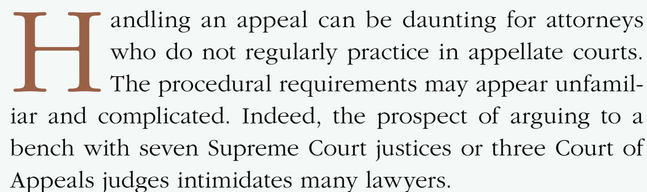
Brief-Writing Tips for the Infrequent Appellate Attorney

By Richard Kraus and Bridget Brown Powers



AT A GLANCE

Understand that appellate courts have a different institutional role and approach to decision-making than trial courts.

Carefully review the court rules and make sure the brief contains all required content.

Consider the appellate court's rule and the applicable standard of review when selecting and writing arguments.

Handling an appeal can be daunting for attorneys who do not regularly practice in appellate courts. The procedural requirements may appear unfamiliar and complicated. Indeed, the prospect of arguing to a bench with seven Supreme Court justices or three Court of Appeals judges intimidates many lawyers.

This article offers tips regarding the most important component of effective appellate advocacy: writing a compelling and persuasive brief. The first step is following the briefing requirements in the court rules so the judges have what they need to decide the appeal.[1] The second step is understanding that trial judges and appellate judges have different institutional roles, and consequently, approach cases with different goals. A brief on appeal is not the same as one in trial court.

The briefing requirements in MCR 7.212 generally apply in both the Supreme Court and Court of Appeals.[2] Although the requirements are nearly identical, the function of each court is not. The Court of Appeals' error-correcting role is to determine whether the lower court made a mistake. The Supreme Court's primary focus as the state court of last resort is to establish the rules of law needed to further the development of Michigan jurisprudence. When writing the brief, it is important to keep in mind the court's function in reviewing and deciding the appeal.

Title page

The first requirement in MCR 7.212(C) is a title page that correctly states the case caption. The title of the brief, e.g., *Appellant's Brief on Appeal*, should be below the caption. To preserve oral argument, the title page must state in bold or capital letters: "ORAL ARGUMENT REQUESTED." This is an important requirement. If the request is not made on the title page, a party loses the right to present oral argument and must file a motion asking leave to do so. Except in unusual circumstances, a party should request oral argument and take advantage of the opportunity to answer questions from the bench. If the appeal involves a ruling that a state constitutional provision, statute, rule, or regulation is invalid, a statement to that effect must also be included on the title page.

The Court of Appeals prefers that parties use the form cover sheet available on its website. The form is a handy way to ensure the title page includes the necessary information.

Table of contents

The table of contents follows the title page. It is essentially an outline of the brief, listing the sections (e.g., statement of facts) and headings for the arguments. If subheadings are used (a strongly recommended practice), they should also be included. Headings and subheadings should enable the court to discern the crux of the arguments being appealed.

Index of authorities

The index of authorities is next and should include the cases, constitutional provisions, statutes, rules, and other authorities cited in the brief. It is a good practice to organize the cases into groups starting with those with the most precedential value, and within each group, alphabetizing the cases. The first group would be Supreme Court cases, followed by published Court of Appeals cases, and then unpublished cases and other authorities. The index must include the complete case citation and provide the page numbers in the brief where the case appears. Citations should follow the format in the *Michigan Appellate Opinion Manual*.[3]

An attorney who fails to cite relevant facts that are damaging to his or her case or tries to state facts in an argumentative manner will instantly lose credibility with the court.

Statement of jurisdiction

The next requirement is the statement of jurisdiction. The statement must cite:

- the authority conferring jurisdiction;
- the date on which the appealed-from order or judgment was entered into the register of actions, and the filing date, disposition date, and entry date of any order that has the effect of tolling the time for appeal;
- the date appellate counsel was appointed, if applicable; and
- the filing date of the claim to appeal or the order granting leave to appeal (or leave to proceed under MCR 7.206).

