

Chapter 27

How to Write an Appellate Brief

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How to Write an Appellate Brief

When faced with a case going up on appeal, some partners at some law firms delegate the task of writing the brief to an associate, reserving for themselves what they think is the more important task of oral argument. If you are an associate on the receiving end of this delegation, then this chapter has been written for you.

The first thing you should realize is that you've been handed the most important job in the appeal. In real-world appellate advocacy, the brief plays a far more important role in persuading the court than does oral argument. Most appellate judges will tell you that oral argument influences the outcome in between 10 percent and 25 percent of cases. That means in the vast majority of cases, oral argument makes no difference; the case is won or lost on the brief.

So if you've been delegated the brief-writing job, congratulations: winning or losing the appeal has been placed in your hands. You've got a daunting task; accomplishing it is going to take a lot of time and effort. So let's get to it.

Learn the Rules

When you get a brief-writing assignment, the first thing you need to do is review the applicable statutes and rules governing appellate procedure in whatever court you're in. This is necessary for two reasons: (1) to avoid malpractice; and (2) to learn what the court expects of you. Pay particular attention to deadlines, requirements for ordering transcripts or making record designations, requirements for form and content of briefs, and other rules governing practice before the court. Don't assume that you already know the rules because you handled an appeal in the same court last year. Rules change; and a refresher never hurt anyone.

Do this first. Some of the rules will tell you how much time you have to get things done. You need to be aware of those deadlines sooner rather than later. You don't want to find out about a deadline 24 hours before it arrives, or worse, 24 hours after it's passed.

Where can you find the rules? The first place to look is the court's web site. Every federal appellate

court has one, and each has links to the Federal Rules of Appellate Procedure and the court's local rules. Most state appellate courts have their own web sites with links to their own sets of rules. In addition, many federal appellate courts have their own *Practitioner's Guide*. If you find one on your court's web site, rejoice: you've found an on-line publication that will tell you everything you need to know about practicing before that court. Bookmark those web pages, and visit them early and often.

Another place you can usually find rules of appellate procedure is in the law books. Look in the statutory compilations, such as United States Code Annotated. Title 28 of the U.S.C.A. includes the Federal Rules of Appellate Procedure along with each circuit court's local rules. State statutory compilations usually have the state-law equivalents; you'll usually find them in the same volume as the statutes governing the organization and jurisdiction of the courts.

Familiarize Yourself with the Case

The best way to learn about the case is to study and master the record. But if you get the brief-writing assignment before the record is available, there are some things you can do right away to get started.

Get copies of everything filed in the trial court by any party or by the court: all pleadings, motions, legal memoranda or briefs, jury charges, jury verdict forms, orders, judgments, written reasons for judgment, and (if available) transcripts. Read these materials; they should give you a sense of the case and some general ideas about possible issues for appeal.

If you did not participate in the trial, talk to trial counsel. Find out what he or she thinks about errors the trial court may have committed and the impact those errors may have had on the final judgment.

As you do these things, start thinking about issues to raise on appeal. Make a list of possible issues, and include in the list everything that looks like it has any chance of success. Eventually, you will need to narrow the list down to no more than three or four issues—

the fewer, the better. But at this preliminary stage, err on the side of inclusion.

Learn the Record—Cold

We now come to the most important aspect of appellate advocacy: knowledge of the record. The record includes the original papers and exhibits filed in the trial court, the transcript of proceedings (if any), and a certified copy of the docket entries prepared by the clerk of the trial court. See, *e.g.*, Rule 10(a) of the Federal Rules of Appellate Procedure.

The record is the universe in which you live and work as an appellate advocate. The appellate court's job is to review the record for errors. If something is not in the record, it cannot be reviewed on appeal.

