

TIPS FOR BECOMING A BETTER APPELLATE ADVOCATE— WRITING THE BRIEF

By Donald Capparella and Amy J. Farrar*

I. INTRODUCTION

Appellate advocacy is daunting to many lawyers. Perhaps it is simply writer's block. Others are stymied by turning a 5,000 page appellate record into a compelling story. Still others have research skills that have become rusty. Whatever the reason, there is hope for those of you willing to patiently develop a method. A systematic process will help you achieve a high quality of advocacy at the appellate level, and allow you to manage your practice better. Like any good process, it is important to begin with a plan.

II. PLANNING THE WRITING OF THE PRINCIPAL BRIEF

A. Have a plan

Plan your writing process the way you would if you were building a house. To build the foundation for solid legal writing you must: identify your issues; plan how long it will take; determine how much research is required; decide who does the research and writing. If others are involved, their schedules need to be also included in the plan, just as builders coordinate electrical and drywall. Most importantly, give the process priority in your schedule; block off time for research and writing on your calendar the way you would a meeting with your client. It is necessary to block off time for research and writing two to three weeks in advance.

Below is an outline for planning a lengthy writing process. In order to work on several briefs at once, it is necessary to be able to jump into (and out of) each brief at a sensible point. Just like a contractor has to build more than one structure at a time, it is rarely possible to work on one brief at a time. If you know where you are in the process at any given point, it is easier to start back after setting your brief aside for a few days.

B. Outline of the writing process

I. Reading and analyzing materials

- A. Lay out the basic factual scenario, be sure to raise legal issues. (1 hour).
- B. Plan research, list sources you plan to check, add new ones as you find them. (1-2 hours).
- C. Schedule the entire project in your calendar; make adjustments as needed. (1 hour).
- D. Begin research. (10-15 hours).

1. Start accumulating rules of law that apply to your fact situation.
2. Do case briefs, or make notes on each case, statute or other authority, and categorize them as to the issue or issues they relate to. Use these tools to organize your research.
4. Make sure you know these six things about each of the relevant authorities you find:
 - a. Citation;
 - b. The governing rule or rules;
 - c. Examples of facts that have satisfied the rule's requirements;
 - d. Examples of facts that have not satisfied the rule's requirements;
 - e. Policies or principles served by the rule;
 - f. Competing analyses or counter-arguments.
5. Update your research by using a citator (Shepards or Keycite) to find similar authority. (5-8 hours).
6. Make notes about your thoughts and don't edit or discard things at this point, stay wide open; decisions about what to abandon will be made later.

II. Creating an annotated outline (5-8 hours)

- A. Begin organizing your research under topics, this is the start of the outline of your brief.
- B. Find holes in the rules you need, continue research.
- C. You may want to begin drafting small portions of your brief by setting forth rules of law that you are sure you will apply, or writing other historical sections that you know you will use.
- E. Continue research, and revise your research plan based upon what you find.
- F. Finish research, and finish updating research.
- G. Finish your outline so your brief is organized.
- H. Note, very often your outline and the structure of your analysis will be controlled by the shape of the rule you find. (e.g., a multi-factor test without one controlling factor will be structured very differently than a test that requires all factors to be met.)
- I. Eventually, you begin to understand the analysis and can place each case within the outline. Make sure you are inserting the case into your outline with the point you are going to be making with that case. You want to choose the best cases that you have, so you will be winnowing

down some here. (e.g., One case may really state the rule really well, but not have good facts. Another case has good facts, but does not state the rule well. Discuss the rule-based case first.)

- J. A detailed outline allows you to start writing at any point. One can only write a section at a time anyway, and I find that transitioning to writing from an outline is very easy. Completing the outline is the most difficult part of writing; like all the prep work that must be done prior to painting a wall. If you do not do the prep work, you will most assuredly have a lousy paint job.

III. Writing a working draft of your paper (5-7 hours)

- A. Writing begins the process of putting flesh on the outline's bones; it also tests your analysis. As you begin writing, be prepared to have your analysis fall apart. If you find yourself not buying your own argument, time to rethink and regroup.
- B. Begin writing your brief at the place of least resistance, or the place you understand well. Don't forget the standards of review in appellate briefs; these are key to framing the substantive issues.
- C. Revisit your outline when you find that an argument is not sound, and reorganize your paper. Writing has a strong recursive quality to it.
- D. Continue writing and revising. Draft sections in any order that works for you; some write the hardest section first, some the easiest first.
- E. Finish your working draft.
- F. Don't worry about citing anything correctly at this stage.

IV. Rewriting and Editing

- A. Read your brief all the way through to ensure that the analysis flows and makes sense, adding and subtracting as you go. Once everything is on the correct order, begin the editing and polishing process.
- B. Put a citation after every statement of law or reference to a case or other authority. Make sure there is a record citation beside every factual or procedural reference, including in the argument section. Factual statements reiterated in the argument section must also have record citations.
- C. Leave at least a full day for putting your brief aside; then pick it up with fresh eyes.

