THE APPELLATE BRIEF: TIPS AND PITFALLS

by

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ATTORNEYS AT LAW

BRIEFS

I. Are briefs important? Why?

They teach and logically explain in writing how the law currently supports your side or logically should support your side. Are briefs really important? Yes, because your brief is your best (perhaps only) opportunity to communicate directly with the court the result you want, the factual basis you rely on and the legal theory that permits/demands that you win.

Too, this is your best (maybe only) opportunity to show that you are properly before the court (or that your opponent is not); that you are more than "another pretty legal face" but that you have exhaustively researched the law of the case and that you have shared your research in a lucid, succinct, careful fashion that complies with the Rules of Appellate Procedure.

Your brief may be the last time you get to tell the court what relief your client needs. At the risk of seeming a little presumptuous, your brief is your chance to teach the reader and logically explain in writing how the law supports your position or at least logically how the law should support your position.

II. Which court you are before merits some thought in preparation of appellate briefs. The roles of the two appellate courts in North Carolina are very different. The Court of Appeals is largely an error correcting court which is circumscribed by prior decisions of the Supreme Court and even by earlier decisions of other panels of the Court of Appeals. Usually there is not an opportunity for the Court of Appeals to substantially change the law.

The North Carolina Supreme Court is the fountain of jurisprudence in North Carolina and its role, inter alia, is to clarify and reconcile decisions of the Court of Appeals, determine state constitutional controversies finally and determine federal constitutional issues unless and until the U.S. Supreme Court or other federal courts rule.

The Supreme Court hears about 100 cases per year while the Court of Appeals and its 15 judges resolve about 1,600 plus cases each year. In the Supreme Court every case is orally argued after briefs are submitted. In the Court of Appeals only 1 of 4 cases is likely to be orally argued but 3 of 4 cases are decided on the briefs without oral argument.

Briefs are important in both appellate courts but are crucial in 75% of the cases decided in the Court of Appeals.

III. Who is your audience? Before writing a brief, the audience you hope to persuade merits some thought. In the Court of Appeals there are great volumes of cases and great pressure to decide and file while the Supreme Court has fewer but weightier

cases that may merit a revised interpretation or clarification of the law or an innovative decision that overrules earlier precedent.

Briefs are read by appellate law clerks, by appellate judges, by clients, by law professors and law review writers but the primary audiences are the judges and their research assistants who must participate in the decision making process.

In the North Carolina Court of Appeals ¾ of cases are not orally argued. Your briefs are your best and only chance of winning in 75% of North Carolina Court of Appeals cases. Because the Court of Appeals selects for oral argument 2-4 cases of each 12 heard each week by a panel (approximately 25%), your initial brief and the appellant's reply brief (when no argument is allowed) are your only communication with the court. A motion for oral argument to be allowed per Rule 30d might be allowed but the tone should be coldly rational and not sound like a written jury speech.

The Court of Appeals requires an Appeal Information Statement in which you can early on request oral arguments. In the Supreme Court all cases are orally argued. Nevertheless, briefs should be carefully constructed and thoughtful. The seven justices hear each year about 100 cases per year; they have more time to consider your brief in each case. They have no page and no word limitation on briefs; even so, succinct briefs are favored.

Briefs should be primarily focused on the decision makers – the judges and justices. However, I suggest that the audience to whom your brief should be addressed ought to be more broad and ought to be focused also on the research assistants who consult with and advise and assist the judges.

Do not assume that every reader of your brief will already be an expert on your brief's primary area of law. The judges may be expert in the area but the law clerks often are not. Though very bright and hard working, law clerks should not be expected to have the same legal experience base that you may have. Assume only that they are talented and diligent but not that they know your field of law as well as you do.

In the decision making process the briefs have primary relevance to the judges and the research assistants but if yours is a case in a developing area of the law (consider Dogwood, after Viar and similar cases), you ought to be very sure that your logic and language is likely to be understandable to the law review writers and others in academia and legal media.

IV. Before beginning to write the brief or prepare the Record on Appeal, first read or re-read the latest version of the North Carolina Rules of Appellate Procedure along with the cases interpreting the rules. You should also see the Court's latest version of its "Style Manual", most recently received this past month.

Merely looking at a brief, motion or Record on Appeal that you did 12 to 18 months ago is not sufficient and can be dangerous. Following the style and formal of old cases' Records on Appeal or briefs or motions, can be dangerous.

Two or three years ago a well respected trial lawyer filed a "bare bones" request for extension of time in which to file his brief reciting only that opposing counsel did not object. This was essentially a copy of a successful motion he had filed a year or so earlier. The Court of Appeals denied the motion for inadequacy of good cause shown. Quick work to move for reconsideration with strong factual support for the renewed motion saved the day. The point is that if you read and comply strictly with the current rules you are less likely to be caught off-base than if you use an "old go-by" as a model.

