Young Lawyers Section

VIII. BRIEF WRITING IN THE COURT OF APPEALS

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Editor's Note: *This article is the final installment in our series providing an introduction to the basics of litigation from a defense perspective. The first article discussed pleading and responding to a cause of action. The second article offered tips and tricks for raising cross claims, third party claims, and pursuing indemnity. The third article addressed seeking discovery and responding to discovery-related issues. The fourth article focused on dispositive motions while the fifth article outlined trial preparation. Parts one and two of the sixth article provided tips, techniques, and strategies for trial advocacy, and the basics of each stage of trial. The Seventh article dealt with the next stage, post-trial. This article completes the series with a look at the appellate process.*

Introduction

This final installment of the Young Lawyers Series will focus on brief writing in the Court of Appeals, a topic too big for these few pages in all honesty. That said, important topics such as interlocutory appeals, handling oral argument in the Court of Appeals, and advocacy in the Michigan Supreme Court or federal courts are necessarily left out.

Initiating the Appeal

Now that an appeal bond is in place and an order staying execution, if necessary, has been entered, it is time to begin preparing the claim of appeal documents. In terms of putting the claim of appeal together, there is nothing this article could provide that is not provided for in the court rules and it is imperative to scour the court rules, namely MCR 7.204 and MCR 7.205, to ensure that the claim of appeal is complete and sufficient to vest the court with jurisdiction. A claim of appeal is meticulously examined by the clerk's office to ensure compliance with the court rules. As anyone who has received a defect letter from the court of appeals can attest, defects in the claim of appeal rarely, if ever, go unnoticed.

Know Your Audience

Appellate brief writing is vastly different from writing at the trial court, which, because of volume and time constraints, must grab the trial judge's attention almost immediately to be effective. Trial court briefing is often more ferocious and to the point. In the Court of Appeals, however, a brief goes through numerous levels of review, beginning with a Prehearing/Research Division Attorney, then the Prehearing/Research Supervisor, and then to the judge's chambers, where each of the three judges on your panel will also have a law clerk (or two) review your brief, your opponent's brief and the prehearing report. Obviously, this multi-faceted review allows for a more deliberate and reflective analysis of the case, making the punchy style of trial court brief writing unnecessary and, ultimately, ineffective.

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This multi-level of review also means that misstatements of the record will be caught—so will misstatements of precedent. With what can sometimes amount to an audience of eight, as well as an opponent who will point out misrepresentations, it is nearly impossible to sneak a record or case law misrepresentation past your readers. The prehearing attorney handling your appeal will scrub the transcripts to create her own fact statement virtually ensuring that record misrepresentations will be corrected. Not all appeals go through the Prehearing Division, however. Complicated matters often avoid the Prehearing Division altogether, either going directly to the judges or sometimes to another, more experienced pool of research attorneys.

The Prehearing Division is a mystery to many practitioners, particularly those who do not venture into the Court of Appeals very often. The Prehearing Division is a pool of fresh attorneys, primarily first and second year lawyers, who examine your appeal before anyone else at the court. The prehearing attorneys analyze and assess your case before it is submitted to a panel of judges or even to the judge's law clerks. The prehearing review is in-depth. The prehearing

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attorney reads all appellate briefs, examines all trial and hearing transcripts, and conducts independent research to draft a global prehearing report, which includes a summary of the issues, a factual and procedural history, a legal analysis and a recommended disposition of the appeal. Again, this rigorous process is undertaken before the appeal is even submitted to a panel of judges or law clerks.

In most cases, the prehearing attorney also prepares a proposed opinion, especially in more straightforward and uncomplicated appeals. In other words, many of the opinions ultimately released by the Court of Appeals are initially prepared by the prehearing attorney, often a first year lawyer, before a panel of judges is even assigned to the appeal. The Prehearing opinions are reviewed by the Prehearing Supervisor, but many of the proposed per curiam opinions stemming from the prehearing division are adopted in large measure by the judges. Getting the prehearing attorney on your side is vital.

With this quick overview of the Court of Appeals structure out of the way, let's move on to the brief itself.

The Statement of Facts

Again, trial court briefing is much different from Court of Appeals briefing and this point cannot be emphasized enough. This difference is most evident in the manner an attorney presents the facts of the case; in the Court of Appeals, a brief's Statement of Facts must remain just that — a presentation of the facts of the case — and must be clearly distinct from the legal analysis. Trial court briefs typically feature a melded factual account and legal analysis.