Judge Alex Kozinski, comparing moot court to real-life appellate advocacy, says that for appellate lawyers, knowing the record is often more important than knowing the law:

Arguing about the law in the abstract is interesting and fun, but what wins cases is the lawyer's ability to marshal the facts littered over an extensive trial court record in a way that's consistent with favorable controlling authority. . . . In real-life appellate advocacy, the record plays a key role, and a lawyer's mastery of the record—or lack thereof—often makes the difference between winning and losing. Kozinski, "In Praise of Moot Court—Not!," 97 *Columbia L. Rev.* 178, 189 (1997).

How do you master the record? There is only one way: a tremendous amount of tedious work. Here are some techniques that have helped me master voluminous records over the years.

Get the Record

You must get your hands on the trial court record, or a copy of it, as soon as it becomes available. Some appellate courts will let you borrow the record; others have arrangements with copying services to copy the record for the lawyers. Find out what your court's procedure is for getting access to the record, and do whatever it takes to get a copy for yourself.

Where I practice, the state and federal appellate courts allow the lawyers to borrow the physical record and take it to their offices. The first thing I do is send the record to a copying service—either in-house or an

outside vendor. I ask the service to "clone" or "replicate" the record: that is, to copy every page and bind each volume of the copies the same way that the original record is bound. I then have a copy of the record that looks and feels exactly like the record that the appellate judges and their law clerks will work with.

With many courts now moving toward electronic filing, you may find that the record is in electronic form. For example, in my most recent U.S. Fifth Circuit appeal, the record was contained on a CD rather than in volumes of paper. Whatever form the record is in, get a copy, preferably in the same form that the court's judges and law clerks will use.

Study and Summarize the Record

If you are going to write the appellate brief, you must study the record—even if you were trial counsel. Don't depend on your memory of what happened at trial. Human memory is flawed. And often, several weeks to several months pass between the end of trial and the start of brief writing. Moreover, the appellate court will decide the case on the record, not on your memory or your adversary's memory of what happened at trial.

As you study the record, summarize it the way you would summarize a deposition. This means extracting the pertinent sections of the record and writing (or dictating) them into another document. The idea is to end up with a condensed version of the record that includes only the information you may need to write the brief.

Summarizing the record is tedious and time-consuming, but it pays two important dividends. First, the summary will help you work efficiently and thus save time over the long haul. Second, by going through the exercise of summarizing the record, you will learn the record cold.

Efficiency comes from being able to work with the summary, rather than the bulkier and more voluminous record, throughout the remainder of the briefing process. To fulfill this purpose, the summary must include all pertinent information, together with citations to the pages in the record where the original information can be found. The information in the summary should be detailed and accurate enough to enable you to rely on it without having to refer back to the record itself (except perhaps for direct quotations of testimony).

As you write the brief, you will find the summary much easier to work with than the full record. When

you need to locate some crucial bit of testimony to support a contention, you will find it much more quickly in the summary than you would if you had to plow through the more voluminous record. If the summary is in a computer file, you will be able to find things instantly by using the “search” feature of whatever software you’re using. Thus, time invested in summarizing the record pays dividends of efficiency throughout the rest of the process.

The other benefit of summarizing the record comes, not from the resulting summary, but from the exercise of summarizing: the exercise helps you learn the record. In studying anything, whether cases in a law-school textbook or a record on appeal, you enhance your ability to learn the material by involving more parts of your brain in the process. Reading the record and writing a summary involves not only eyesight, but also motor skills. Similarly, dictating a summary involves not only eyesight, but also speech and hearing. Whether you write the summary yourself or dictate it, the act of summarizing forces you not only to read a bit of the material, but also to think about it, to analyze it to decide whether it’s important, to boil it down to its essence, and to write or speak a few sentences conveying the essential information. The result is that you learn the material better because you bring more of your mental resources to bear on the task.

To gain these learning benefits, you must summarize the record yourself. If you delegate this task, then you will “lose[] the opportunity to gain the familiarity with the evidence that is necessary for good appellate advocacy.” Michael R. Fontham, *Written and Oral Advocacy*, §3.7 (1985).

Organizing the Summary

There are many good ways to organize a record summary. Here is what works for me—try it, and modify to suit your needs and preferences.

