

# Readable Briefs for Busy Judges

By Stephen Shapiro

Discussions of good legal writing are really discussions about the needs of the intended audience. Appellate judges write for a diverse group of readers: justices of the Supreme Court, judges in other circuits, district judges, winning and losing litigants, law-enforcement officials, lawyers advising clients, academics and law students, and even, as Justice Black once put it, “the boys in the barbershop.” No wonder we have various theories about what makes a good appellate opinion.

But lawyers appearing in federal courts of appeals address a more limited audience. We write for three busy judges loaded down with briefs in six to nine cases every argument day, with over 1,000 pages of reading material. And the old advice about changing places with the judges applies more than ever as case loads rise. We need to help the judges get through this pile efficiently and understand our client’s story, explained in terms of record facts and legal principles.

Good writing meets the needs of these busy people. Suggestions on good writing appear in Mayer Brown’s recent volume, *Federal Appellate Practice* (2008), as well as *Making Your Case* (2008), by Antonin Scalia and Bryan J. Garner. I can sum up the key rules by repeating advice I got from Judge Easterbrook 30 years ago when he served as deputy solicitor general: Follow standard rules of usage, grammar, and punctuation. Use short sentences. Use short paragraphs. Use active verbs. Use headings or subheadings every three or four pages. Reduce footnotes to a minimum and keep them short. And include a short preamble at the beginning of argument sections to explain where your argument is headed.

Once you have drafted the brief and have made sure that it complies with all rules of the court in which you are filing, show it to someone in your office who has no knowledge of the case. Find out if the brief reads easily and tells a compelling story. I recommend the “one sitting” rule and the “two martini” rule. If the brief can’t be read in one sitting,

it is too long. If it can’t be understood after two martinis, it is too complicated. When revising, do your best to minimize jargon. Judges appreciate direct, colloquial writing. And be sure to explain unfamiliar terms and technologies in simple language. A glossary of unfamiliar terms and acronyms at the front of the brief is required in some circuits and is good practice everywhere. In many cases, acronyms can be avoided by, for example, calling an agency with a cumbersome name “the Commission.”

Let’s talk for a minute about the first 15 pages of the brief, which lawyers struggle to get right. The biggest problem

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I see with statements of facts in briefs is that they go on and on in mind-numbing detail without letting the reader know why he or she is getting all this information. Without some indication of its ultimate relevance, the reader can’t absorb the detail.

The following techniques help.

In some cases, a two- or three-sentence preface before stating the questions presented opens the door to comprehension. The questions take on meaning from the preface; otherwise, they may be unintelligible. Examples of prefatory statements appear in the Mayer Brown book on appellate practice. Questions should not be overly argumentative, but they should orient the reader in a way that leads to a correct resolution of the case.

In the statement of facts, you can begin with a one-page preamble that says what the case and appeal are all

about. This isn’t the place to argue, but to advise the reader on what is at issue and why the case is important in real-world terms.

If the case comes up in a novel field, consider including a short opening section in the statement entitled “statutory background” or “regulatory background.” This gives the court a snapshot view of the legal framework and makes the factual recital more understandable.

In the statement itself, I recommend subheadings that break up an endless scroll of detailed information. For example, you might break the statement down into “the gold mining industry,” “background of the dispute,” “allegations of the complaint,” “proceedings in the trial court,” “evidence presented,” and “the trial court’s rulings.” Some lawyers write very long factual statements, but ordinarily that is a bad idea. Present the facts in digestible bites, all supported by accurate record cites. You can elaborate facts as relevant to particular legal arguments after your initial factual presentation.

As Judge Easterbrook recommended, the headings and subheadings in the argument should be short sentences that sum up the point developed in your next few pages. The headings and subheadings in sequence tell your whole story. So when the judges see them in the table of contents, the argument pops up in short form. Don’t use mere “topical” headings, such as “The Due Process Issue.” That doesn’t give the reader any road map.

How about the number of questions presented? As a young lawyer, I was told that if anyone on the trial team thought an issue had merit, I should shovel it in. That wasn’t very good advice. Judges will confirm that when they get shotgun appeals, they assume that the arguments are going to be weak ones. No one can believe that there are a dozen reversible errors in a single case. Wherever possible, assert one, two or three questions on appeal and weave them together in an integrated, thematic way in the body of your argument. That has more impact.

What about the summary? Justice Sca-

lia's excellent book questions the value of summaries. I doubt that is the general view; after all, the rules still require them. And Justice Thomas has asserted just as vigorously that summaries are exceptionally important to him. Either way, Justice Scalia's view represents fair comment on the quality of summaries many lawyers provide. Save your summary for the last part of your drafting effort. Make it interesting and not just verbatim repetition. For most briefs, a summary of three or four pages suffices. Longer summaries bog down the reader. Again, think of this as a bridge to your argument that prepares the reader for the coming detail.