V. The Statement of Facts.

Like any good story teller, a good appellate lawyer can factually relate the statement of the facts in a less harmful way (but honestly) than his/her opponent's story of the same incident.

Many observers suggest that appellees need not restate the statement of facts if it is fair and even-handed. While I do not suggest a lawyer should be other than fair, what seems fair may depend on which side of the case you represent. I would urge that advocates should never abdicate their responsibility to state or restate the facts.

VI. How to get the essential facts.

To get the facts, you'll need case transcripts – get them all and arrange early with all court reporters (yes, there may be more than 1 court reporter). Your goal is that a judge reading the statement of facts will know what the case is about and what the appeal involves – without reading further.

You should also consult with the lawyer who tried the case to get his/her input about whether and in what respects the trial court erred or did not err. This should be a supplement, not a substitute, for your reading of the transcript and documents in the trial.

VII. Re-read the rules regarding deadlines – you should personally check the records and brief's due dates and have a second lawyer or your experienced legal assistant independently double check the dates.

Know your deadlines well in advance, i.e., what is due and when. If work is scheduled in an orderly fashion – fewer nerves get frayed – quality improves as does your quality of life.

VIII. The statement of the case should state the procedural posture of the case, so that the court knows our legal situation. If there is any doubt as to appealability of an issue, the legal facts should be made clear.

IX. Issues on Appeal.

While we no longer have the "assignment of error" conundrum in North Carolina appellate practice, we still need to state issues on appeal clearly and involve our trial counsel or another experienced trial lawyer to look with us for omissions and/or erroneous trial tactics by both sides.

X. Essential items within the brief.

- State the Burden of Proof on each issue, citing authority. Double check your research to be sure of the Burden of Proof.

- In which order should we discuss issues in our brief? For appellants, you may write/discuss the issues in:

  (1) Chronological order, when helpful to understanding
  (2) Order of importance (likelihood of prevailing) or
  (3) A different order, if one issue practically forecloses necessity for court to reach other issues (show them an easy way out!)

However, appellees should always follow the order set by the appellant for the convenience of the judges and law clerks reading the briefs. Searching for appellee's response argument (because it is in a different order) is very frustrating for the reader.

- List each issue with citation to Record on Appeal and to transcript pages.

- State/summarize your argument (if you can) in 1 or 2 sentences in the opening paragraph of each issue's discussion.

- Follow up with logical but succinct discussion of the rationale(s) on which we rely for the court to rule our way. Follow with pointed but polite emasculation of opponents' expected arguments.

- Do not ignore the other side's cases and arguments; better to distinguish their key cases and point out the flaws in their logic.

- If relevant; delicately point out adverse consequences for the appellate court system arising from a ruling adverse to us: Increased appeals from trial court determinations; making trial court's burdens more complex.

- Review the cases you cited to assure yourself that the cases really do stand for the proposition for which you cite them. Err on the side of caution. One instance of "over introducing" a case as precedent can severely damage a lawyer's credibility and reputation for "straight shooting."

Citations – strictly follow blue book or particular court's citation protocol.

- Use string cites only when necessary, i.e. only to show gradual evolutionary development of law from earlier position to current status (in our favor) or to illustrate where earlier cases went astray from formerly prevailing cases.

- Routinely use most current case on point plus (if necessary) the seminal case.

Text – write clearly and succinctly in short declarative sentences with well-chosen, easily understood language not susceptible of mistaken misinterpretation. Choose carefully the words you use. Remember to whom you are speaking, clerks: judges, client, etc.

- Respect the RAP page or word limitations in briefs. In the North Carolina Court of Appeals the page limit is 35 pages.

- Even when there is no page limit imposed by the court, write sparingly. Remember, this case (though special to you and your client) is one of many in which briefs, records, exhibits, depositions and appendices will need to be read – Judges get tired too/Judges generally do not like unnecessarily duplicative/repetitive statements of argument. Be especially careful when portions of a major brief are written by different lawyers – be sure not to be redundant.

- Be concise, succinct, and merciful.

Conclusion: After discussion of all issues to be briefed, add a general conclusion in which you thoughtfully state clearly but summarily what relief you want the reviewing court to order for your client.

Editing. Edit your own brief and have an experienced writer re-edit it taking care not to permit your facts or logic to be distorted by editing.

Reading. Read your brief yourself. Have a new lawyer read your brief; ask her to tell you (the author or editor) about your argument and the cases you cite. Ask her to point out any unclear areas and any omissions or ambiguities. Ask for suggestions or alternatives.

Common problems:

- Final briefs have never been read before filing.

- Spell check has taken the place of "reading for understanding."

- Malapropisms. Using an incorrect or "wrong" word that looks like or appears similar to the correct word.

- Misspelled words, use of the wrong word, omitted words, missing verbs and nonsensical "would be" sentences all conspire to convey to the court that you did not care and that your clerical staff are careless or worse and that you do not supervise their work. The presence of 2 errors raises a troubling presumption that there may be more and that the brief is not reliable.