To summarize a record on computer, some lawyers I know use Summation or other specialized litigation software. Personally, I prefer plain old word processors: WordPerfect or MS Word. I find Word and WordPerfect documents easy to organize and, at crunch time, easy to search. I format each paragraph with “hanging indent,” beginning each paragraph with the record-page number followed by a tab. The effect is to have the page numbers lined up vertically in the left margin, making them easy to spot.

When summarizing a voluminous record, I like to create a separate computer document for each witness’s testimony, using the witness’s name as the file name. I keep all these documents in one subfolder, usually labeled “Witness testimony” or something similar, so that at crunch time, I can run a search on all documents in that subfolder to locate whatever crucial information I need immediately.

Each document is eventually printed and placed in a three-ring binder. I put the witness’s name and record volume in the document header, so that each page of the summary tells me who supplied the particular testimony and which record volume it’s in. I put a tabbed numbered separator before each witness’s testimony, and use spreadsheet software (Excel or Quattro) to create an index of witnesses; the index tells me which tab number corresponds to that witness’s testimony. By using a spreadsheet, I can sort the index by tab number (creating a table of contents) or by witness name (creating an alphabetical index).

Outline the Facts

Once you have summarized the record, you are ready to marshal the evidence. By “marshal the evidence,” I mean gathering in one place all evidence on each significant factual issue. There are many ways to go about this. Here is my technique.

By the time I finish summarizing the record, I know what the important facts are. I create a word processing document for each important fact, keeping all these documents in a subfolder labeled “Outlines” or something similar. I then read the summary I just created, from beginning to end, flagging any page that has testimony on any important factual point, and highlighting the testimony on the page. Usually I make a list of the factual issues as I go through the record, assigning a number to each issue. When I find testimony in the summary on one of those issues, I draw a circle around it and write the issue number in the right-hand margin. Sometimes I put a little yellow “Post-it” note on the edge of the page, with the issue number written on the Post-it note.

(Note that at this point, the time invested in summarizing the record is starting to pay efficiency dividends. Marshaling evidence from the summary is much easier than trying to marshal it from the original record.)

Once you have some testimony on an issue flagged, transfer that testimony from the summary to the mini-outline for that issue. You can type it by hand into the mini-outline, or you can copy and paste from the document containing the witness's testimony to the mini-outline. You may want to do this as you go through the record flagging testimony, but I prefer doing it afterward, after I've drawn all my circles, written all my numbers in margins, and peppered my summary with Post-it notes. I'll open one mini-outline—say for an issue I've numbered “5”—and, going through the summary front to back, scan the margins or Post-it notes for a 5.

Remember: when copying testimony from the summary to the mini-outline, be sure to include the witness's name and the volume and page of the record where that bit of testimony can be found. In any outline you make, you always want direct references back to the original record.

Make a Chronology

In cases where the pertinent facts occurred over a period of time, it may help to make a written chronology. This involves going through the summary, extracting the testimony concerning the relevant events, and re-arranging it into chronological order.

At trial, various parts of the story are usually told by various witnesses and are rarely presented in chronological order. Thus, from reading the record or the summary, it can be difficult to get a clear picture of how events transpired and how they relate to each other. By making a chronology, you can solve this problem.

The chronology should juxtapose all testimony pertaining to the same event, whether the testimony is from one witness or several witnesses. When you do this, you will instantly spot any inconsistencies in a witness's testimony. And when several witnesses describe an event, you will see at a glance the points on which the witnesses agree and those on which they disagree—all without having to flip back and forth through the summary or the record itself.

Make sure that when you copy testimony from the summary to the chronology, you include the witnesses' names and the record references.

The chronology can be an invaluable aid when the time comes to draft your statement of facts; all you'll

have to do is put the chronology into the form of a narrative. And if you've faithfully copied the record references from record to summary to chronology, you won't have to go hunting for those references when citing the record.

Some Tips on Legal Research

So far, we've talked about, in Judge Kozinski's words, “marshal[ing] the facts littered over an extensive trial court record in a way that's consistent with favorable controlling authority.” We haven't yet talked much about finding those “favorable controlling authorities”—legal research.

