

TEN WAYS LAWYERS SABOTAGE THEIR APPEALS

Discussion Topic Outline

Part 1 – What not to write

Appellate persuasion comprises oral and written components. But don't assume that the two are equal; polls of appellate jurists consistently show that oral argument changes a justice's or judge's mind only about 10% to 20% of the time. That means that something on the order of 85% of appellate persuasion comes from your briefs.

Accordingly you can't expect to file a so-so brief and then resuscitate the case with a brilliant oral argument. That's possible in theory, but the deck is stacked against you if you try that approach. Here are some of the most common ways in which lawyers harm their clients' interests when preparing appellate briefs.

1. Assume you're writing to decisionmaking machines.

Appellate jurists are smart. And they have smart law clerks. This sometimes leads lawyers to conclude that their primary writing task is to ensure that their briefs don't omit anything. The readers are smart enough to figure out where each argument, case cite, and bit of evidence fits in the case.

But while they're smart, they're also human. Humans prefer to read material that's logically organized, and even interesting. That means you have to prepare your brief in such a way that the reader wants to know what's in the next sentence.

2. Write to your page limits.

If you can be persuasive in a ten-page brief, you can be twice as convincing in twenty, right? And even more so where the rules give you 35 or even 50 pages?

Wrong. In any context, shorter is almost always better. That's particularly true in appellate courts, where hundreds of appeals compete for a particularly scarce resource: judicial attention.

But your case is different, right? You *need* all those pages to make all of your points. In fact, you might even ask the court to give you additional pages.

Think again.

3. Use footnotes liberally, including for substantive argument.

The chief advantage of using footnotes, in some lawyers' view, is that unlike the main text, they can be single-spaced, thus giving you room for more words than you can cram into the main body of the brief.

This view is short-sighted, and not merely because of topic 2 above. The problem is that often jurists simply don't read what's in footnotes. They *only* read the main text. If you put an important analytical point in a footnote, you run the risk that your message will never reach your intended audience.

To be fair, appellate opinions often contain footnotes, including some very long ones. It's tempting to use them in the same way the justices do – that way, you're writing in a way that's familiar to them. But this approach isn't the most persuasive way to write.

4. Once you're in the appellate court, the parties' names change to "Appellant" and "Appellee."

In drafting your briefs, it may seem not only correct but more authoritative to use the names *Appellant* and *Appellee*. But both state and federal appellate courts direct you not to do that. Why not, when doing so promotes simplicity?

Because in persuasion, as with most other forms of communication – leaving aside James Joyce and a host of poets – clarity is more important than simplicity.

See FRAP 28(d) and Va.Supp. Ct. Rule 5:26(f) for the general rule and some examples. There's no parallel rule in the Court of Appeals of Virginia. Obey the rule anyway.

5. Show the appellate court how clueless the trial judge and your opponent are.

Political campaigns have shown conclusively that *ad hominem* attacks work. That opens the door to mentioning how regularly your appellate court reverses this trial judge. You can and should show the justices where your opponent has lied and mis-cited cases in his briefs, to the point where the State Bar ought to step in.

Except you shouldn't. Attacks on the person who made the decision below are never well-received and will be held against you. Attack the ruling, not the person who made it. And judicial proceedings are the wrong forum for complaints about ethical misconduct by opposing counsel. They waste time and don't relate to the issues that are on review.

Stay above the fray, even – especially – if your opponent cannot.

Part 2 – What not to Say

So, if 85% of appellate persuasion comes from the briefs, that means oral argument is of minor significance, right?

It's true that oral argument may change the outcome in only one case out of seven. But there's no way to know whether yours is that one, so it makes sense to prepare as well as you can, just in case. In addition, it's easier to lose a winning appeal by a sloppy argument than it is to turn a losing case into a winner by sheer eloquence. Here are some strategies to avoid if you want to maximize your chances of success at the lectern.

6. Conceding points is a good thing, right? It makes you look reasonable.

When an appellate jurist begins a question with, "Will you concede that . . .," you should regard that as a four-alarm fire. Unless you've prepared very well, you run the risk of giving away the farm by a too-hasty concession.

The opposite extreme is dangerous, too, because it makes you look unreasonably intransigent; you cannot simply adopt a never-concede-anything policy.

This tightrope walk illustrates the need to prepare not just for your speech, but for as many questions as possible – particularly the most troublesome ones. In some courts and some cases, you may be able to buy a little extra time so you can evaluate fully the effect of the concession, rather than making a snap decision that might cost you the case.

7. Regard every question warily, because questions are attacks on the strength of your position.

Some questions are undoubtedly antagonistic to your case. Occasionally the jurist will give you a subtle hint, such as delivering the question with an unmistakable snarl.