If the order entered below adjudicated fewer than all claims or fewer than the rights and liabilities of all parties, the statement must provide enough detail for the court to determine whether it has jurisdiction. The appellee can either accept the appellant's statement or submit a counterstatement explaining why the court does not have jurisdiction to decide the entire case or specific orders or judgments.

Statement of questions presented

The questions-presented section is critical because the court will only consider the issues set forth in the statement.[4] Each question should be numbered and worded such that the answer is an unqualified "yes" or "no." Each question must be clearly and concisely written and should not be redundant. There are several recommended approaches, ranging from a short question beginning with "whether" to an introductory statement about the lower court ruling followed by a question.[5] Below each question, the statement should include the answer (or the failure to answer) of the trial court and the parties' answers.

Introduction

Although MCR 7.212 does not require an introduction, it is sound practice to include a short summary of the key facts and arguments before the statement of facts. A well-written introduction orients the court to the case, providing the judges and staff with an up-front understanding of what is important.

Statement of facts

The statement of facts is arguably the most important part of the brief. MCR 7.212(C)(6) requires a "clear, concise, and chronological narrative" that must include "all material facts, both favorable and unfavorable" and must be "fairly stated without argument or bias." Effective appellate advocates must pay close attention to this rule and follow it faithfully. An attorney who fails to cite relevant facts that are damaging to his or her case or tries to state facts in an argumentative manner will instantly lose credibility with the court.

Each fact in the brief must be in the record, and a party must cite to exactly where the fact can be found in the record. Statements of facts can often be choppy because of the required record citations after most sentences. A good brief writer will rewrite the factual statement until it flows together cohesively and efficaciously tells the client's story without embellishment, bias, or argument.

The statement of facts, and indeed the entire brief, should be written in an interesting and concise manner that is compelling and captures the reader's attention. It should not be any longer than it needs to be. The statement must include "all material facts," but should not contain facts or procedural history that are unnecessary for deciding the issues on appeal. Judges prefer short, well-written briefs—and, yes, they pay attention to misspellings, incorrect punctuation, and grammatical errors! A lengthy, rambling statement of facts with incorrect record citations or other errors can leave the court with the impression that the attorney's brief is not reliable.

Argument

An attorney must carefully select the arguments that he or she believes will lead the court to rule in the client's favor. There is an appellate aphorism to keep in mind: "When a party comes to us with nine grounds for reversing, that usually means there are none."[6]

Standard of review

The first step in developing arguments is identifying the applicable standard of review. Indeed, as a potential appellant, understanding the standard of review is critical when deciding whether to appeal at all. Arguing that the jury got it wrong is well-nigh futile, and arguing that the trial judge

incorrectly decided the facts is not much easier. An appellant's odds of success are much better when the court engages in de novo review.[7]

On appeal, the issue is usually not whether the jury or judge was right in deciding the factual merits of the case. The ultimate questions are whether the lower court proceedings were conducted under proper legal standards and procedures and, if an error occurred, whether it warrants reversal or other relief. Knowing the proper role of appellate courts and recognizing the need to demonstrate *reversible* error are critical to selecting and presenting arguments. A party will not win an appeal by establishing that the trial court erred; it is necessary to establish that reversal or relief is warranted because of the error.[8]

A common mistake is stating the applicable standard of review, but only giving it lip service in the argument itself. If a question is subject to abuse-of-discretion review, an appellant must demonstrate that the decision is outside the range of principled outcomes. Arguing that a court was wrong in exercising its discretion is not enough; the standard requires that the trial court's decision failed to reflect a reasoned application of the governing principles.[9] The standard of review must be interwoven throughout the argument and come full circle at the end to show why the appellate court should or should not reverse the trial court.

Preservation

MCR 7.212(C)(7) requires a statement about preservation of issues for appeal. A party may have a valid argument, but an appellate court may not consider it because the issue was not raised or decided in the trial court.[10] A court has the discretion to decide unpreserved issues, so it is critical to persuasively argue why the argument should be considered.[11]

Authority and reasoned argument

Arguments must be supported by persuasive authority and reasoned argument. Otherwise, a court may find the argument has been waived.[12] While this requirement seems obvious, a common error is simply asserting a position without discussing relevant authorities or relying on emphatic assertions the trial court erred without explaining why.