Lawyers give insufficient attention to the "standard of review" discussion preceding legal arguments. Most just say review is "de novo" or "deferential" and cite a case. Much depends on the standard of review, so it is best to spoon-feed the judges. Demonstrate what standard applies to particular issues. For example, legal standards, legal conclusions and reasoning, and policy analysis of lower courts get de novo review. Sometimes application of the law to a particular record gets searching review because of the need for appellate guidance, even in a jury case (e.g., *Brooke Group v. Brown & Williamson*).<sup>1</sup> Findings of historical fact and resolution of witness credibility get deferential review, but occasionally appellants prevail on such issues when the record is one-sided and a shocking error appears—the case thus flunks the "dead, unrefrigerated fish" standard. If you represent the appellant, cite cases from your circuit, showing that you are entitled to meaningful review on all your issues. The appellee will cite precedent showing that deferential review applies and requires affirmance. *Federal Standards of Review* by Steven Alan Childress and Martha S. Davis (1999), is a good starting place for research. Do your homework by focusing on the law of your circuit for particular issues.

On substantive legal arguments, I suggest sticking with the rule of first things first. The Supreme Court tells us to start with the statutory language if we have a statutory issue. Then turn to the

structure and purpose of the statute and the lessons they teach. If regulations are involved, they come after the statute. Don't blow your credibility by saying that the language is "plain" if it is not.

Of course, when addressing case law, Supreme Court precedent deserves the most attention, along with precedent from your court of appeals. But the judges care about law in other circuits, too. And while district court precedent counts for less, you can, if true, point out that a majority of district courts agree with you.

Lawyers always seem to say too little or too much about the key cases. Many briefs go on for page after page about a particular case, giving all the facts and then offering lengthy block quotes. That

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isn't very effective. Nor is it effective to just cite cases in a string or offer snippet quotes. Describe the background and holding of an important case in a few sentences, with a short quote.

But bear in mind the limits of case-law precedent. There are rarely "on point" holdings that compel a result. Because of this, you need to explain the sound reasons for applying the rule or precedent that you advocate. Justices and appellate judges have commented that if the precedents lead to a bad result, they will distinguish or rethink the precedents. As my mentor Bob Stern used to say, always explain "the reason why."

What about legislative history? Of course, it comes after your analysis of statutory language. Some judges attach importance to it. Others don't because Congress hasn't enacted it and the president hasn't signed it. To cover bases with judges who consider legislative

history, I try to show that the enactment background supports the best reading of the statutory language. Use the most authoritative materials—conference reports, key committee reports, and, of course, statements of purpose that may be included in the statute itself. Statements in floor debates count for little unless a sponsor of the legislation has something important to say.

I should add a word about policy and pragmatic arguments. Lawyers need to cover these important arguments and do so in persuasive detail, but after wrestling with the statutory language and precedents. This is paradoxical. The policy argument may be the most effective part of your brief, but it can't be the first part, at least in full-blown form. You don't want your opening salvo to sound like an appeal for judicial legislation or, worse yet, an effort to dodge statutory language and case precedent.

So what policies count? The policies that count are those articulated by Congress and the Supreme Court, not our own sense of good and bad. But that doesn't mean you should leave out arguments based on fairness, predictability, the needs of law enforcement, economic effects, and burdens on the judicial system. A good pragmatic argument focuses on all the points that a reasonable person would view as significant, as Judge Posner has discussed in thoughtful books and articles, including *The Problems of Jurisprudence*.<sup>2</sup> It provides a powerful finale to your brief. Support policy arguments with conventional legal authorities and academic writing, including materials on the Web that are subject to judicial notice. Appellate judges not only read the newspaper but also search the Web.

What makes a brief interesting and worthy competition for the evening news? As the chief justice said in a recent interview: Tell a good story. Active verbs keep the story rolling. So do short sentences and conversational vocabulary, as used by the best journalists. Varied punctuation, sentence length, and sentence structure help maintain interest. You may want to italicize once or twice for emphasis, but no more. More than that looks like shouting. Bul-

let points add variety, but use them only once in a brief. A well-chosen metaphor enlivens your argument. And an occasional short paragraph gives extra punch. Avoid large numbers of footnotes, especially argumentative footnotes. Nothing interrupts a good story more than dizzy plunges from text to footnote, where type is small and single-spaced. And be sure to edit your brief energetically to cut out the flab. Always use a good page printer and photocopier: Big, dark type that jumps off the page helps the reader; faded or uneven type causes eye strain and annoyance.

Of course, practical consequences make your judges care about the outcome. Within the limits of controlling legislation and precedent, judges try to avoid bad consequences for society and the judicial system, while treating litigants fairly. So you need to explain

why reversal or affirmance will make the world a better place. In doing so, write for the whole court, with arguments that will appeal to judges of various philosophies.

Complete candor in discussing record facts and legal authority is, of course, essential to any brief filed in court. Fess up to weaknesses and then deal with them in your argument; don't wait for the reply brief to do so. As Judge Posner has observed, a concession can be a source of strength rather than weakness. It proves that your position holds up under fire.

Whether filing a joint or separate appendix, try your best to make it a user-friendly document. Appellate judges have said repeatedly that appendixes are too long, so limit your appendix (beyond required materials) to one volume whenever possible. Include an informative index that tells the judges what each item is and where it appears in the record. Include

enough testimony from key witnesses so that the reader understands who they are and what they have to say. Unless rules require otherwise, place key exhibits at the end—your best documents only—and always make sure they are readable.

My final comment is on typos and miscites. Many judges have said that if a lawyer doesn't care enough about the brief to root out typos and miscites, that reflects negatively on the whole presentation. So we should do our best to give the court perfect work. ■

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### Endnotes

1. 509 U.S. 209, 230 (1993).
2. RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 454–69 (1990).