Telling you step-by-step how to conduct legal research is beyond the scope of this article. Nevertheless, there are some legal-research points peculiar to appellate brief writing that I want to share.

Standards of Review

First, you must research the standard of appellate review applicable to each issue in your case. By “standard of review,” I mean the level of deference that the appellate court will give to the jury's or trial court's ruling. Rule 28(a)(9)(B) of the Federal Rules of Appellate Procedure requires that the appellant's brief include, “for each issue, a concise statement of the applicable standard of review. . . .” Some state appellate courts may have a similar requirement. But aside from the requirement, you must understand the standard of review applicable to each issue to evaluate competently your chances of winning on that issue and to advocate your position credibly.

If you're writing a brief for a federal circuit court, there are at least two excellent resources you can find in any decent law library to get you started on your standard-of-review research:

- Steven Alan Childress, *A Standards of Review Primer: Federal Civil Appeal*, 125 F.R.D. 319 (1989). Professor Childress describes numerous review standards applicable to a great variety of issues that might arise in a civil case, with citations to case law from several circuits.
- George C. Pratt, *Standards of Review*, in *Moore's Federal Practice* §206 (3d ed. 2005). Judge Pratt gives the subject a thorough treatment. At the end of his chapter is a list of issues, arranged alphabetically.

cally from “Abstention” to “Trial Rulings,” with the standard of review applicable to each, supported by citations to case law from all circuits, or from as many circuits as Judge Pratt could find.

Be Efficient

When researching any legal point, look for controlling authorities first. On questions of federal law, try to find a United States Supreme Court case first or, failing that, a case from the controlling circuit. Look for persuasive authorities only if you can’t find any controlling authorities. (The exception to this rule is when you are trying to have the controlling authorities overruled or modified.)

For each proposition of law you assert, try to find (a) the oldest supporting authority, and (b) the newest. Being able to cite both ancient and modern authorities “emphasizes the continued validity of that point of law without drowning the inference in a sea of citations.” 2 George K. Rahdert & Larry M. Roth, *Appeals to the Fifth Circuit Manual*, ch. 21, p. 14 (1997).

Update your authorities (KeyCite or Shepardize) sooner rather than later. As soon as you think you may use a case, update it. Do this in your research-and-analysis phase, not in the drafting or editing phase. You don’t want to draft, edit, and polish an entire argument, and *then* find out that the pivotal case you relied on was overruled five years ago. (Update your authorities again immediately before you send the final version of the brief to be photocopied.)

Separate Research Outlines

I have often found it helpful to make a separate research outline for each legal issue. The purpose is to collect in one place all the legal authorities I have on a particular point. The authorities should be arranged in descending order of importance or strength.

What to include in the outline depends on the purpose for which you are considering citing the authority. For example, if you are using a case as authority for a rule of law, you should quote the rule of law from the case verbatim. If you are using a case to compare its facts to yours, you should outline the facts and note what the court did in light of those facts.

These mini-outlines of legal research serve two purposes. First, just as the mini-outline of evidence on a factual point helps you evaluate the strength or

weakness of evidence on that point, the mini-outlines of law help you instantly see how strong the law is on a particular legal point. Second, when the time comes to outline and actually write the brief, you will have a ready, efficient means of relocating your legal authorities. The mini-outlines of law will save you lots of time later by enabling you to avoid repeatedly plowing through a pile of books or printed-out cases to find some snippet of law you need for your draft.

Analyze the Issues

As you research (in fact, throughout the briefing process), analyze the issues. As another author advises, make a conscious effort to think about the issues, and set aside time to do this. Fontham, *supra*, §3.10. Don’t just read the legal authorities—absorb them. Try to learn not only the rule of law, but its underlying principle or reason. Think about how the underlying principles and reasons apply to your case and whether they support your position. If you do this, and later base your argument on the underlying principles, you will convey the impression of having justice and fairness on your side, not just legal technicalities.