The need to present relevant precedent cannot be overstated. The first step is understanding what constitutes binding precedent and what is merely persuasive authority.[13] Another word of caution: most appellate judges take the rule on unpublished opinions seriously.[14] Don't cite them unless there is a good reason for it.

The next step is making sure the holding of a cited case supports the argument. The word-search functions of electronic research databases are good at finding favorable language in opinions, but quoting the language is not helpful when the case's holding is contrary. The final step is weaving the precedent into the argument. Devoting several pages to summarizing cases has little impact without explaining why the holdings fit the facts or support the party's legal position.

Effective arguments

Appellate judges and staff study many briefs, so it is important to make the arguments easy to understand and interesting to read. Arguments should be organized into focused sections rather than lengthy blocks of run-on text. Repetition is unnecessary and can be irritating. A brief that stands out from the pack can be a real advantage.

The important facts must be woven into the argument. Including record citations in the argument is helpful so judges do not have to go back to the statement of facts to verify a factual assertion. The facts should be argued persuasively, but remember that an appellate brief is not a second chance to make a closing argument to the jury. An advocate who overstates or mischaracterizes facts loses credibility.

Meaningful headings are an effective way to organize and present an argument. Conclusory statements such as "the trial court erred by granting summary disposition" are a waste of precious space. A heading should include a concise and persuasive explanation of the substantive argument. Subheadings are useful to explain the argument's logical flow and avoid several pages of unbroken text. A good way to test the effectiveness of headings is by reading the table of contents by itself.

Deciding how to organize and present an argument requires careful thought. Appellate judges are generalists. Given the types of cases dominating their workloads, most judges are familiar with issues commonly presented in criminal and family law cases, for example, so there is little need for an extended discussion of basic legal principles. On the other hand, judges cannot be expected to know the intricacies of specialized legal areas. Effective advocacy requires a comprehensible explanation of the governing principles and legal context for decision in these appeals. But it is also important to remember that judges are smart people who can readily learn the relevant aspects of an unfamiliar legal field.

Many articles and texts stress an important message: writing well matters. This is true in all legal writing, but especially on appeal. Poor style, wasteful legal jargon, rambling and repetitive text, grammatical errors, and other impediments get in the way. A judge should want to read the brief, not simply endure it.

The tone of appellate briefs also matters. While professionalism and civility should always guide attorneys, those virtues are especially important in appellate courts. Do not criticize the trial court. Do not demonize the other party or complain about opposing counsel. Explain why the lower court erred and the outcome should be reversed.

After writing the argument, go back and shorten it. Most briefs are longer than necessary; careful editing can make them more effective and persuasive.

Relief requested

Too many briefs end with a whimper: "For the reasons stated in this brief, appellant respectfully requests this Court to reverse." The conclusion is the last opportunity to persuade, and it should not be wasted. A succinct summary of the brief's theme is helpful; a lengthy repeat of the arguments is not.

This section of the brief serves another critical function: providing the court with a precise statement of the relief requested on appeal. In some cases, it may be enough to ask the court to affirm. But in others, it may be necessary to include more detail about what the party wants the court to do. Make sure the court knows the desired outcome if the appeal is successful.

Appendix

A recent amendment to the briefing rule requires an appendix in the Court of Appeals.[15] View the appendix as a way to make it easier for judges and staff to review the important parts of the trial court record rather than as another burden imposed on counsel.

