How To Write A Winning Brief: The Elements Of Written Advocacy

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Almost every major case, at one time or another, hinges on a brief. A case will be won or lost on preliminary objections or summary judgment, post-trial motions or appeal. Sloppy argument leaves an advocate exposed on one flank or another, vulnerable to an opponent's attack or to a judge's professional skepticism. Superior advocacy increases the likelihood of success.

When it comes to written advocacy, there exists a remarkably level playing field among firms of diverse size and status. Greater manpower and economic clout do not make for better briefs. Case law is easily accessible, and words are cheap. In this endeavor at least, individual effort yields results.

Just as courtroom advocacy encompasses skills and judgment that are learned, so does written advocacy. The following is a summary of the basic elements of written advocacy. The emphasis here is on what makes a brief a powerful argument, not on writing or what makes exposition literary – a lawyer must be a master advocate first, then a stylist.

1. Know the record. Know the facts. A building needs a foundation, especially if it to withstand hostile elements. Know what you need to know to build your case. On post-trial motions and appeal, know the record; on preliminary objections, know the precise phrasing of the complaint; on summary judgment, know the depositions and documents. A colleague's summary of the record or facts is no substitute for your own total immersion in them. Likewise relying on your memory of what happened at trial is no substitute for reading the transcript.

Example: On post-trial motion, defendant, having lost a personal injury case, argued that it was error to admit plaintiff's expert report into evidence and send it into the jury room. Of course, if the expert testified to the same effect, the error would be harmless. But a review of the record revealed something more, forgotten by defense counsel: While examining a witness, defense counsel had actually read an alleged offensive passage of the expert report. Once this was pointed out in the brief, the entire post-trial motion lost credibility.

The experience of the defendant lawyer described above teaches something else: You must know not only those facts supporting your position but also those unfavorable to it. Otherwise, you cannot anticipate counter-arguments and evaluate the relative merits of potential arguments.

2. Develop a theory of the case. After you know the record or facts, the underlying support for any legal argument, you should develop an overarching theory

for the case.

In every case, there is a core of undisputed facts. On certain factual matters, all the evidence will agree; for example, it might be clear that the decedent was a homicide victim or that a plaintiff was exposed to the defendant's asbestos. Sometimes this core of undisputed facts also will include facts that, although disputable at another procedural stage, are not properly disputed now – such as the allegations in the complaint on a demurrer.

In addition, there are facts that, while open to dispute, are not worth disputing. These are disputes that you will almost surely lose, or perhaps, at the post-trial stage for instance, that you have already lost. Decide what is impossible, improper or strategically foolish to dispute. Develop a theory that can withstand the admission of these facts.

If your theory is inconsistent with indisputable facts, your opponent will spotlight those facts that you cannot dispute. Your entire interpretation of the facts and legal position will be cast in doubt. Likewise, you should be prepared to take advantage of an opponent who presents a theory inconsistent with indisputable facts.

A theory of the case must be coherent, explaining as much as possible without internal inconsistencies. Avoid legal arguments based upon opposing premises or otherwise at odds with each other. The only exceptions are arguments explicitly made in the alternative. Arguments properly made in the alternative are arguments that are based on opposing assumptions and that do not concede the validity of either one or both of the underlying assumptions.

Example: On appeal, a defendant in a personal injury action argued that certain testimony from plaintiff's physician/medical expert should have been excluded. Plaintiff injured his right knee in the accident. His expert, in addition to testifying about his right knee, testified about problems with plaintiff's left knee. The expert explicitly disavowed any relationship between the left knee and the accident. The trial court reasoned that it was relevant for the jury to know about the left knee so that it could assess how the accident had affected the plaintiff's mobility.

At the same time, the defendant argued that it was error to exclude information that defendant tried to introduce about medical problems arising from a subsequent accident, not involving either knee.

These arguments of defendant were at odds. The full medical condition was either relevant or it was not. And surely, if only part of it was relevant, it was the part concerning mobility. Defendant became an easy target by arguing, in essence, that any trial court decision that was unfavorable to defendant was reversible error.

