



Brief Writing—In General

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Consider this: it is the trial of the most important case in your career, the case that you have been working on for years, and the most important witness on the other side has just finished her direct testimony. Her cross-examination is the moment you have been waiting for, the key, the pivotal part of the trial, the make-or-break point of the entire case. And so, of course, you hand over the cross-examination to the most junior, the most inexperienced, the least knowledgeable lawyer on the team. Sound crazy? Of course it does. Yet this—unfortunately—is a fairly apt description of what goes on in law firms across the country when it comes to appeals.

In the United States federal appellate system, the appellate brief is the functional equivalent of the cross-examination of the key witness in the key case. This is so not only because the majority of appeals—in some circuits over 80 percent—are decided without oral argument, but also because, even when there is oral argument, judges agree that the briefs are far more important to their decision-making process. In law firms across the country, however (and perhaps, in particular, in large law firms), lawyers without appellate experience are given primary responsibility for writing the appellate brief. Then, to compound the problem, the more senior lawyers on the case give the brief relatively short shrift, in some cases spending just an hour or two reading the brief over just to make sure it generally reads well and makes sense.

This phenomenon exists despite the fact that, over the last two centuries, the appellate brief has become the preeminent feature of the appellate process. Indeed, briefs have now replaced oral argument as the main source of communication with the appellate court, mostly as a result of the increasing caseload of the appellate court, with the attendant increased pressures and constraints on the time of appellate judges. Technological advances also have contributed to the role and power of the written word. A brief look at the history of the American appellate process, dating back to its English roots, demonstrates this shift in focus.

14-1 A BIT OF HISTORY

The English legal system developed two branches of the legal profession, solicitors and barristers. Solicitors handled the client's affairs outside the courtroom, and barristers were the courtroom advocates. Because only barristers could appear in court to represent litigants and make

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oral arguments on their behalf, the barristers' job was viewed as more significant. The same was true in the English appellate courts, where proceedings were almost exclusively oral and continued for many hours. Indeed, the only written components of the English appellate system were the trial record and copies of the reports of cases cited by counsel. When oral argument came to a close, the judge would issue an oral opinion.

The oral traditions ingrained in the English legal system had a major impact on the development of the American appellate system, but they did not retain as strong a hold in American courts. Because the roots of the English legal system were developed before the introduction of the printing press, typewriter, and copy machine, significant emphasis was of necessity placed on oral advocacy and oral opinions. While technological advances did not produce a major change in the deeply embedded oral foundation of English legal proceedings, they had a profound effect on the American system. The changes in practice in the United States Supreme Court alone in the past century and a half illustrate the point.

Before 1849, the Supreme Court did not limit the length of oral argument, and written briefs were not even mentioned in the Supreme Court's rules. There are stories told of arguments continuing, literally, for days. For instance, the arguments of Daniel Webster, Luther Martin, and their colleagues in *McCullough v. State of Maryland*, 17 U.S. 316 (1819), are reported to have lasted for six full days! In 1849, the Supreme Court imposed a two-hour limit on the time allotted for each attorney's oral argument; in 1870, oral argument was cut to two hours per side; in 1911, it was reduced to 45 to 90 minutes per side; in 1931, it declined to 30 to 60 minutes per side, in most cases; and finally, in 1984, the time allotted for oral argument in the Supreme Court was reduced to its present state of 30 minutes per side.

Conversely, the Supreme Court did not require written briefs at all until 1821. At that time, the briefs contained all the material pleadings, facts, and documents on which the parties relied, along with the points of law and facts intended to be presented at the argument. All this, and yet the briefs were limited to three to four pages in length. Then, in 1884, the Supreme Court mandated for the first time that the briefs include legal arguments and points of law, as well as relevant authority. By the turn of the century, the new form of legal argument—written, rather than oral—was taking hold.

While the Supreme Court still hears oral argument in virtually every case it disposes of on the merits, the situation is far different in the federal courts of appeals. Indeed, today federal appellate courts around the country rely so heavily on the written brief that most cases are decided without any oral argument at all. And even where oral argument is granted, it is typically limited to 10 or 15 minutes per side.

14-2 THE STATISTICS SPEAK

According to records kept by the Administrative Office of the United States Courts, for the 12-month period ending September 30, 2009, 71.5 percent of appeals that were terminated on the merits in the 12 circuit courts of appeals were decided on the basis of the briefs alone, without oral argument. This represents a significant decline in oral arguments from 1999, when 62.9 percent of the cases were decided on the briefs without oral argument.

