The Alexander Blewett III School of Law
The Scholarly Forum @ Montana Law

Faculty Journal Articles & Other Writings | Faculty Publications

7-2005

How to Make Your Appellate Brief More Readable

Jonathon S. Byington
Alexander Blewett III School of Law at the University of Montana, jonathon.byington@umontana.edu

Follow this and additional works at: http://scholarship.law.umt.edu/faculty_barjournals

Part of the Legal Writing and Research Commons

Recommended Citation
Jonathon S. Byington, *How to Make Your Appellate Brief More Readable* , 48 Advocate 17 (2005),
Available at: http://scholarship.law.umt.edu/faculty_barjournals/48

This Article is brought to you for free and open access by the Faculty Publications at The Scholarly Forum @ Montana Law. It has been accepted for inclusion in Faculty Journal Articles & Other Writings by an authorized administrator of The Scholarly Forum @ Montana Law.

How to Make Your Appellate Brief More "Readable"

By Jonathan Byington

This article discusses ways to improve the readability of appellate briefs. It is a synthesis of suggestions from several state appellate judges,[1] numerous articles on appellate practice,[2] and my own observations. An appellate brief should be written for its reader. Its purpose is to persuade the reader that the lower tribunal's decision was either right or wrong. Although the methods of persuasion are as numerous as the personalities of the attorneys who utilize them, all persuasive briefs share one fundamental attribute—they are readable. A brief is readable if it communicates clearly. Attaining readability demands more than mere grammatically correct sentences or the absence of spelling errors. It requires writers to invest extra effort to adjust every aspect of the brief so the reader's job is easier. The affect on the reader should be the driving force throughout the brief-writing process because a brief that is easy to understand is persuasive.

Credibility is Earned, Not Assumed

Credibility is one of the most important virtues of a readable brief. A brief is credible if it is trustworthy or believable. An attorney's credibility requires years to establish and a single moment to destroy. Likewise, a brief loses credibility the instant it starts to mislead the reader. A brief can mislead by misrepresenting legal authority, exaggerating the facts, misquoting something, not providing a spot cite or mischaracterizing portions of the record. As a general matter, the reader's perception of the writer's credibility will affect how the brief is read. Writers must ensure their brief builds credibility instead of destroying it.

Organization is Essential to Making Your Brief Readable

Much like building a house without a blueprint, a brief written without a preliminary outline runs the risk of omitting vital components and resulting in a disjointed product. An unorganized brief places an unwarranted burden on the reader. In contrast, a readable brief places each piece of the puzzle with the end picture in mind. It leads the reader, piece by piece, until the entire picture is revealed.

Writers should start the brief-writing process by determining what they want the court to do. Correctly stating the issues is an important factor in obtaining the desired result. Each issue should be analyzed separately and arguments should be structured in the same order as the issues presented. The strongest argument should be stated first. The strongest argument is the argument on which the reader is most likely to agree with the writer. If a writer is representing the respondent, the brief should be structured in the same order as the appellant's unless there is a dispositive issue.

The Standard of Review Shapes the Appeal

The beginning of the argument section should state the standard of review for each issue. At the outset of the brief-writing process, a writer should determine the standard of review immediately after deciding what the issues are. The standard of review helps the writer identify and focus on the most persuasive aspects of the appeal. The standard of review also defines how the appellate court will view the arguments. For example, if a writer is making an "insufficiency of the evidence" claim, it would be unpersuasive to only discuss favorable evidence if the record contains evidence that supports the opposing party's position.

While the standard of review is important, it is not persuasive to fill an entire page with quotations reciting the applicable standard of review. Appellate judges are very familiar with standards of review and long block quotations are unhelpful. A respondent should never assume the standard of review the appellant used is correct. If appropriate, a respondent should point out that a different standard of review applies.