An effective theory of the case eliminates not only the arguments inconsistent with

indisputable facts or other arguments but also those that are dubious for any reason. Throwing up as many arguments as possible in the hope that one will stick is not strategy. Strong arguments suffer from the company of the weak. Anyone indiscriminately indignant about every perceived injustice loses credibility.

In essence, the best theory for a case is not simply the most favorable – it is the most favorable plausible theory.

3. Articulate the issues in your own terms but fairly. A court rules on issues. Whether writing an opening or responsive brief, a lawyer addressing the court articulates the issues.

The issues, of course, arise from the theory of the case. The issues are, in a sense, single sentence crystallizations of the theory. In appellate briefs, they may be listed separately as "Statement of Issues Presented." Otherwise, they are the single sentence headings to each of the brief's arguments.

Do not allow an opponent to impose his perception of the issues onto your case. You and your opponent – and the judge as well – may see a single set of facts as giving rise to different legal issues. While other viewpoints cannot be ignored, they are not necessarily correct. They do not necessarily identify the points of law on which a decision must turn.

Example: On appeal, defendant claimed it was error for the trial court to permit plaintiff's expert to testify that, as part of his inspection of an automobile tire, he had made a small cut in the tread. Defendant claimed it was error because the expert allegedly did not mention cutting the tire in his pre-trial expert report. Defendant argued that admission of this testimony was improper because the testimony was not based on evidence in the record.

While it may indeed be error for an expert to render an opinion based on facts outside of the record, that legal rule did not govern this situation. The testimony that the expert cut the tire was not an expert opinion and was evidence made a part of the record by the only witness qualified to so testify. Defendant really had a dispute about inadequate discovery responses and unfair surprise, although defendant did not frame it in those terms.

It was incumbent on plaintiff to place the issue in the proper context, being mindful not to re-create in full defendant's proper argument. It would have been error for plaintiff to be lured into defendant's legal morass.

Finally, in framing the issues, one must remember the audience. A trial court's institutional function is different from an appellate court's, and hence its interest in legal issues is different. Likewise, an appellate court exercising discretionary jurisdiction has interests different from an appellate court hearing an appeal as of right. Often, the same

issues should be re-cast to highlight what is most significant for each tribunal or each procedural setting.

4. Report the facts from the perspective most favorable to your client without deviating from a fair and plausible reading of the record. Two opposing forces work upon a lawyer writing a statement of the facts. On the one hand, he wants the facts to be perfect, favoring his client 100 percent. On the other hand, he is constrained by the record, by indisputable facts that are imperfect, by evidence that is unfavorable, conflicting or subject to alternative interpretations. If he casts the facts in too favorable a light, they could veer from the record and be subject to attack on that basis. If he reads the record too literally or fails to recognize the brightest interpretations of the evidence, his case loses strength. Finding the best articulation of facts goes hand in hand with developing a persuasive theory of a case. You must strike a balance between the ideal and the plausible.

In the interest or plausibility, unfavorable facts cannot be ignored. You may place an unfavorable, indisputable fact in a context different from your opponent's; while the fact may be important from his viewpoint, it is really not unfavorable when seen in the proper light. Perhaps it is immaterial to the specific legal issue to be decided. Perhaps it has some explanation: While it may be true that your client, charged with first-degree murder, pulled the trigger, he did not intend to pull the trigger or point the gun in anyone's direction.

In responding to a brief, always be prepared to point out that your opponent's rendition of the facts does not correspond to the record.

Example: A defendant appealing a product liability verdict claimed that the plaintiff misused an automobile tire by driving for "three miles" while it was underinflated. However, the testimony consistently stated that plaintiff drove on it "from two to three miles" after noticing that it needed air. Plaintiff's best strategy in the responsive brief was not to exaggerate the testimony in the same manner as the defendant, claiming that plaintiff drove only two miles. The difference between two and three miles was immaterial, especially in light of plaintiff's theory of the case. More was gained by referring to the distance as "two to three miles" and pointing out that defendant's mischaracterization of this testimony was typical of his treatment of the entire record.

The converse lesson is this: Do not stretch the facts beyond what the record can plausibly bear.

Finally, every assertion of fact should be followed by a citation to the record. Otherwise, the suspicion is that that writer has indeed stretched the record to suit his wishes.