But most jurists have better poker faces than that; they pose questions in a tone that conveys interest in the answer. Recognize that not all such questions seek to undercut your position. Jurists frequently ask "friendly questions," which are opportunities for you to strengthen your case with a forceful answer. In those instances, the real target of the friendly question is another person in the room.

8. You never know what you'll need at the lectern, so bring your whole case file.

The first clause in this strategy is true; no one can anticipate every possible question, and no one can know which pleading, exhibit, transcript, case, statute, or other document might be needed when a question comes out of left field.

Resist the urge to come to the courthouse with four bankers' boxes loaded on a hand truck. When you walk to the lectern, it's far better to travel light. That being said, if you want the security blanket of having literally everything available to you at a moment's notice, you may now bring a tablet (or laptop, though that's probably too bulky) to the lectern with you. See the Fourth Circuit's Electronic Device Policy and the Supreme Court of Virginia's Computers in the Courtroom Policy.

Just be sure you know *very* well how to use it.

9. There are some things that just aren't my fault.

Appellate attorneys routinely handle appeals in cases they didn't try. In some of those cases, important legal issues may have been poorly preserved below. Jurists will assuredly point this out, in a question that decidedly is not friendly.

You'll be tempted to reply to such a question, "Yes, but I didn't try the case below. Someone else made that mistake." If you do, you will have succeeded in throwing the trial lawyer under the bus, but you will not succeed in deflecting the question. You're your client's representative in the appellate courtroom, and you need to own the case, not make excuses or shift blame.

The court will know from the record that you weren't trial counsel, so you don't need to explain yourself. Instead, focus on how the issue may have been better preserved elsewhere in the record, or why it isn't crucial to the resolution of the case.

10. The client's interest is the only thing that matters.

This is partially true; you're required to advance your client's cause faithfully, and you can't do anything to prejudice her. Rule of Professional Conduct 1.3(c).

But keeping the focus entirely upon your client's case can hamstring you in an appellate court. Those courts issue published opinions that will govern the next similar case, and the one after that. People and businesses make decisions based on the state of the law as announced in those opinions, and the jurists who write them don't want to establish a troublesome doctrine.

As counter-intuitive as it sounds, in an appellate court you must consider persons other than your client. That's because the jurists are thinking about those other people: How will a reversal, or an affirmance, affect society? Will it complicate future trials? Will it undercut the legislative framework in this area of the law?

Because the court will be thinking along these lines, you need to do so, too. Plan for hypothetical questions that don't match your facts exactly, but will foreseeably arise in future cases. Be prepared to tell the court how you want its opinion to read.

In an appellate court, you're no longer representing just a client; you're advocating a doctrine.

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What the Authorities Say

1. Make your briefs interesting.

“[Those] on the other side of the bench are not super-human in . . . their capacity to understand If you overload them with irrelevant matter, or bore them to tears with tedious and repetitive arguments, you can only reduce their receptivity to your real points. Anything you can do to make your brief shorter, lighter, and more readable, will improve your chances of getting your point across.” Denecke, et. al., *Notes on Appellate Brief Writing*, 51 Or. L. Rev. 351, 359 (1972).

2. Draft concise briefs.

“92. Strive to halve your page limits.” Garner, *The Winning Brief*, 3d ed. (Oxford Univ. Press 2014) at 615.

“What are the criticisms generally expressed by judges against lawyers’ briefs today? Here are some:

- Too long. Too long. Too long.
- Too many issues or points. . . .” Aldisert, *Winning on Appeal*, 2d ed. (NITA 2003) §2.4.

“Brevity is enjoined as the outstanding characteristic of good pleading.” Va. Sup. Ct. Rule 1:4(j).

“The Fourth Circuit encourages short, concise briefs. . . . A motion for permission to submit a longer brief must be made to the Court of Appeals at least 10 days prior to the due date of the brief and must be supported by a statement of reasons. These motions are not favored and will be granted only for exceptional reasons.” 4th Cir. Loc. R. 32(b).

3. Use footnotes sparingly if at all.

“When reading a footnoted [text] one’s eyes are constantly moving from text to footnotes and back again If footnotes were a rational form of communication, Darwinian selection would have resulted in the eyes being set vertically rather than on an inefficient horizontal plane.” Mikva, *Goodbye to Footnotes*, 56 U. Colo. L. Rev. 647, 648 (1985).

“If it’s important enough to say, say it in the text of your brief, not in a footnote. The only hard and fast rule is: ‘When in doubt, do not use them.’” Aldisert, *Winning on Appeal*, 2d ed. (NITA 2003) §17.3.

4. Use descriptors to identify the parties.

As the topic outline indicates, rules of court require this. Here are some useful examples and guidelines.

While the rules authorize the use of names, descriptors are usually better, because they’re unambiguous. If you use names in an appeal called *Smith v. Jones*, the court will have to make a mental note of who’s who; but if you use “the buyer” and “the seller,” there’s no memorization required.