Talk about the issues with others. Explaining the arguments should deepen your understanding of your position. And you can test the persuasiveness of the arguments by finding out whether they persuade objective people. *Id.*

As you analyze the issues, keep in mind the harmless error rule. An error by the trial court is not grounds for reversal unless the effort could have made a difference in the outcome of the trial. For example, an erroneous evidentiary ruling is generally not grounds for reversal if the record contains other evidence proving the same fact for which the erroneously included or excluded evidence was offered. Ask yourself whether the error in question truly affected your client’s rights. If you can answer that question “yes” with conviction, then you just might have a winnable issue on appeal. If not, consider discarding the issue.

Narrow the Issues

Now comes the hard part: narrowing the issues. This involves more than weeding out frivolous issues and harmless errors. You must also eliminate any issue

or argument that is weak. Your goal is to select just a few strong issues on which you can make compelling arguments and with which you can win the case. How few issues? Experienced appellate judges and advocates agree that a good rule of thumb is a maximum of three, or perhaps four, issues on appeal—the fewer, the better. See, e.g., Ruggero J. Aldisert, *Winning on Appeal* §8.6 (rev. 1st ed. 1999).

Why no more than three or four issues? First, if you can't convince the court with your three or four strongest arguments, you're not likely to convince the court with your weaker arguments. Second, if you mix weak arguments with strong ones, you run the risk of burying your good arguments in excess verbiage. Third, offering up numerous arguments gives the impression that you don't have confidence in any one. Fourth, since most appellate courts impose page limits on briefs, you probably don't have the space to adequately brief more than three or four issues. See *Jones v. Barnes*, 463 U.S. 745, 751–53 (1983) (citing several experienced appellate judges and advocates who unanimously agree that only a few issues should be argued on appeal).

Outline the Brief

Before actually writing the brief, you must make an outline. “The lawyer who writes a brief without a preliminary outline would if he were a carpenter, build an edifice without a plan.” Mortimer Levitan, “Confidential Chat on the Craft of Briefing,” 1957 Wisc. L. Rev. 59, 60. At this point, having exhaustively studied the record and analyzed the issues, you must organize your thoughts and ideas. Making an outline forces you to organize.

If you have followed the steps recommended above, your outline is already halfway done. For each issue, you should already have a mini-outline of evidence or a mini-outline of law. Outlining the brief will consist mainly of selecting chunks of these mini-outlines and organizing them into a coherent presentation. As you copy from mini-outlines to big outline, remember to copy appropriate citations to the record or to supporting legal authorities.

Experts agree that in organizing the arguments, you should lead with your strongest. First impressions count before an appellate court, just as they count before a jury. A strong opening salvo lends strength to

the balance of the brief. Aside from that, the strongest-argument-first rule is so well recognized that appellate judges will expect to find your strongest argument first. If you place a weaker argument in first position, the judges will assume that the following arguments are even weaker. Finally, there are the risks that the judge may not read your entire brief or that the judge's attention may wander. If you save your best for last, the judge may miss it. But if you put your best argument first, you enhance the odds that the argument will make the desired impression on the judge.

The First Draft

Once your outline is ready, you are finally ready to begin writing the first draft of the brief. If you have followed the steps suggested above (or used similar techniques that work for you), the actual writing should flow smoothly. You should be able to draft or dictate the entire brief in one sitting. You shouldn't have to stop to think about what to say next or to find some bit of testimony or snippet of law—everything you need should be at your fingertips, complete with citations.

Some lawyers faced with a brief-writing task search for another brief previously filed in the same court to use as a form. I recommend that you don't do this, for several reasons, including these:

- Most forms are poorly written, so if you follow them, you're teaching yourself to be a bad writer.
- Procedural law and court rules change, but forms do not change. Any form more than a year old could very well be obsolete.
- If you follow forms that don't change, you won't change as a writer. Living things change; anything that never changes is dead. Anything that never changes cannot grow.
- Forms can't get you to “excellent”; they can only get you to “good enough.” You should aspire to excellence, not just to “good enough.”
- Forms promote “monkey-see, monkey-do” behavior. If your goal is to blend in with all the other monkeys, you'll never distinguish yourself as a lawyer.