Use the Statement of Facts to Provide a Context for Compelling Legal Argument

Readers want to learn the facts that are in the record, not the attorney's opinions, conclusions, or interpretation of the facts. There is a difference between advocating and arguing. Although facts should not contain argument, wise writers will produce a recitation of the facts that advocates in their favor. To increase readability, make the facts a story. Unfavorable facts should be included and put into perspective. This allows writers to characterize the bad facts in a way that favors their position. It also decreases the strength of their opponent's use of the facts. Addressing bad facts also enhances the writer's credibility and makes the reader feel like the facts are being recited accurately. Do not include immaterial dates or pleadings in your statement of facts. A writer should include everything the reader needs to know and nothing else. Remember that the reader is not familiar with the case and needs some background to obtain a complete picture of what has happened. Depending on the issues and the standard of review, an appellate brief rarely needs to include every fact or pleading that was submitted to the trial court.

In general, every sentence that states a fact should contain a reference to the record. References should cite to the original source (i.e., a deposition or trial transcript) instead of the district court's findings of fact. Citing to the record gives the reader the opportunity to refer to the original source if necessary. It also helps keep the writer from exaggerating substantially from the facts in the record. When advocating, do not slant the facts to the point of losing credibility. Cite the record at the end of a paragraph if all of the facts in the paragraph come from the same page of the record. If two or more sentences in a paragraph come from different pages in the record, cite the corresponding page in the record after each sentence.

Minimize the Significance of Your Opponent's Strengths By Discussing Them

In addition to discussing unfavorable facts, writers should address their case's weaknesses and diffuse their opponent's strongest arguments. This includes recognizing opposing authority, the boundaries of the standard of review and opposing policy concerns. Addressing your opponent's strengths also builds your credibility. Only address your opponent's strongest points and do not dwell on them. Otherwise, it will imply you are overly concerned with your opponent's position.

Personal Attacks On Opposing Counsel or the Trial Court Are Counterproductive

If the purpose of your brief is to persuade, belittling opposing counsel merely diverts the reader's attention away from the substantive issues. It breaks the flow of persuasion. Although some writers cannot resist the temptation to call opposing counsel an "inept moron," the better way to convince a reader is to show how baseless opposing counsel's arguments are. Attacking the weaknesses of your opponent's assertions is much more persuasive than denouncing your opponent's character.

Similarly, insulting or demeaning comments about the trial court simply tarnishes credibility. Many appellate judges used to be trial judges. In addition, appellate judges and trial judges are peers. Persuading appellate judges to agree with the writer on substantive issues is extremely difficult if the judges are shaking their heads disagreeing with the writer's demeaning comments. A writer should attack a wrong decision without assaulting the decision-maker.

Headings Enhance Readability Because They Orient the Reader

Just as landmarks on a map help explorers find their way, headings help the reader know what the arguments are and where they are going. Effective headings advocate the writer's position instead of merely labeling the topic of the section. Headings should summarize the essential factual and legal argument of the succeeding section without being a "copy-and-paste" of the issues presented. Each issue should have a separate heading and, if appropriate, the elements of each issue should have their own sub-headings.

Attachments Ease the Reader's Burden and Increase Comprehension

Attachments are an under-utilized source for brief writers. Maps, charts, diagrams or tables often convey information much more effectively than raw, plain text. For instance, a timetable can replace long procedural histories or complicated chains of title. In moments, a color-coded subdivision plat can convey what would have required twenty pages of metes and bounds descriptions.

Attachments must already be in the record and should cite to their corresponding location in the record. Place attachments in an appendix at the end of the brief. If you have more than one attachment, put a tab between them. Attachments can include the Memorandum Decision and Order that is being appealed as well as other key documents or language. In terms of the writer's quest to make the reader's job easier, attachments can be the "Holy Grail."

