



What Judges Say About How to Brief That Arcane Appeal (and Practically Everything Else)

| By Stephanie Simon Morita and Noel D. Massie

All appellate lawyers have had one of those cases—you know, the appeal involving some arcane area of law that produces haunting visions of the judges' eyes glazing over or drooping as they read your brief. Advocates in these cases fear the subject matter will be too complex or boring to present in a fashion that engages and compels their judicial audience. We have been there. So we set out to discover what judges who read appellate briefs in these cases want to see. The advice and suggestions we received are indeed helpful for drafting more persuasive and less perplexing briefs on arcane issues, but they also apply to every brief you may write.

In light of the Michigan Supreme Court's adoption of new rules governing appeals to circuit court¹ and the recent decision creating a bifurcated appeal process for property tax classification decisions that now routes some appeals to circuit court,² we decided to begin our search by interviewing two circuit court judges.

Judge Michael P. Hatty became a judge of the 44th Judicial Circuit Court in Livingston County in 2009 following 29 years in private practice. Drawing on his experience with several appeals involving property tax classifications, he was eager to offer tips on how best to brief arcane issues—and, as it turned out, any issue. We also spoke with Judge James Batzer, chief judge of the 19th Judicial Circuit Court. Judge Batzer was an assistant attorney general for five years before his 1984 election to the circuit bench and has served as a visiting judge on the Court of Appeals. He has seen a little bit of everything during his 25-plus years on the circuit bench—not unexpected since the 19th Circuit, which encompasses Manistee and Benzie counties, currently includes a maximum security prison, a casino, and a sizable migrant population supporting the area's agricultural industry. We have distilled

and combined below these two judges' wish lists for circuit court appeal briefs on topics both obscure and mundane.

(1) Include a Statement of Jurisdiction: This should appear at the beginning of the brief. Counsel should cite both the

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applicable statute and court rule, which can occasionally conflict. The court can address these conflicts, but only if made aware of the problem. *McDougall v Schanz*³ provides guidance for determining if statute or court rule controls, depending on whether the issue is substantive or procedural. Appeals from probate court decisions have been a longstanding problem; the Michigan Constitution grants jurisdiction to the circuit court, but the current Probate Code (EPIC) provides that most appeals go directly to the Court of Appeals.

(2) Assume the reader knows nothing about the case: An attorney who has worked on a case to the point where it is being reviewed on appeal knows a lot about the facts and the law. But a judge usually approaches the appeal knowing nothing about the case. The brief writer's job is to tell the court everything it needs to know to reach a correct decision, yet not so much that the essence is lost in a morass of detail. It may be helpful to explain the history of the case and the applicable law as if one were a gentle teacher, especially if arcane or unusual issues are involved.

FAST FACTS

Whether briefing an arcane or mundane issue, be truthful, clear, and concise in your writing without being repetitive or making personal attacks.

It is important to present all the facts fairly—and in cases with arcane issues, to explain clearly the unusual or case of first impression.

While there is no one perfect way to present an argument, always be mindful of the many competing demands on the court's attention.

The real purpose of oral argument in the Court of Appeals is to give the judges the chance to ask the advocates to clarify factual or legal questions that concern the Court and may determine its ruling.

- (3) **Be succinct and truthful:** Discussion of critical facts should be supported by accurate citations to the transcript, exhibits, or other evidence. Every judge knows that attorneys are advocates trying to present their cases in the best possible light, but nothing more quickly alienates a judge than a lawyer who misstates the facts or the law. Lawyers must be able to distinguish a colorable argument that a case stands for a certain proposition from a frivolous argument that a case stands for something its text clearly does not support. Avoid the latter type of argument! The careless advocate not only loses the judge (and leaves a bad impression for future cases), but might end up answering to the court about why he or she should not be personally sanctioned.
- (4) **Keep opposing counsel honest:** By the same token, when opposing counsel has not cited to the record or has asserted a fact the record does not support, point this out in a professional tone.
- (5) **When presenting the arcane or odd issue, you have to do more work:** Judge Batzer cited an example from his experience: an airplane crash case involving the question of whether Michigan or California law should be applied. He determined that California law governed after reading briefs that included citations to law review articles he found helpful in his decision making. The extra work the attorney put into research and briefing made a difference.
- (6) **Respect the value of oral argument:** Even when the judge has an idea of how he or she plans to rule before taking the

bench, something said during oral argument may affect the way the court analyzes an issue or decides the entire case. Prepare thoroughly.

- (7) **Be sensible about brief length:** Some cases and arguments are necessarily more complex and may require detailed briefing. There may be nuances or apparent conflicts in caselaw that counsel needs to explain. However, counsel should not waste the court's time on hopeless or throwaway issues. Stick to a limited number of issues where you might prevail and leave the rest alone.
- (8) **Don't try to change the law in circuit court:** Circuit court judges cannot overturn or ignore precedential appellate decisions. When you are up against precedent you believe is wrongly decided, be open about that fact and say you are arguing to preserve the issue. (The same advice applies when you are in the Court of Appeals and faced with unfavorable Court of Appeals or Supreme Court precedent.) When confronted with a question of first impression in Michigan, argue current law from other jurisdictions (or, perhaps, restatement principles) and tell the court why your position will achieve justice in the case.
- (9) **Recognize that the court's time is limited:** Make your points succinctly and move on. Repeating the same arguments may cost you the court's attention and cause the court to skip over portions of your brief. If you have clear precedent on your side, say so up front and be clear about why it controls your case.
- (10) **Avoid belittling the lower court or insulting opposing counsel:** Criticizing the lower court or attacking opposing counsel does not help your brief or your client—even if the comments are deserved. Stick to business. Methodically point out the court's error or the other party's inaccurate or unsupported factual claims. There is no need to accuse opposing counsel of lying; the court can figure that out on its own. Better to say that opposing counsel is overly zealous, mistaken, or misguided. Ad hominem attacks are not persuasive and only waste the court's time.