5. Organize a brief by placing the key arguments first. A brief's arguments should be ordered under the same principle as good newspaper journalism – the most

important information comes first. In a brief, key arguments come first. Often, the key arguments are the strongest and most compelling. Sometimes, however, the most compelling arguments are not the most significant.

Example: A defendant appealing a plaintiff's verdict has an irrefutable argument about a mistake in the assessment of delay damages. But that mistake only accounts for ten percent of the verdict. He should begin with the strongest argument justifying a new trial.

In general, other strategies of ordering arguments – on the basis of chronology, say, or theme – are not as effective as placing key arguments first.

6. Do the law justice. The purpose of case citations is not aesthetic. Effective citation has little to do with the famous Blue Book or with the quantity of the cities. Articulate the determinative legal principle to be derived from a case. In addition, consider summarizing the pertinent holding in one or two sentences in parenthesis following the cite.

Legal authority, like the facts, can be stretched too far to fit a lawyer's need, and if it is, the advocate has offered another target to his opponent.

Unfavorable legal authority, like unfavorable facts, cannot be ignored. While no one should do an opponent's research for him, if it is obvious that either an opponent or the court will apply certain unfavorable cases, anticipate them in a brief and discuss them before your opponent, demonstrating why they do not apply. Like a trial advocate anticipating an opponent's cross-examination, you will steal your opponent's thunder. Even more importantly, if you neglect legal authority that clearly applies, you lost credibility. Unfavorable cases are best distinguished after you have applied the law to the facts; you are, in effect, explaining how certain law does not apply to the facts.

7. Anticipate those counter-arguments readily apparent from a reading of the relevant law. In crafting a plausible theory of the case, you will have anticipated all the worthwhile counter-arguments. In writing the actual brief, you may find it strategically wise to discuss in advance not only cases that will obviously be cited against you but also entire arguments to be made against you. Again, the determining factor is how obvious is it that your adversary or the court –and always assume these readers are intelligent – will raise the argument. Ideally, you might write an opening brief that leaves your opponent nothing to say.

8. Understand logic and be prepared to identify logical fallacies. In another era, we would have learned Aristotelian logic in grade school. Classical logic – including deductive and inductive reasoning, the syllogism and standard fallacies – is not obsolete. Contemporary theories of legal interpretation still depend on it.

Crafting tight, logical arguments, however, may be one of the most difficult skills for

a lawyer to learn. Indeed, it is common for arguments in briefs and judicial opinions to be crippled by identifiable lapses in reason; it may be the most prestigious firm, charging its client the highest price, or the Supreme Court itself, that slips. Time would be well spent, even by the most eminent, reading or re-reading the basics of Aristotelian logic.

In legal writing, certain fallacies seem more prevalent than others. The following is a list of commons errors. Skilled advocates, of course, avoid these and hang any opponent who commits them.

A. Battling the Straw Man. Whether purposefully or not, lawyers often take an opposing argument or proposition and transform it into something weaker – into the straw-man – and only then tear it apart. Such an argument, standing alone, seems absolutely compelling, but really it is irrelevant. The lawyer has refuted something other than what he was obligated to refute. Anyone succumbing to this fallacy winds up arguing past an opponent instead of engaging him.

The straw-man fallacy begins with a mischaracterization, either of the facts, the law or an entire argument. If the mischaracterization goes unidentified, it may carry the day. By the same token, deliberately mischaracterizing in the hope that you can pull the wool over someone's eyes is foolish; it creates another target to be attacked. Mischaracterization, of course, is not the same as a recharacterization; the former is erroneous.

The straw-man fallacy is a variant of the "red herring," the tactic of avoiding an issue by directing the discussion to another topic. "Red herring," originally a hunting term, referred to dragging a herring across the trail to confuse the hounds.

B. Begging the Question. An argument begs the question if, during the course of its exposition, it assumes the proposition it seeks to prove. The assumption that ends up getting built into the argument will be disguised; it must be a re-casting of the conclusion so that the fallacy would not be so obvious.