In 2009, for example, the Third Circuit Court of Appeals granted oral argument in 15.8 percent of cases. By way of comparison, at the other end of the spectrum, the District of Columbia Circuit heard oral argument in 47.6 percent of the cases terminated on the merits, the Seventh Circuit in 47.4 percent, and the Second Circuit in 39.1 percent. On the other hand, the Eleventh Circuit heard oral argument in only 14.4 percent of the cases terminated on the merits; the

Fourth Circuit in 12.1 percent, and the Fifth Circuit in 27.3 percent. And even where the appellate court holds oral argument, the time allotted per side continues to diminish. As caseloads continue to increase, it is likely that these trends will continue.

The statistics speak for themselves: because the federal courts of appeals dispose of most appeals without oral argument, the appellate brief is of paramount importance. The brief represents the principal, and in most cases the only, opportunity for the appellate lawyer to make his or her case to the appellate court. Indeed, the brief often is the very vehicle by which the judges decide whether or not even to hear argument in the case. The brief, in short, is *the* defining point in the appellate process.

14-3 THE JUDGES JUDGE

The virtually uniform comments of appellate judges confirm the statistics. Former Chief Justice William Rehnquist put it succinctly: “[I]nside of a hundred years the written brief has largely taken the place that was once reserved for oral argument. For that reason, an ability to write clearly has become the most important prerequisite for an American appellate lawyer.” Indeed, according to the chief justice, “rarely is good oral advocacy sufficient to overcome the impression made by a poorly written brief.” William H. Rehnquist, *From Webster to Word-Processing: The Ascendance of the Appellate Brief*, 1 J. App. Prac. & Process 1, at 3, 4 (1999).

Justice Ruth Bader Ginsburg concurs: “As between briefing and argument, there is a near-universal agreement among federal appellate judges that the brief is more important—certainly it is more enduring. Oral argument is fleeting—here today, it may be forgotten tomorrow, after the court has heard perhaps six or seven subsequent arguments.” Ruth Bader Ginsburg, *Remarks on Appellate Advocacy*, 50 S.C. L. Rev. 567, 567–68 (1999).

Appellate judges around the country echo these views. Judge Joel Dubina of the Eleventh Circuit emphasizes that the appellate brief is the single most important factor in the appellate process. Joel F. Dubina, *How to Litigate Successfully in the United States Court of Appeals for the Eleventh Circuit*, 29 Cumb. L. Rev. 1, 2 (1998/1999). Senior Judge Ruggero J. Aldisert of the Third Circuit states that oral argument adds very little to the ultimate result of a contested case and estimates that “[n]inety-five percent of appellate cases are won or lost on the basis of written briefs.” Ruggero J. Aldisert, *The Appellate Bar: Professional Responsibility and Professional Competence—A view from the Jaundiced Eye of One Appellate Judge*, 11 Cap. U.L. Rev. 445, 456 (1982).

Moreover, even when oral argument is granted, the brief still carries tremendous weight. For one thing, in the federal courts of appeals, where the decision whether to grant oral argument is entirely discretionary (Federal Rule of Appellate Procedure 34), the judges have only the briefs to go on in making that decision. So even on the threshold level of getting to the oral argument gate, as it were, the brief is key. And given that far more cases are affirmed than reversed on appeal—particularly where the panel decides the case without oral argument—it is particularly incumbent on the appellant to write a brief that will capture the court’s interest and attention enough to motivate the court to set the case down for oral argument.

More substantively, whether there is oral argument or not, the judges overwhelmingly agree that cases are decided primarily on the basis of the briefs. Indeed, in all her years on the bench, Justice Ginsburg rarely has seen victories “snatched at oral argument from a total defeat the judges had anticipated on the basis of the briefs.” Ginsburg, *above*, at 570.

Judge Dubina says that since he has been on the court of appeals, oral argument has changed his mind in no more than 10 percent of the cases. Dubina, above, at 8. According to Patricia M. Wald, former chief judge of the U.S. Court of Appeals for the D.C. Circuit, “[O]ral argument seldom brings you 180 degrees around, but if your tilt is, say 51–49%, it can make a big difference.” Patricia M. Wald, *19 Tips From 19 Years On the Appellate Bench*, 1 J. App. Prac. & Process 7, 17 (1999).