In eminent domain cases, we strongly recommend using *the landowner* to identify the condemnee. You may use the condemnor if you wish, though “VDOT,” “the Authority,” or “the utility” are probably just as good.

Once upon a time, the advice in divorce cases was simple: use “the husband” and “the wife.” That’s still effective in opposite-sex unions, but after *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015), you may need to be creative.

It’s perfectly acceptable to use “the defendant” and “the Commonwealth” or “the prosecution” in criminal appeals, since that’s unambiguous. The main exception is where multiple defendants are tried together; then you’ll probably need to use their names.

The fundamental criterion is clarity. If your descriptor is short and unambiguous, it’s generally okay.

5. Attack the ruling, not the judge who made it.

“A traditional story of Marshal Wright’s was that when [one lawyer] began an elaborate opening by citing many of the fundamental authorities, he was interrupted by an Associate Justice who said that [he] ought to take it for granted that the Court knew some elementary law. To this [the lawyer] replied: ‘Your Honors, that was the mistake I made in the Court below.’” Butler, *A Century at the Bar of the Supreme Court of the United States* (1942) at 88-89.

6. Think in advance about possible concessions.

“Don’t try to defend the indefensible. If a legal rule favoring your outcome is exceedingly difficult to square with the facts of your case, forget about it.” Scalia and Garner, *Making Your Case* (Thomson/West 2008) at 20.

“Be careful about making concessions. If in the preparation of your argument you believe that it may be appropriate to make concessions, then do it. Do not make careless concessions at oral argument on the spur of the moment. They may come back to haunt you.” Aldisert, *Winning on Appeal*, 2d ed. (NITA 2003) §24.4.6.

“[M]ore cases have been lost by counsel seeking to be agreeable and conceding points they should not, than by their standing firm.” Bederman, *A Chilly Reception at the Court*, 5 J. App. Pract. & Proc. 51, 57-58 (Spring 2003).

7. Recognize, and take advantage of, friendly questions.

“Occasionally, especially when you have been hard pressed by another member of the panel, a judge will try to give you a helping hand – asking, for example, a rhetorical question that suggests what your answer to an earlier hostile question might have been. It’s the height of ingratitude (and of foolishness) to mistake this friendly intervention for a hostile one and to resist the help that has been offered.” Scalia and Garner, *Making Your Case* (Thomson/West 2008) at 196.

“Friendly questions. These are the soft pitches judges throw lawyers to enable them to cast their positions in a favorable light. . . . Such questions from an appellate judge can mean that she is using the lawyer as a mouthpiece in a debate with her colleagues on the panel.” Vail, *Oral Arguments Big Challenge: Fielding Questions from the Court*, 1 J. App. Pract. & Proc. 401, 403 (Summer 1999).

8. Travel light to the lectern.

“An attorney who, during argument, fumbles through masses of office files, bundles of books, and court records is usually unprepared.” Pope, *Argument on Appeal*, 14 Pract. Lawy. 33, 45 (1968).

“There is something psychologically persuasive about a man who comes before an appellate court unburdened by a lot of legal paraphernalia.” Morison, *Oral Argument on Appeal*, 10 Wash. & Lee L. Rev. 1, 7 (1953).

“An attorney should not bring lots of papers, notes, and books to the podium or even to the courtroom – they are usually not needed or useful and they give the impression that the lawyer is not prepared.” Axelrad, *Appellate Practice in Federal and State Courts* (Law Journ. Press 2014) §11.09.

9. Never make excuses.

“If you don’t know the answer, admit it; the penalty for not having an answer at your fingertips is less severe than the penalty for trying to fake it, getting caught, and giving the court an opportunity to bat you around like a cat playing with a ball of yarn.” Boyce, *Reflections on Going to the Show*, 17 App. Advocate at 21-23 (Summer 2004).

“Nor is it ever satisfactory for an appellate judge to hear, as I have, the explanation that an appellate lawyer does not know where in the record the particular objection was taken because, ‘I didn’t try the case below.’ Neither did the judges hearing the appeal! We expect you to know the record, backwards and forwards, and certainly better than we do.” Garth, *How to Appeal to an Appellate Judge*, 21 Litg. 20, 22 (Fall 1994).

10. Think about where your preferred doctrine leads.

“Justice Antonin Scalia reminds lawyers that the five worst words they can say . . . in response to a hypothetical are, ‘That is not this case.’ As the Justice puts it, ‘We know that is not this case – we are not stupid. We want to know what will happen in the next case.’” Axelrad, *Appellate Practice in Federal and State Courts* (Law Journ. Press 2014) §11.05.

“Remember the court is not only deciding your case, which is *your* primary concern, but is establishing rules for future cases, which is the *court’s* primary concern.” Heinke & Casadio, *Oral Argument in the Federal Circuit Courts*, 16 Cal. Litg. 36, 40 (2003).