Example: An admitted drug addict was apprehended immediately after leaving a corner bar with a significant amount of drugs in his possession. He was charged with possession with intent to deliver. The arresting officers testified that they were in the neighborhood, received a radio call that a man was selling drugs on the corner, pulled up to the corner and found the defendant, who immediately ran. The prosecutor's expert witness was asked, "If police officers responding to such a radio call found a man with that significant quantity of drugs who fled from police, was it likely that the man possessed those drugs with intent to deliver?" In closing, the prosecutor referred explicitly to this police testimony and the favorable expert opinion. Defense counsel made no objection to any of the above. No witnesses of a drug sale testified. The defendant was convicted.

The prosecution's case begged the question. The assumption that defendant was selling drugs was built into the police radio call, which was exploited at the two most critical points in the trial – the delivery of the expert opinion and the closing. Whoever may have reported the drug sale to the police dispatcher was not offered as a witness, although that person's hearsay statement in effect was admitted into evidence. On post-trial motions with new counsel, who identified the fallacy, defendant was granted a new trial.

C. Denying the Antecedent. This is one fallacy of deductive, syllogistic reasoning. The "antecedent" is the "if clause" of a hypothetical proposition, and the "consequent" is the "then clause." A denial of the antecedent does not result in the negative of the consequent. The truth of "If X, then Y" does not mandate the truth of "If not X, then not Y."

Example: On post-trial motion in a product liability case, a defendant argued that prejudicial error was committed by the court's refusal to deliver a jury instruction saying that a plaintiff's misuse of a product could defeat his claim. The defendant cited a Superior Court case that stood for the following proposition: If a trial court delivers a jury instruction on product misuse in a case where there is some evidence of misuse, it does not commit prejudicial error. However, denying the antecedent does not prove the negative of the consequent. It does not follow that if the trial court does not deliver a jury instruction on product misuse in a case where there is some evidence of misuse, it commits prejudicial error. In the case at bar, the possibility of misuse was covered by more general instructions on causation and substantial factor.

D. Faulty Analogy. In the context of legal argument, analogies suggest which legal principles ought to apply and how they should be applied to similar, though not identical, situations. Cases are analogous if the factual similarities are pertinent to the legal principles applied. Material dissimilarities between the two cases cannot be ignored if an analogy is to be persuasive. Likewise, an effective analogy cannot be based on similarities that are really immaterial to the legal principles.

E. Equivocation. Also a fallacy of syllogistic reasoning, equivocation involves the misuse of words. A term is used in two different senses, instead of the single sense that would allow for legitimate reasoning.

Example: Plaintiff's medical expert testified that certain complications had a "secondary" relationship to the car accident. Defendant found a case stating that a plaintiff could not recover where conduct had a "secondary" and not a proximate causal relationship to the injury. Therefore, defendant argued, plaintiff could not recover.

However, "secondary" meant one thing in the context of the medical testimony and another in the context of the cited case. The medical expert meant that the complications arose over a period of time but still as a result of the initial injury. The medical use of "secondary" was not inconsistent with the legal concept of proximate

cause; "but for" the accident, the complications would not have arisen. In the cited case, "secondary" meant that the conduct was not a substantial factor and that the causal relationship that existed was attenuated.

F. Either/Or Fallacy. Either X or Y. Not X. Therefore Y. Such either/or reasoning works only when all alternatives are considered and when they are mutually exclusive. Usually, however, reality is not black or white, as lawyers tend to paint it. It may be gray or even green, that is, it may fall somewhere between extremes or be something else altogether.

G. Fallacy of the Half-Truth. While everything said may be true, it may be that not everything was said. Just as a material omission can constitute fraud, so can it make for a faulty argument. Often in making the facts appear favorable, a lawyer omits the unfavorable. This approach, while it may produce a brief that is persuasive standing alone, is ultimately counter-productive. Responsive briefs exist to debunk half-truths.

H. Post Hoc, Ergo Propter Hoc. Because one event or circumstance occurred after another, it does not follow that it occurred because of another. Lawyers like to forget this when convenient.

To be sure, brief writing is only one aspect of litigation and the business of law. But it should not be left behind as careers advance. When seasoned lawyers focus on "more important" matters, it shows. When a brief’s packaging comes before thinking, it shows. When written advocacy becomes a second-class duty, it shows. Likewise, when well-honed skills stand behind a brief, it shows. The surest way to win is to do the best work.