Judge Richard Arnold of the Eighth Circuit deems oral argument more important than do most of his counterparts in the federal system, noting that it provides a unique opportunity for the judges and the lawyers actually to engage in a discussion about the case. Yet even Judge Arnold calculates that oral argument changed his mind in only 16.5 percent of the cases he heard over a 10-month period. Myron H. Bright and Richard S. Arnold, *Oral Argument? It May Be Crucial!*, ABA J., Sept. 1984, at 69.

What is clear is that, regardless of whether oral argument is granted, it is the brief that makes the first impression on the court. And the brief also makes the last impression—when the judge turns to write an opinion after the oral argument, he or she likely turns back to the brief.

Justice Thurgood Marshall made the point precisely:

It is the brief that does the final job, if for no other reason than that the opinions are often written several weeks and sometimes months after the argument. The arguments, great as they may have been, are forgotten. In the seclusion of his chambers, the judge has only his briefs and his law books. At that time your brief is your only spokesman.

Thurgood Marshall, “The Federal Appeal,” in *Counsel on Appeal* 139, 146 (Arthur A. Charpentier ed. 1968).

14-4 THE LAWYERS PRACTICE

Against this background, what is the actual practice of lawyers in drafting the appellate brief, this most critical of documents, this most defining of points in the appellate process? One would think that, like the cross-examination of the key witness, the drafting of the brief principally would be in the hands of the most capable writer, the most experienced appellate advocate, the person in the office or on the team who is most versed in effective written advocacy, particularly at the appellate level. But, unfortunately, often the opposite is true.

In many firms, brief-writing most often is relegated to the most junior lawyers in the office. That’s what firms hire associates for, after all! Indeed, even the term “brief-writer” itself is often viewed as pejorative and, while perhaps marginally acceptable for a female lawyer on a “mommy track,” certainly is no role that any self-respecting “real” lawyer would want to find him- or herself in.

So there comes to be a troubling disconnect between reality and practice: while experienced lawyers know (or should know) that the brief is the key to success on appeal, they do not act in accordance with that knowledge. With oral arguments becoming less and less significant and brief-writing becoming more and more important to the outcome of appeals, it seems counter-intuitive that so many experienced lawyers are content to relegate the bulk of the brief-writing to their colleagues without appellate experience.

Yet the more senior lawyers count on making their mark on the appeal at what is viewed as the sexier and more glamorous part of the appellate process—presenting the oral argument—yes, the very same argument that in all likelihood never will occur, or (if it does) may soon be forgot-

ten, or (if it occurs and if it is not forgotten), likely will make very little difference to the ultimate outcome of the case. After all, all those years of practice, all that carefully honed experience, all that success in the limelight was not spent to be “just a brief-writer”!

Another problem, particularly endemic to large cases handled by large law firms, is that all too often briefs are written by a group of lawyers, with various people taking responsibility for different parts of the briefs—and, not surprisingly, producing a confusing and disjointed product. The inclusion of many different viewpoints and writing styles in one brief inevitably results in incongruity, if not incoherence. Even worse, the brief ends up with no unifying theme. At some point, a single person, hopefully, the experienced and able appellate advocate, needs to take charge of the brief and turn all of his or her attention to it. That is the only way to produce a “seamless,” concise, coherent, thematic, focused—and, ultimately, persuasive—brief.

The bottom line is that good, clear, persuasive writing takes skill, and it takes time—time with few distractions to provide the opportunity for sustained focus. That sustained devotion to one task is often difficult for busy trial lawyers who have many other matters to attend to in the course of a day. And, even if a lawyer has the time, not everyone has the inclination to roll up his or her sleeves and do the hard thinking, analyzing, drafting, and synthesizing jobs that go into good appellate briefs. Who but the seasoned appellate lawyer would ponder over the choice and placement of every word, à la Mark Twain’s infamous observation that, “[t]he difference between the almost-right word and the *right* word is really a large matter—it’s the difference between the lightning bug and the lightning!” And who but the seasoned appellate lawyer would get the same kind of satisfaction and—dare I say—thrill out of producing a tight and effective brief as a trial lawyer gets out of performing a crushing cross-examination.

Further, even in the minority of cases where oral argument is granted, if the person arguing the appeal did not play a major role in writing the brief, the oral argument will be adversely affected. The person who has orchestrated the brief can best orchestrate the oral argument; conversely, the person who has not been deeply involved from the outset in crafting the brief will have a difficult time understanding how the parts of the case fit together, why some arguments should be emphasized and others not, and why certain themes were accepted and others rejected. A lawyer brought in solely for the argument can “learn” the case, can even memorize the brief and the record, but that can never take the place of having been the heart and soul behind the crafting of the brief.

