 (2d ed. 1993).

13 Michael, *supra* note 1; *cf.* Henry T. Lummus, *How Lawyers Should Argue Cases on Appeal*, 26 J. Am. Jud. Soc. 151, 152 (1943) ("Counsel who cites a case impliedly warrants that he has read and studied it and that according to his judgment the case supports the proposition for which it is cited.").

14 Prettyman, *supra* note 9, at 295.

15 John C. Godbold, T*wenty Pages and Twenty Minutes – Effective Advocacy on Appeal*, 30 Sw. L.J. 801, 816-17 (1976).

16 Tigar, *supra* note 12, § 9.07, at 334 (footnote omitted); *see also, e,g.*, Godbold, *supra* note 15, at 816-17 ("If it is revealed that what [the lawyer] says or writes cannot be believed, he forfeits the confidence which he seeks to create.").

17 McElhaney, *supra* note 11, at 143.

18 Michael, *supra* note 1; *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."); Lummus, *supra* note 13, at 153 (judges "pay no attention to things that are not disclosed by the record, and if we find counsel stepping in and out of the record we begin to doubt whether much of what he says is supported by the record").

19 Rutledge, *supra* note 5, at 254.

20 John A. Wilson, *Common Sense in Advocacy: Some General Observations on Trial of a Suit*, 43 A.B.A.J. 600, 602, 603 (1957).

21 Michael, *supra* note 1.

22 Hugh R. Jones, *Appellate Advocacy, Written and Oral*, 47 J. Mo. Bar 297, 304 (1991).

23 *Id*. at 300.

24 *Id*.

25 *Id*.

26 Michael, *supra* note 1; *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.").

27 Robert L. Stern, Appellate Practice in the United States § 16.1, at 441 (2d ed. 1989).

28 Tigar, *supra* note 12, § 11.01, at 418 & n.15.

29 *In re Cont'l Cas. Co*., 29 F.3d 292, 295 (7th Cir. 1994).

30 Oliver Wendell Holmes, *The Law*, in Speeches by Oliver Wendell Holmes 16, 16 (1934) (speech delivered Feb. 5, 1885).

31 Louis D. Brandeis, *The Living Law*, 10 Ill. L. Rev. 461, 470 (1916).

32 *Adamson v. California*, 332 U.S. 46, 59 (1947) (Frankfurter, J., concurring).

33 Henry Weihofen, Legal Writing Style 8-104 (2d ed. 1980) (discussing the four fundamentals).

Douglas E. Abrams, a law professor at the University of Missouri, has written or co-authored five books. Four U.S. Supreme Court decisions have cited his law review articles.