Use Citations to Strengthen, Not Lengthen Your Argument

In general, string citations are unhelpful and should be avoided. The applicability of a "well-settled" rule does not depend on how many citations follow it. Wherever possible, use pinpoint citations (citing to a specific page) for both authority and the record. If writers truly have their reader in mind, they will rarely cite authority without providing the reader the exact location of the proposition being cited. Citing a source without referring to specific material within the source suggests it does not directly stand for the position the writer is asserting. It also obligates the reader to cull through the entire source to find the relevant language. Forcing the reader to spend time and energy researching your assertions prevents the reader from focusing on the substance of your argument.

Write Quotations So They Will Not Be Skipped Or Skimmed

Long block quotes are often skimmed or skipped. A reader will be more likely to read a block quotation if the writer explains why the quotation is important before requiring the reader to read it. For example, before quoting important statutory language, the writer should explain why the statute is being quoted and what the reader should obtain from reading it. The writer should also use ellipsis to shorten long quotations to include only the essential points. Break up quotations by paraphrasing and remember to cite the paraphrase using a pinpoint citation. When paraphrasing or using ellipsis, a writer should be cautious not to slant the paraphrase to the point of misleading; otherwise, credibility will be lost when the reader checks the original source.

A Brief Filled With Gimmicks is Not Persuasive

Do not repeatedly use italics, bold, underlining, capitalization or multiple exclamation marks for emphasis!!! It is disruptive and distracting. As far as labeling the parties, it is more persuasive to refer to them by name or status (i.e., employer or buyer) rather than appellant or defendant. Writers should label the parties consistently and not refer to their client by name and the opposing party as "the defendant."

A Readable Brief Requires Extra Effort—But Readability Results In Persuasion

Writers must bear the burden of making their briefs readable. Prevailing on appeal depends primarily on the persuasiveness of the brief. A readable brief enables writers to convince readers without the readers noticing they are being influenced. Readers think they have come to the conclusion themselves when, in reality, the writer has been holding their hands throughout the entire process of persuasion. Applying the principles in this article will aid the writer in that endeavor.

About the Author:

Jonathon S. Byington *is currently serving as a law clerk for Justice Linda Copple Trout of the Idaho Supreme Court. After his clerkship, he will join the law firm of Racine, Olson, Nye, Budge & Bailey, Chartered in Pocatello, Idaho. In 2001, he graduated from Utah State University with a B.S. degree in finance and economics. In 2004, he graduated from the University of Idaho College of Law, summa cum laude.*

Endnotes

1 In preparing this article, the author sought the advice of members of the Idaho Supreme Court and the Idaho Court of Appeals.

2 The following sources influenced this article: David Lewis, *Common Knowledge About Appellate Briefs: True or False?*, 6 J. APP. PRAC. & PROCESS 331 (Fall 2004); Charles A. Bird and Webster Burke Kinnaird, *Objective Analysis of Advocacy Preferences and Prevalent Mythologies in One California Appellate Court*, 4 J. APP. PRAC. & PROCESS 141 (Spring 2004); Mortimer Levitan, *Confidential Chat on the Craft of Briefing*, 4 J. APP. PRAC. & PROCESS 305 (Spring 2004); Andrew H. Baida, *Writing a Better Brief: The Civil Appeals Style Manual of the Office of the Maryland Attorney General*, 3 J. APP. PRAC. & PROCESS 685 (Fall 2001); Patricia M. Wald, *19 Tips From 19 Years On The Appellate Bench*, 1 J. APP. PRAC. & PROCESS 7 (Winter 1999); Alex Kozinski, *The Wrong Stuff*, 1992 BYU L. REV. 325 (1992); Christine M. Durham, *Writing a Winning Appellate Brief*, 10 UTAH B.J. 34 (Oct. 1997); Fred I. Parker, *Appellate Advocacy and Practice in the Second Circuit*, 64 BROOK. L. REV. 457 (Summer 1998); Harry Pregerson, *The Seven Sins of Appellate Brief Writing and Other Transgressions*, 34 UCLA L. REV. 431 (1986); FREDERICK BERNAYS WIENER, EFFECTIVE APPELLATE ADVOCACY (rev. ed. 2004); CAROLE C. BERRY, EFFECTIVE APPELLATE ADVOCACY: BRIEF WRITING AND ORAL ARGUMENT (1998); HENRY WEIHOFEN, LEGAL WRITING STYLE (2d. ed. 1980).