We then turned our attention to the Court of Appeals and sought advice from Judges Christopher Murray and Amy Ronayne Krause. Before his appointment to the Court of Appeals in 2002, Judge Murray served as deputy legal counsel to Governor John Engler and as a judge in the Family Division of Wayne County Circuit Court. He is also a member of the Board of Law Examiners. Judge Krause was appointed to the Court of Appeals in December 2010 after nearly eight years as a district court judge.

Her multifaceted background also includes private practice, eight years as an assistant prosecutor, and six years in the Attorney General's Office.

Judges Murray and Krause reinforced a theme also voiced by our circuit judges. Because judges on the circuit and appellate benches are required to decide cases in many different areas, advocates bear the responsibility to educate the court about the governing law and its applicability to the facts. In private practice, most attorneys are specialists. When an attorney becomes a judge, however, he or she can no longer focus on mastering a particular area of law to the exclusion of other areas. For example, the monthly case call for a Court of Appeals judge may include appeals from circuit and probate courts involving real property disputes, no-fault cases, criminal cases, commercial disputes, family law decisions, and other such matters as well as appeals from decisions by the Public Service Commission, Tax Tribunal, Workers' Compensation Appellate Commission, and other public agencies and tribunals.

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Judge Murray suggested that the attorney who understands that Court of Appeals judges face this challenge can turn it to his or her advantage by beginning briefs with a one- or two-page introduction to educate the Court about "what the dispute generally concerns, how the lower [court, commission, or tribunal] ruled, and why it was correct or incorrect." This big-picture view of the case enables judges to "get a quick handle on what the case is about and what we should be looking for as we read on."

Judge Murray favors quoting both critical testimony from the record and key passages from controlling cases. While most lawyers are able to point the Court in the desired direction, "providing the actual text that should result in the Court's ruling your way is important." He recommends reproducing truly critical testimony verbatim—in judicious amounts, of course—as opposed to providing only a citation to the record. Keep prepared oral argument short and to the point. The brief should contain everything that needs to be said; the judges will have thoroughly reviewed and analyzed it. The real purpose of oral argument in the Court of Appeals is to give the judges the chance to ask the advocates to clarify factual or legal questions that concern the Court and may determine its ruling.



Judge Krause offered tips for briefing both arcane and familiar issues:

- Appellants should strive to catch the reader's attention at the outset by succinctly explaining the injustice or unfairness of the result to follow. This is even more important if you are doing an application for leave to appeal.
- All documents that the lawyer regards as dispositive or vitally important should be attached or filed in the appendix. Keep in mind that you can be selective in an ordinary appeal because the transcript is part of the record that has been sent to the Court of Appeals. But err on the side of inclusion when preparing or responding to an application for leave because the Court of Appeals does *not* receive the lower court or tribunal record.
- Provide a clear statement of the standard of review and, where applicable, any unusual burden of proof or persuasion.
- If precedent is an obstacle, acknowledge this but explain clearly why your case is distinguishable or, if you have no other option, why the precedent is wrongly decided.

Conclusion

Whether you are wrestling with an arcane issue or presenting a more garden-variety case, it is important to be truthful, clear, and concise. Set forth your best and winning arguments without unnecessary repetition or off-point caselaw. Do not inappropriately shade the facts. Present the bad along with the good and deal with it forthrightly. Avoid personal attacks on opposing counsel and remain professional. Assume the judge knows nothing about the facts of your case and may have little knowledge of the governing law, especially if the appeal presents unusual issues or comes from a specialized tribunal. Do the extra work needed to clearly explain uncommon issues and cases of first impression. Know your audience. Acknowledge the limits of what your audience can accomplish—there's no sense in urging a court to do something beyond its power. Be aware that different courts (and judges) view the role of oral argument differently, and tailor your arguments accordingly.

There is no one perfect way to present a difficult, complex, or maddeningly obscure case in an appellate brief. But understanding the demands on the court you are addressing and presenting your argument in a clear and succinct manner will go a long way toward ensuring that your position receives careful consideration. Good luck! ■



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FOOTNOTES

1. The thoroughly rewritten Subchapter 7.100 of the Michigan Court Rules took effect on May 1, 2012. See MCR 7.100 *et seq.*
2. Appeals brought by the Michigan Department of Treasury go to the Michigan Tax Tribunal, under MCL 211.34c(7), while appeals brought by property owners go to circuit court. See *Michigan Cogeneration Venture Ltd P'ship v Naftaly*, 489 Mich 83; 803 NW2d 674 (2011).
3. *McDougall v Schanz*, 461 Mich 15; 597 NW2d 148 (1999).