Final thoughts

Writing a persuasive appellate brief is not easy, especially for attorneys who do not frequently handle appeals, but several basic steps can help. Read the court rules to know what must be included in the brief. Present the facts fairly and accurately. Pay close attention to the standard of review when selecting and writing arguments. Organize arguments into tightly written sections supported by solid authority. Understand and respect the appellate court's institutional role. ■

Richard Kraus is a shareholder with Foster, Swift, Collins & Smith, PC, and chair of its appellate group, with more than 40 years' experience in handling state and federal appeals. He is certified as an appellate specialist by the American Institute of Appellate Practice. He is a member of the SBM Appellate Practice Section Council and the ABA Council of Appellate Lawyers Executive Committee and State Chairs Committee.

Bridget Brown Powers is the principal of Brown Powers, PLLC, in Petoskey and is current chair of the SBM Appellate Practice Section Council, co-editor of the Michigan Appellate Practice Journal, *member of the Michigan Supreme Court Historical Society Advocates Guild, committee member of the Michigan Appellate Bench Bar Conference Foundation, and Fellow of the American Bar Foundation. In addition to appeals, her practice focuses on real property law, business law, municipal law, and estate planning.*

ENDNOTES

1. Both the Michigan Supreme Court and Court of Appeals publish internal operating procedures that are helpful in understanding how the court rules are interpreted and applied. The manuals are currently available at *Internal Operating Procedures (IOPs): Subchapter 7.300 Court Rules,* Michigan Supreme Court <https://courts.michigan.gov/Courts/MichiganSupremeCourt/Clerks/ClerksOfficeDocuments/html/MCR%207.300%20IOPs-Responsive%20HTML5/index.html#t=MCR_7.300_IOPs%2FMSC_IOPs_7.300_CoverPage%2FMSC_IOPs_7.300_CoverPage.htm> and *Internal Operating Procedures,* Michigan Court of Appeals <https://courts.michigan.gov/courts/coa/clerksoffice/pages/iop.aspx>. All websites cited in this article were accessed July 27, 2019.
2. MCR 7.305 and MCR 7.312 have requirements specific to appeals to the Supreme Court.
3. *Michigan Appellate Opinion Manual,* Office of the Reporter of Decisions, Michigan Supreme Court (December 2017). The most current version is available at <https://courts.michigan.gov/Courts/MichiganSupremeCourt/Documents/MiAppOpManual.pdf#search=%22opinion%20manual%22>.
4. *Busch v Holmes,* 256 Mich App 4, 12; 662 NW2d 64 (2003).
5. Garner, *How to frame issues clearly and succinctly for effective motions and briefs,* ABA Journal (March 1, 2017) <www.abajournal.com/magazine/article?/effective_pleadings?_issue_framing> [https://perma.cc/567E-PUC5].
6. *Fifth Third Mortgage Co v Chicago Title Ins Co,* 692 F3d 507, 509 (CA 6, 2012).
7. A word of caution: don't cut and paste from old briefs. The standards for reviewing discretionary questions and administrative interpretations of statutes have changed over the years. Citing an out-of-date standard can undermine the court's confidence in an attorney's legal research and arguments.
8. For civil appeals, see MCR 2.613(A). The standards for reversible error in criminal cases are more intricate but must be understood and followed in presenting arguments on appeal.
9. *Edry v Adelman,* 486 Mich 634, 639; 786 NW2d 567 (2010).
10. For an excellent discussion of Michigan's preservation doctrines, see Gerville-Reache, *Navigating Michigan's Murky Preservation Doctrine,* 95 Mich B J 30 (January 2016) <http://www.michbar.org/file/barjournal/article/documents/pdf4article2789.pdf>.
11. See *Hines v Volkswagen of America, Inc,* 265 Mich App 432, 443–444; 695 NW2d 84 (2005). Different standards of review may apply to certain unpreserved claims of error, especially in criminal cases.
12. *McIntosh v McIntosh,* 282 Mich App 471, 485; 768 NW2d 325 (2009).
13. For a thorough review of Michigan law, see Dembinski, *Set a Precedent,* 95 Mich B J 26 (January 2016) <http://www.michbar.org/file/barjournal/article/documents/pdf4article2788.pdf>.
14. MCR 7.215(C)(1).
15. MCR 7.212(J).