Can you write the very first brief in your professional career without a form? Of course you can. Just follow the appellate rules you reviewed at the start of this process; they will tell you everything you need to include in your brief and what form to put it in.

If you feel more comfortable referring to a form, let me make three suggestions. First, try to get your form from the clerk's office, not from another lawyer at your firm. Many appellate-court clerks keep model briefs handy for just this purpose. A form you get from the clerk is more likely to be a reliable guide than something written by your colleague, who may not know any more than you know about brief writing. Second, unless you get your form from the clerk, question everything in it; try to verify whether what you see in the form actually conforms to the rules. If there is a conflict between the form and the rules, follow the rules, not the form. Third, try writing the draft without referring to the form, using only the rules as your guide. After you've finished the draft, compare it to your form to see whether you omitted anything. If there's a discrepancy between your form and your draft, don't assume that the form writer got it right and you got it wrong—it may be the other way around. To resolve such a discrepancy, check the rules.

Try to complete the first draft well in advance of filing. How far in advance depends on the complexity of the case and the number of persons who will review the draft. For most cases, you should have the first draft completed between one and two weeks before the filing date—perhaps longer if so desired by your supervisor or your client.

Refinement

The first draft is just that: a first draft. If you've followed the steps outlined above, the first draft will be a very good work product. But in our business, "very good" isn't good enough. The brief that is ultimately filed must be the best brief you can feasibly produce in the time you have.

If you complete your first draft one to two weeks ahead of the filing date, you will have plenty of time to revise and refine the brief. Writing experts agree that it's a good idea to allow an interval between the end of drafting and the start of editing. The ideal is at least a full day *not* looking at or thinking about the brief. You've just spent several days filling your brain to the brim and probably a full day pouring it all out into the draft. The experience can be cathartic. You need the mental break. You also need an interval to switch from the creative mode of a writer to the critical mode of an editor.

Follow Through

Murphy's Law—anything that can go wrong will go wrong—applies nowhere with greater force than it does to getting an appellate brief copied, bound, and filed timely.

Get the final version of the brief to the photocopy folks at least 24 hours before filing—longer if they need the time to copy and bind. If the partner who needs to review and sign the brief is dilly-dallying, diplomatically remind him or her that you need to get the brief to photocopying 24 hours before filing to assure timely filing and avoidance of malpractice.

When the brief is signed and ready to be copied, don't rely on interoffice mail to get the brief and your instructions to photocopying. Take it there yourself. Talk to the photocopy personnel, and make sure they know what you need and when you need it. Do all of this far enough in advance so that, if something does go wrong (*e.g.*, red covers when you need blue), you have time to fix it before the brief must be filed.

If the brief is going to be filed by hand delivery to clerk of court, don't rely on your firm's court-run system to get the job done. If you have a reliable court runner, personally give the brief to him or her for filing, along with your instructions about when it must be filed. Have the court runner call you by cell phone as soon as the clerk clocks in the brief—until you get that call, assume that the job is not yet done. If you don't have a reliable court runner available, enlist a reliable paralegal. If necessary, take it to court yourself.

If you file by mail, as federal appellate courts and many state appellate courts allow (see, *e.g.*, Rule 25(a)(2)(B) of the Federal Rules of Appellate Procedure), don't assume that the brief will be timely mailed because you left it in the mailroom at 4:45 p.m. on the deadline day. Have someone take the brief to the post office, get it hand-cancelled (to make sure it's postmarked timely), and obtain a receipt of mailing. The receipt is your assurance that the brief was, in fact, mailed and postmarked timely. Again, if you don't feel comfortable relying on someone else to run this errand properly, do it yourself.

When you know the brief has been filed timely (and not a minute before), relax. And congratulate yourself on a job well done.

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