Lucky lawyers and smart lawyers have a great legal assistant double check citations, compliance with appellate rules regarding format, word or page limitations and other technicalities that occur in appellate briefs. It is much better to be embarrassed by having an obvious error caught in-house, rather than noticing it after a brief is filed or the case is about to be argued.

Finally, work to guarantee:

- Proper service on opposing counsel – by the book.

- Timely filing with the appellate court.

Two questions recur in lawyer's CLE programs, especially Appellate CLE programs: "What do Judges like? What do Judges not like?" and what are the attributes of a "great brief."

Judges are individuals and all of use have our preferences and our "pet peeves." In response to my inquiry of our Court of Appeals several years ago, here is the best list:

- What Judges Like:

1. Clear, non-argumentative statement of facts. After reading the statement of facts, the judge should be able to understand the background of the case.

2. Clear, concise argument that shows that the attorney fully understands the law and focuses the court on the pivotal legal issue in the case.

3. Conceding a losing issue. Do not waste time on an untenable issue.

4. Use the number of pages in your brief that are necessary. If you don't need 35 pages, don't use them. Filler material detracts from the impact of your argument.

- What Judges Dislike:

    1. Argumentative statement of facts. See concurring opinion in *In re* B.B., 2006 N.C. App. LEXIS 956, at *8-9, 2006 WL 114777, at *3 (COA05-1355, unpublished opinion filed 2 May 2006).

    2. Use of the Internet as a source of evidence. See *Citifinancial Inc., v. Messer*, 167 N.C.App. 742, 748, 606 S.E.2d. 453, 457 (2005) (Steelman, J., concurring).

    3. Lawyers who do not know how to use sentencing grid. The presumptive, aggravated, and mitigated ranges are specified in North Carolina Gen. Stat. § 15 A-1340.17 (2006). See *State v. Parker*, 2003 N.C. App. LEXIS 681, at *8-9, 2003 WL 1873603, at *3 (COA02-846, unpublished opinion filed 15 Apr. 2003) (copy attached).

    4. Personal attacks on trial judges. See *State v. Rollins*, 131 N.C. App. 601, 508 S.E.2d 554 (1998).

    5. Arguments which in effect state "our evidence was better than their evidence" and "therefore we should have won" in cases where the facts were controverted.

    6. Jury arguments in briefs.

    7. Incomplete research due to pinpoint computer research. This practice often results in the citation of cases for legal principles not decided in the case.

- A "great brief" should have these attributes, at a minimum:

    1. Conciseness, "short and to the point."

    2. Standard of review included. Having this right at the beginning really helps the reader know how much and what kind of evidence he/she is looking for as he/she reads your arguments and looks at the record.

    3. Facts and procedural history that are (a) entirely relevant to the points being argued and (b) written as if the reader is brand new to the case, as indeed the appeals court is, as opposed to someone who has been involved since before the trial.

    4. Clarity of reasoning. Identify the issue, state the relevant law, and apply it to your facts; do not wander about from point to point.

    5. Proper grammar and punctuation.

6. Citations to the record and/or transcript to support factual statements.

7. Pinpoint cites.

8. Print out of relevant statutes in the appendix so that the judge does not have to look them up in the statute books.

9. Excessive footnotes, particularly when used to get around the page limitations is very irritating.

10. Generally, a great brief is written such that, if he/she agrees with it, the judge writing the opinion can lift and reuse portions of it wholesale; that is, it should be written as if it is the court's opinion holding in your favor.

Among the available references, I suggest this bibliography:

- "Mastering Appellate Practices in North Carolina," North Carolina Bar Foundation (Nov 2, 2007).

- "Legal Writing Style", Weihofer (1961), West Publishing, particularly chapters 9 and 10, "Briefs."

- "Judicial Opinion Writing Manual", ABA App. Judges conf., Judicial Division, ABA (1991), West Publishing.

- "Thinking like a Writer: A Lawyer's Guide to Effective Writing and Editing", Armstrong & Terrell (Clark Boardman and Callaghan 1992).

- "Legal Writing that Works", McElhaney, ABA Journal (July 2007)

- "Appendix…Canons of Statutory Constriction", Harvard L.R., 108:97 – 108.

- "Writing from the Reader's Perspective: Nouns or Verbs," George Goper, Duke University.

- "From the Law Clerk's Perch: Some thoughts on Litigating before the North Carolina Court of Appeals", Saad Gul, North Carolina Lawyers Weekly (August 3, 2007).

- "Effective Brief Writing Despite High Volume Practice: Ten Misconseptions…" Ricks & Istuon, University of Toledo LR 38:1113. (2007).

- "How Judges Read Appellate Briefs", Ebel, Appellate Advocacy (March '06).

A special thank you to my former Court of Appeals colleagues who were generous with suggestions and comments. SSE.