Indeed, given the intensity of oral argument—perhaps attributable both to the compressed time period for argument and the court’s heightened interest in those few cases that are selected for oral argument—it is difficult to imagine a lawyer arguing an appeal before a federal appellate court who did not have a heavy hand in the briefing.

Chief Justice Rehnquist described the problems that arise when a lawyer argues the appeal despite the fact that he or she did not participate in the drafting of the brief. According to the chief justice, “[t]he impression given [to the Court] is . . . like that of a horse in a children’s play, the horse being the simulated skin of the animal draped over two children, one providing the front feet, and the other providing the back feet. It looks fine until it begins to move, and then it is clear that there are two separate beings involved, often pulling in different directions.” Rehnquist, above, at 5–6.

14-5 THE “JUST A BRIEF-WRITER’S” SOLUTION

The “solution,” as it were, speaks for itself. Taking the advice of appellate judges throughout the country, lawyers (and their clients) should make sure that experienced appellate advocates are primarily responsible for crafting appellate briefs. With the brief being the headliner of the appellate process, the experienced appellate lawyer should immerse him- or herself in both the record and the case law and take a dominant role in the brief-writing process itself. This more active role will add experience and knowledge to the brief-writing process that is not available where a junior or less experienced appellate lawyer is writing the brief. Additionally, this more hands-on role will serve to increase the effectiveness of any oral argument that may be had, and could be the deciding factor in the close case, where the oral argument may actually make a difference.

Perhaps somewhat counterintuitively, the increased involvement of the appellate lawyer at the brief-writing stage likely also will reduce the overall cost of the appeal. While clients may not initially appreciate the value in having more experienced lawyers with higher billing rates spending more time writing briefs, this approach actually results in efficiencies. When the experienced appellate lawyer takes the lead in drafting from the start, he or she may spend more time on the brief than if another lawyer did the initial drafting. The total time spent, however—and, so, the cost—ultimately will be less. In addition, if there is oral argument, costs will be reduced because the lawyer presenting the argument will not have to learn the entire case from scratch in order to present the 10- or 15-minute argument. This approach eliminates the step where the person with the real knowledge of the facts, the law, and the theme of the appeal—that is, the one who wrote the brief—has to convey the chip with all that information to the person presenting the oral argument.

As to the challenge of devoting sustained attention to the brief, consider this: trial lawyers spend days out of their offices taking or defending depositions or on trial, focusing exclusively on one matter for one client and inaccessible to other clients’ competing demands on their time. This concentrated attention to one project is what is necessary, what is expected, and what makes us the professionals that we are. So why not consider time spent writing an appellate brief the same way?

Moreover, the shift in emphasis in the appellate process from oral advocacy to written advocacy—in large part to conserve judicial resources—has had the somewhat paradoxical effect of so inundating appellate judges with so much to read that succinct, crisp, well-written briefs are at a higher premium than ever before. Appellate briefs need to get the court’s attention, in order to influence the panel’s decision whether to schedule oral argument at all. To do that, they need to be focused, well-organized, and easy to read. They need to be, in a word, brief. They need to have a coherent theme. They need to be lively and captivating. They need to present the facts in such a way as to make the court want to come out your way; they need to present the law in such a way as to show the court how to get there.

And of utmost importance, appellate briefs need to state (but not overstate) the facts and the law in such a way as to persuade. They need to avoid being so transparently aggressive or one-sided that they antagonize or risk credibility. They need to refrain from the unfortunate tendency to attack or impugn the integrity or intelligence of opposing counsel or (if a brief for the appellant) of the trial court. They need to anticipate and deal with the weaknesses of the case. Every case has them; the most powerful brief meets those weaknesses head-on and shows the court the way around them.

The list goes on and on. This article is not meant to supplement the excellent materials available on effective legal writing. The point here is simply that, given the intense weight that the appellate brief must carry today, it only makes basic sense to put the best person available to the task.

To end where we began: no one would expect anything less than that it is the senior trial lawyer who prepares for and then cross-examines the key witness in the key trial. Similarly, given the realities of how appeals are decided, we should come to expect that senior appellate lawyers spend significant time actually drafting appellate briefs.