V. Converting your Brief into a Document Designed for a Reader

- A. Shape the paper; make sure you have good transitions and check your word choices.
- B. Read portions of your brief out loud. Be prepared to go back to an earlier stage in the process on portions of your paper.
- C. Write the introduction second to last, and the conclusion last. Trust me, this works.
- D. If you have not yet done so, and you should have already done so, Keycite all cases for proper citation information, and precedential value. Never cite a case or other authority that you have not read in full, and Keycited or Shepardized.

VI. Editing for Style and Technical Correctness

- A. Develop a checklist from the rules of appellate procedure and have your secretary or paralegal check for each part. For example, someone needs to make sure the brief cover includes “ORAL ARGUMENT REQUESTED” or you will have waived oral argument. Do not trust yourself to do this; you will be tired and sick of your brief by this time.
- B. Proofread your brief; this is not the same as editing, you are looking for small errors. Spell check and search for common errors that spell check will not catch. (e.g., trail court). If possible, find an editor, preferably someone who knows nothing about the case, to read your brief and make comments.
- C. Keep a list of transitional phrases and words that you do or do not want to use. You may find that the list on page 68 of BRYAN A. GARNER, LEGAL WRITING IN PLAIN ENGLISH: A TEXT WITH EXERCISES (2001) provides a helpful beginning to the creation of your own list.
- D. The best way to bring your writing alive and keep your reader interested is to use the active voice. Watch for “be” verbs followed by a past participle (usually words ending in *-ed*). Instead of writing in this way, arrange your sentences with the actor first, followed by the action and then the recipient of the action. Remember: “if you’re active, you do things; if you’re passive, things are done to you.”¹
- E. Consider your audience. If you know the judge or court you’re appealing to, keep in mind your past experiences with the judge or court. If not, find someone you trust who does know the judge or court and use their experience to your advantage.

III. COMMENTS ON THE STATEMENT OF FACTS

A. Tell a story.

First and foremost, a brief must tell a compelling story, one that cries out for relief for your client. Judges are people; they want to feel like they are doing the right thing. You can help them rule in your favor if you tell a compelling story about your client, using

classic archetypes. Cast the characters of your lawsuit into the traditional roles in a story: victim, hero, etc. Convince the judge that the world is a better and fairer place if your client wins.

The record is your only source for this story in an appellate brief. I suggest the following method for converting a complex appellate record into such a story. First, read the record through once very slowly and carefully, indexing all the key facts by the page number of the technical record or transcript or exhibit or other piece of evidence where it exists. I type very quickly, so I read and type at the same time. As thoughts or possible issues occur to you, type them in for future reference. Once you have indexed the record, you can then write the story of the case from the index, quoting from the most critical portions.

In almost all cases, I tell a story chronologically, as if the reader is living it, with very few digressions. I also recommend subheadings that tell a story themselves, almost as if they were headlines for a series of newspaper articles. The goal is to capture the reader's attention, and keep them turning the page. By writing from the index, all of the citations to the pages in the record are easily available to you, and you only have to read the entire record one time.

IV. COMMENTS ON THE STATEMENT OF THE CASE

I use the same method for the statement of the case as I use for the statement of the facts. I simply tell the story of the case as it proceeded in court. In both the statement of the facts and statement of the case, I try to only tell the critical parts of the story that are necessary for the judge to apply the applicable legal rules and make a decision. However, I will add other facts or procedural events that are particularly interesting, or that provide necessary context.

V. COMMENTS ON RESEARCH

Now that we are in the computer research era (yes, I am old enough to remember what books were like), there are so many different ways to research. That topic is outside the scope of this paper, with a few exceptions:

- A. Don't overlook the efficiencies and advantages of secondary sources. Find law review and bar journal articles for a particular subject matter; and don't be afraid to use treatises, ALR articles and other resources for basic legal principles.
- B. Another helpful tip is to determine which judges in the relevant jurisdiction are known for writing thoughtful, detailed opinions and include his/her name in the search query. Certain judges, if they have written about an issue, will do a lot of research for you.
- C. Use proper citation form. Find and use someone who is good at citation work if you are not.

- D. Read the rules of Appellate Procedure, the Courts of Appeals and Supreme Court, as they apply to briefs, and follow them. For example, did you know there are special rules for divorce cases?²

VI. FINAL THOUGHTS ON THE WRITING PROCESS

- A. Know yourself. Understand your own strengths and weaknesses, and capitalize on them. We each have a process that works best for us, e.g., starting with the hardest part of a brief or issue first and knowing that the rest will follow, or vice versa. Notice what works for you; change the game to motivate yourself. Don't feel like you have to write a brief from beginning to end. If all else fails, begin by drafting the style or certificate of service to get started.
- B. Talk out loud. If you really are having a tough time knowing where to start, discuss your case with someone who knows nothing about it. Notice where you start and what you emphasize; let that inform your writing.

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¹ GARNER, LEGAL WRITING IN PLAIN ENGLISH: A TEXT WITH EXERCISES at 24.

² Rule 7, Rules of the Court of Appeals of Tennessee.