

Writing Better, Attention-Grabbing Appellate Briefs

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Upon Further Review

When I entered the private practice of law in 1991 following a two-year clerkship for a judge serving on the U.S. Court of Appeals for the Third Circuit, I remember being told by someone far more experienced that someday it will seem like second nature to dictate the contents of a brief into a Dictaphone or mini tape recorder. At that time, I was part of a new generation of lawyers who grew up with computers and learned to write by typing the contents of a document right onto an empty page in a computer's word processing program.



"Lawyers aren't paid to type" was the adage of that time. Instead, lawyers were paid to write lengthy documents by speaking into a microphone, producing an audiotape that a secretary would then type into a document, which the attorney thereafter would spend hours rewriting, editing, and returning again and again to the secretary until the final product was perfect or as close as it could ever get as a result of that process. That was not how I wrote an appellate brief in 1991, nor at any time thereafter.

Compared to then, lawyers of today have so many advantages to help in writing better appellate briefs. First, high-quality persuasive legal writing is far more accessible to lawyers and the general public now than it was in 1991. Not only are well-written appellate briefs easily accessible over the Internet to anyone who knows where to look, but so is the written work product, in the form of judicial opinions, of numerous very talented appellate judges. Moreover, computers give us the ability not only to more easily produce well-written briefs, but also to make those briefs look visually appealing and easier to read. A persuasive, visually appealing brief that captures the attention of the reader is already well on the way to accomplishing its objective.

So many young people today graduate high school without learning how to write well, then they graduate college and still haven't learned. Before long, they are graduating law school, having learned to think like a lawyer and, even worse, having perhaps learned to write like a lawyer. At the risk of providing too stark of a choice, writers of appellate briefs must opt either to write like a lawyer or to write in a manner that the reader is likely to find worth reading.

When I entered private practice in 1991, I had spent the previous two years as the consumer of appellate briefs, serving as a law clerk to a federal appellate judge. One of my tasks was to write bench memos to help my judge prepare for oral arguments. To do that, I had to closely study the opposing briefs that the lawyers had submitted in the case. What you quickly learn in that position is that a relative few lawyers are very talented at writing interesting, easy-to-understand and persuasive appellate briefs, while the vast majority of lawyers are not. Moreover, the perceived quality of the law firm that submitted the brief was not always a good predictor of whether the brief would or would not be well written.

It is beyond the capacity of this column to teach someone to be a compelling appellate brief writer. But compelling

appellate written advocacy typically reflects certain characteristics: clarity of thought and explanation; persuasiveness; and accessibility, producing an ease of understanding no matter how complex the subject matter.

One way that I became a better appellate writer, able to craft written legal arguments that were effectively presented, was by studying the opinions of many of the best legal writers among the appellate judiciary. During the first five years of my practice, among those were U.S. Supreme Court Justice Antonin Scalia; First Circuit Judge Bruce M. Selya; Fourth Circuit Judges J. Harvie Wilkinson III and J. Michael Luttig; Sixth Circuit Judge Danny J. Boggs; Seventh Circuit Judges Richard A. Posner, Frank H. Easterbrook and Terence T. Evans; and Ninth Circuit Judge Alex Kozinski. All but two of these judges (Luttig left the judiciary for an in-house job and Evans died) are still crafting appellate opinions even today.

Skipping ahead to the present, happily, the ranks of appellate judges who are highly talented writers have only continued to expand. Among the more recent additions to my list are U.S. Supreme Court Chief Justice John G. Roberts Jr. and Associate Justice Elena Kagan; D.C. Circuit Judges Brett M. Kavanaugh and Janice Rogers Brown; First Circuit Judge O. Rogeriee Thompson; Sixth Circuit Judge Jeffrey S. Sutton; Tenth Circuit Judge Neil M. Gorsuch and former Judge Michael W. McConnell; and Eleventh Circuit Chief Judge Edward E. Carnes.

Writing a judicial opinion and an appellate brief are not precisely identical skill sets. Nevertheless, both forms of writing require the author to engage in persuasive legal writing in the context of a story involving facts and legal principles. Just as a brief for appellee or a reply brief for appellant must deal with an opposing viewpoint, so must a dissenting opinion or the portion of a majority opinion addressing the differing views of a dissenting or partially concurring judge.

Recently, I read an opinion written by Gorsuch, and one of my first reactions was, "This is not fair to the vast majority of other appellate judges, how he makes even the most rudimentary of legal disputes the subject of a compelling-to-read opinion." To be sure, the vast majority of opinions contained in the Federal Reporter, Third Series are not compelling reads, just the same way that the vast majority of briefs that appellate judges must trudge through aren't either. Nevertheless, the fact that some appellate judges can break through the monotony and capture the attention of the reader teaches a lesson: Namely, it is not necessarily the raw material consisting of the facts and applicable law, but rather its manner of presentation, that will determine the reader's level of interest and degree of captivation.

Another, more obvious, source of excellence in appellate brief-writing that can be accessed over the Internet consists of some of the best appellate briefs being written today. The Office of the Solicitor General of the U.S. Department of Justice posts online all of the briefs that it files in the U.S. Supreme Court, and they are almost uniformly of very high quality. Many of the appellate briefs of attorney Paul D. Clement, a former solicitor general who has been in private practice since mid-2008, are available online. Clement is an excellent appellate brief writer. And numerous appellate briefs written by the highly talented appellate advocates who practice at the Mayer Brown law firm are available online via that law firm's website.

A common theme of my appellate columns is that the facts and the law governing a given appeal will play the most important roles in determining an appeal's outcome. Being a great writer, and submitting a brief that looks good to the eye, cannot change those facts or that law. Yet, lawyers who brief appeals are in the business of communicating and persuading. A brief that is interesting, easy to understand, and compelling in its arguments is much more likely to persuade than one that is difficult to understand, a chore to read, and off-putting or otherwise insensitive to the reader. Just as good lawyering can determine whether a case is won or lost at the trial court level, good appellate lawyering can win appeals that otherwise would not be won.

Having the best possible appellate brief may not make a difference in every single case. Whether it will make a difference in your case, you probably won't know until it is too late. That is reason enough to make sure that you submit the best-written, best-looking brief that you are capable of producing. The appellate judges and law clerks will not only appreciate the respite from the ordinary drudgery that your fine work provides, but more importantly, your excellent brief might even serve to win the case for your client.

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