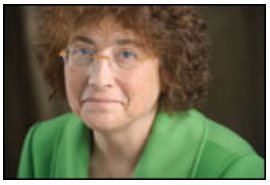
Wisconsin Law Journal

BRIEFS FOR THE BRIEF WRITER: In appellate briefs, don't forget the brief part

By: DIANE SLOMOWITZ April 12, 2016 8:44 am



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Appellate briefs. The bane of some lawyers, the boon of others, including me.

Section 809.19, Wis. Stats. lays out the basic specifications for Court of Appeals briefs, Sec. 809.62 for Supreme Court Petitions for review.

The goal, of course, is to present your case for affirmance or reversal as best you can within these requirements and the applicable standards of review.

The best way to achieve that goal is to make it as easy as possible for the court to rule your way.

In any but the most clear-cut appeals (which are rare) every party may of course have a reasonable position to present to the court. Especially in the Court of Appeals, where oral argument is the exception, perhaps the biggest influence on judges' decisions is the appellate briefs themselves.

Appellate judges (and their staff) will independently review the law. Given enough time, they may even take a stab into the record. Nonetheless, their first substantive exposure to your case (aside from the staff's memo) will be the parties' briefs, even if it's only through the Statement of the Case and Conclusion. And, depending on a brief's composition and tone, that first review can make or break an appeal.

As a young associate decades ago, I thought I would be most effective by relying on long briefs, more argument than record, adjective after adjective (showing "strength"), and critiques, if civil, of opposing counsel ("confidence"). Now, I have to imagine that the courts that read those tomes grumbled at the extra work my inexperience had given them.

So what have I learned over the years? What do the courts appreciate? What makes them cringe? What makes it easier for them to do their job? And what makes it harder? Here are a few tips.

1. The record rules. Technically and practically, a fact not in the record does not exist (aside from judicial notice) for appellate purposes. So make it easy for the court. Have every factual statement come from the record and contain an accurate citation to the record. Take the court where you want it to go. The court may very well feel resentment if it has to go searching in the record because you refused to provide support for your statements and general arguments yourself.
2. The Statement of the Case is a statement, not an argument. You can write a complete and accurate procedural and factual case history without giving away the farm over adverse facts. Don't omit "bad" facts or findings. Opposing counsel will call you out (winning points if it's done civilly) or the court will find them on its own. Once that happens, you lose the court's trust, and possibly your appellate case. You can lessen the effects of an adverse fact or finding (and increase the court's confidence in the rest of your brief) by explaining, differentiating or weakening it, if possible, again using full record citations.
3. Admit when you're behind. As you should do when making a proper Statement of the Case, don't ignore the elephant in the room. If the trial court founded its ruling on a "bad" case, face it head on, and not in a buried footnote. If your client made a crucial admission in a deposition, don't pretend he or she never made the statement. Explain it, distinguish it or, if a case is bad law, say so and say why. Doing so will win the court's respect; not doing so may result in the court's taking umbrage.
4. Opposing counsel is not the enemy. Aggressive advocacy is one thing. Disparagement, mockery, or caustic comments about opposing counsel is another. The courts don't like it, and neither do most lawyers. Be civil. Target your opponent's arguments, not his or her character. You'll help your cause, and your reputation.
5. Get to the point. The appellate courts are busy. So are you. The courts neither want nor need to wade through pushy phrases ("clearly wrong," "patently unreasonable," "eminently obvious") and paragraphs to understand your argument. Be clear, direct and organized. Use fewer words than you think necessary. Then edit what you

have down to its essence. It may take you more time than writing a stream-of-consciousness brief, but you will produce a big-print roadmap for the court — and your client.

You may have more or different tips than these. Even so, all appellate-brief writers share one goal — convincing the appellate court to adopt your arguments on the merits. The best way to do that is to give the court an easy-to-follow, straightforward, rule-compliant and civil appellate brief.

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