Staff Attorney
American Civil Liberties Union of Idaho

The American Civil Liberties Union of Idaho, an organization devoted to the defense of the Bill of Rights, seeks staff attorney. Responsibilities include evaluating and processing legal intake, coordinating and providing back-up assistance to ACLU-ID litigation, participating directly in litigation in selected cases, preparing legal memoranda and demand letters, expanding pool of cooperating attorneys and supervising student interns. Exceptional analytic, research, writing and oral advocacy skills, broad knowledge of and commitment to civil liberties principles required; experience litigating constitutional issues preferred. Salary dependent on experience. Excellent benefits package. Send cover letter, resume, legal writing sample, and three professional references to:

Search Committee
ACLU of Idaho
P.O. Box 1897
Boise, ID 83701

The ACLU is an Affirmative Action/Equal Opportunity Employer. Women, people of color, GLBT persons, and people with disabilities are encouraged to apply. Write for a full job description. Please do not e-mail or call. No interviews will be scheduled until after August 22, 2005. Applications will be accepted until the position is filled.

Miller Engineering

Idaho
Boise-Twin Falls
208-326-4729

Michigan
Ann Arbor
734-662-6822

www.millerengineering.com
e-mail: jmiller@millerengineering.com

Mechanical Engineering
Power Tools and Machine Guarding
Guarding and Entanglement Accidents
Compliance with OSHA/ANSI/ASTM/UL/NFPA
Metalworking, Woodworking, Plastic Molding
Warnings, Labels, Instructions and User Manuals
Warnings & Instructions Books by Miller & Lehto (4)
Design of User Manuals & Warnings (ANSI Z535)
International (ISO) Symbol/Warning Requirements
Health & Chemical Hazard Warnings
Consumer Product Safety
Human Factors and Ergonomics
Slips, Falls: Premise - Vehicle - Ladder
Child, Home Appliances, Power Tools & Electrical
Vehicles: Auto, Truck, Trailer, Boat, Recreational
Auto Crash Data Retrieval System (Vetronix CDR)
Roadway/Traffic Accident Reconstruction
ATV, Jet Ski, Snowmobile, Personal Watercraft
Seat Belts, Air Bags, Restraint Usage/Warnings
Chemical, Environmental and Fire
Fires & Explosions: Vapors/Electrical/Chemical
OSHA Material Safety Data Sheets (MSDS)
Chemical Labeling Requirements (ANSI Z129.1)
Groundwater & Environmental Contamination
Chemical & Solid Waste Disposal Warnings
Agricultural and Construction Engineering
Construction Trades & Equipment Accidents
Tractor, Implement, Harvester & Grain Storage
Chemicals: Pesticides, Herbicides, Fungicides

James M. Miller, PE, PhD **Mark R. Lehto, PhD**
Bradley T. Cook, PE, BSME
Our 12 other professional staff represent degrees in mechanical, agricultural, chemical, human factors, ergonomics, packaging, law and psychology

PCKeys Technology Solutions

CAN YOU PASS OUR QUIZ?

HOW DO YOU:

Buy 1 Get 1 Half Off July! Call Today!

- **SELECT A SENTENCE WITH ONE CLICK?**
- **GENERATE A SINGLE PDF FILE FROM 5 SOURCE FILES INCLUDING BOOKMARKS?**
- **PREVENT CHANGES TO A WORD OR PDF DOCUMENT WHEN ITS SENT FOR REVIEW?**
- **UPDATE FORMATTING OF ALL TITLES AT ONCE?**
- **REPLACE PAPER WITH ELECTRONIC FILES?**

If you don't know, we can help. PCKeys designed the *only* computer training in Idaho specifically for legal pros!
208.331.3121 www.pckeys.com legal@pckeys.com