Since the large majority of the time appellate courts resolve disputes of law and not fact, it is often assumed that the legal argument is most important in the Court of Appeals. I don't believe this is entirely accurate. Providing an accurate statement of facts is probably the single most important component of an effective brief—it goes first and the facts shape the contours of the legal discussion. Playing loose with the record will remove any credibility an attorney may have had; everything you say from them on will be met with skepticism, not only in that particular case, but also for upcoming appeals. While there are hundreds of trial judges across the State of Michigan, there are only 28 judges on the Court of Appeals. And again, because the way the Court of Appeals is structured, your brief will be fact checked on a number of levels, virtually guaranteeing that any misstatement or misrepresentation will be caught.

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The court rules impose a number of requirements for the brief's statement of facts to ensure a demarcation between the facts and the legal argument. And although the rules are often not followed and it is rare to see an appellate brief stricken for failure to follow these requirements, the rules provide useful stylistic suggestions, including a requirement that the statement of facts be "clear," "concise" and, importantly, that "[a]ll material facts, both favorable and unfavorable, must be fairly stated without argument or bias."[1] In addition, a brief on appeal can rely only on the record actually submitted below.[2]

Playing loose with the record will remove any credibility an attorney may have had.

Nearly every appellate practitioner has a nightmare story about a perfectly defensible appeal that was thwarted by an inadequately developed record in the trial court. A trial judge may be familiar with your case, thus removing the need to bombard the judge with deposition transcripts and loads of paper. This might succeed in the trial court, but it is immensely harmful in the Court of Appeals. Only those materials actually submitted to the trial court can be considered by the Court of Appeals.[3] Have a document or deposition transcript that may be dispositive of the appeal? It does not matter if it is not part of the record.

The court rules' repeated instructions that the statement of facts must be neutral and objective may sound like it is not possible to "argue" your client's legal position in the statement of facts, but there are still effective and ethical ways to introduce and plant the seeds of your argument in the fact statement without resorting to the trial court style brief writing, which can run afoul of effective brief writing in the Court of Appeals.

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Although it is a statement of the **facts** of the case, an effective brief uses the statement of facts to frame the legal issues addressed later in the argument section. The fact statement should not only contain the underlying facts, but also the procedural history of the case, which can be used effectively to introduce the legal issues central to the appeal. If a dispositive motion was filed in the trial court, this is a prime opportunity to outline the positions of the parties and their take on the factual and legal questions involved in your appeal, *e.g.*, "Defendant moved for summary disposition arguing that the ice hazard was open and obvious, while Plaintiff argued that there were special aspects of the hazard thereby precluding application of the open and obvious doctrine." Although truly providing a factual account of your case, this technique foreshadows the central legal issues the rest of the brief will tackle.

Another method to guide the legal discussion is to insert a summary of appellate issues or statement of the case before delving into the fact statement. This is allowed under the court rules as long as the summary is clearly marked as such and is not made a part of the fact statement. Introducing the legal issues gives the court some sort of context within which to understand and analyze the facts provided. The Statement of Questions Presented can also serve this purpose of providing the reader with the appropriate background of the legal issues to understand the Fact Statement.

In presenting the statement of facts, never disparage opposing counsel or the trial judge. Few things will turn off an appellate judge more than character assassinations of the trial judge or unfair attacks of the plaintiff's attorney. Once in the Court of Appeals, it is time to let go of the fact that the plaintiff failed to timely answer interrogatories or that the plaintiff's attorney was late to a deposition. Petty personal attacks do not address the legal issues of the case, and on a more pragmatic level, many Court of Appeals judges were trial judges before taking the appellate bench. This creates a natural level of sympathy for the judge being attacked.

While it is never a good idea to unfairly disparage the trial judge or your opponents, it is effective to use their misstatements of the law or questionable legal positions asserted in the trial court to cast doubt upon their legal position on appeal. For example, if arguing for a reversal, use bizarre quotations from hearing transcripts or trial court briefs to cast doubt on your opponents or the trial judge. To use the "open and obvious" issue used above as an example, suppose the trial judge ruled that a sheet of ice in a store's parking lot was not open and obvious because the plaintiff testified he could not see it when he walked past it. This reasoning conflicts with the objective standard our case law mandates for the open and obvious doctrine, and obviously, this misstatement of the law should be prominent in the procedural history of the case.

By the end of the fact statement, the issues should be framed and hopefully by introducing the legal issues early on (either in the Statement of Questions Presented, the Table of Contents, or in a Summary of Appellate Issues), the reader is already persuaded or at least leaning your way.

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The Argument Section

Giving advice on the argument section of your brief is a little tougher. The law is the law and it is up to you decide the most effective and logical way to present your argument. Some general guidelines are offered below, but to carry themes developed above, also know that your legal citations and analyses will be scrutinized in the same manner as your factual account. In fact, your legal arguments may be scrutinized even further because your audience will go beyond the authorities the parties cite in their briefs to conduct independent legal research, while there is nowhere to go for a more detailed factual account other than the record itself.

The court rules actually require bold-faced, all caps, argument headings.[4] But again, complying with what may seem like petty technicalities of the court rules is not a burden; it actually helps you write a more effective brief. Appellate briefs, including the additional components and statements required, often approach 60 pages. Argument headings are necessary to break up lengthy legal discussions. They serve as a roadmap in the brief's table of contents, and force the writer to ensure some level of logical flow to the structure of the argument.

A couple of other requirements: every brief must have a Statement of the Standard of Review and an Issue Preservation Statement. Don't view these two requirements as mere technicalities. An unfavorable standard of review can be the death knell of a compelling legal argument. To prevail on appeal under the abuse of discretion, for example, it is necessary to

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show that there was only one "reasonable and principled outcome," and not two or more from which a judge could reasonably choose.[5] This is obviously a high hurdle and if you are representing an appellant, you want to get out from under this burdensome standard of review if at all possible. Evidentiary issues are reviewed under the abuse of discretion standard, but if the evidence admitted is inadmissible as a matter of law (under a *de novo* standard), an abuse of discretion is shown.[6]

Even more difficult than prevailing under the abuse of discretion standard is obtaining a reversal on an argument that was not raised in the trial court; an unpreserved issue is a virtually guaranteed loser.[7] For unpreserved errors, relief is not available absent plain error affecting substantial rights.[8] The Court of Appeals "may consider an issue not decided by the lower court if it involves a question of law and the facts necessary for its resolution have been presented,"[9] but this gives the court discretion to address the issue or not, a position no appellant wants to be in.

As for the heart of the argument section, it is somewhat difficult to offer guidance. There is no "blueprint" for effectively arguing your point; argument style and structure will vary according to the issues involved and *a priori* whether you are the appellant or appellee. An appellant's brief, naturally, will be more emphatic, screeching and argumentative while the appellee will try to paint the lower court result as reasonable, fair and legally accurate. Furthermore, the tenor of your brief should also correspond to the issue being addressed. There's no need to scream and rave about the trial judge's denial of $250.00 in taxable costs—this will compromise the effectiveness of those arguments where screaming and raving are called for.

One other thing to keep in mind is that the Court of Appeals handles criminal appeals, termination of parental rights cases, zoning disputes, worker's compensation claims, insurance coverage litigation, etc. Just because you understand the three different ways to prove acquiescence to boundary lines does not mean your reader does, especially given that the typical prehearing attorney is a first or second year lawyer. Although many attorneys are specialists, the chances that any random Court of Appeals judge shares your specialty are quite slim.

As for styles generally, in a very Oprah-esque sense, be yourself. Writing styles vary greatly and a good result can be obtained with an explanatory style of appellate brief writing or with a bellowing diatribe about the injustice of the result below. Lastly, the sheer bulk of brief reading performed by the judges who will decide your case begs for some level of creativity or effort to make the brief an interesting read.

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Conclusion

Once matters conclude in the trial court, it is only "Halftime." A victory or loss at that point is not total or final by any means. On many issues, an appellate court gives you an opportunity to prevail in your case despite a loss in front of the trial court. Conversely, this also means that a trial court victory can be squandered with an ineffective appellate court brief.

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Keeping many of these themes in mind while still in the trial court can greatly enhance your chances of success in the appellate courts, principal among them is to ensure a fully developed record in the trial court and to ensure that all appellate issues are adequately preserved. The former concern can be taken care of quite easily: attach the entire transcript of the deposition, for example, even if only referring to parts of it. When taking a second look at the case in the appellate courts, it is not uncommon to refer to different or additional deposition testimony in a brief.

The second concern though, which can easily turn a winning appeal into a guaranteed loser, can be resolved by consulting with an appellate specialist early on while the case is still in the trial court. As hinted at in the last installment of this series of articles, appellate attorneys generally see cases in terms of the law, while trial attorneys primarily see cases in terms of the facts. At lunch or in the hallway, run your case by an in-house appellate

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attorney, who may be able to give you a different legal perspective of your case and that may help in the trial court and ultimately, in the Court of Appeals.

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Endnotes

1. MCR 7.212(C)(6).
2. MCR 7.210(A)(1); *Sherman v Sea Ray Boats, Inc*, 251 Mich App 41, 56; 649 NW2d 783 (2002).
3. *Reeves v Kmart Corp*, 229 Mich App 466, 481, n. 7, 582 NW2d 841 (1998).
4. MCR 7.212(C)(7).
5. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).
6. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).
7. See ***Error! Main Document Only***. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999) (defining unpreserved error as that which was not raised in the trial court).
8. *Hilgendorf v St John Hosp & Med Ctr Corp*, 245 Mich App 670, 700; 630 NW2d 356 (2001).
9. *Michigan Twp Participating Plan v Fed Ins Co*, 233 Mich App 422, 435-436; 592 NW2d 760 (1999).