APPEALINGLY BRIEF

THE LITTLE BOOK OF BIG APPELLATE TIPS

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How to Write Persuasive Briefs and Excel at Oral Argument

Daniel J. Klau

of

McElroy, Deutsch,
Mulvaney & Carpenter, LLP

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About The Author

Dan Klau is one of New England's leading appellate lawyers. A graduate of Boston University School of Law, *summa cum laude,* he has successfully represented private and public sector clients in appeals in the Connecticut Supreme and Appellate courts, the United States Courts of Appeal for the First and Second Circuits and the United States Supreme Court.

Dan is the founding co-chair of the Appellate Advocacy section of the Connecticut Bar Association, a former columnist for the Connecticut Law Tribune (an American Lawyer Media publication) on appellate practice and procedure, and a frequent writer, commentator and lecturer on appellate, First Amendment and open government issues. He is the author of the legal blog *Appealingly Brief!*, and has been an adjunct professor at UConn School of Law since 2003, where he teaches privacy law.

When Dan is not practicing law, he can often be found at his piano writing humorous songs about the legal profession. He released his first album of musico-legal parodies, *The Billable Hour Blues*, in 2004, and his second album, *The Lawyer Is A ~~Tramp~~ Champ*, in 2015.

Dan and his wife, Jennifer, live in West Hartford, Connecticut. They have three children, none of whom exhibit any desire to become lawyers.

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Tip No. 2

"Briefs Are Not Written—They Are Re-Written."

Unlike Athena, who was born fully grown from Zeus's brow, appellate briefs are not born fully formed from the fingertips of their authors. They continue to grow and develop following their premature birth as preliminary drafts. The way they grow and develop is through a constant nurturing process known as editing. Multiple drafts of a brief, reviewed by more than one set of eyes, are the rule, not the exception.

Noted federal appellate judge Alex Kozinski of the Ninth Circuit Court of Appeals was the keynote speaker at an appellate seminar I attended a few years ago. He said his opinions often go through upwards of seventy—yes, seventy—drafts before they are released. Personally, I think seventy drafts is a wee bit excessive. Still, his statement underscores my point about the importance of editing. With the possible exception of Lincoln's Gettysburg Address, *every* document can and must be improved through editing.

Tip No. 3

"Know Your Audience."

The ancient Greek maxim states "know thyself." For writers of all persuasions, however, the appropriate maxim is "know thy audience." Successful writers know their audience and tailor what they write to appeal (no pun intended) to their audience. To be effective, appellate lawyers need to know and understand their primary and secondary audiences: respectively, appellate judges and their law clerks.

By the time you stand at the lectern of an appellate court for oral argument, you will have lived and breathed your appeal for many months, sometimes even a year or more. Your brief, however, is only one of *dozens* that the appellate judges will read as they prepare for oral arguments during the term in which they will hear your case.

Appellate judges live in a perpetual state of being overwhelmed by 8½ x 11 inch pieces of paper filled with 12 to 14 point Times New Roman or other font. They read and read, then write and write, then read and read again for a living.

Knowing that appellate judges are inundated with paper, you have two options: (1) you can make their jobs easier, or (2) you can make their jobs harder. You make their jobs easier by writing briefs that are easier to read and understand. The easier

your brief is to read, the more likely the judge will understand, absorb and remember your arguments and, most important, find them persuasive. Tips 4-11 are all suggestions for writing and organizing your briefs in a way that makes them easier for judges to read and understand.

I mentioned that law clerks are your secondary audience. Everything I say in this book about making briefs easier for judges to read also applies to their law clerks, but there are a few additional tips specifically related to clerks.

First, because most clerks are recent law school graduates, usually with law review experience, they tend to be Blue Book™ experts. Make sure you use proper citations throughout your brief. If you are sloppy, the clerk will notice, will think less of your effort and may tell his or her judge. Rightly or wrongly, the judge may assume that if you don't care about proper citations, you may not care about other things as well, like accurately describing the trial record and properly characterizing relevant case law and other sources.

Second, while appellate judges read your briefs and key cases cited therein, the clerks read *everything*. They read each case you cite to make sure you have accurately described the proposition for which you cited it. They read the trial transcript to make sure you properly quoted or summarized it. They look at exhibits you cite in your brief and/or

appendix. Some lawyers have a tendency to "push the envelope" in their briefs, i.e., to mischaracterize a case or the record. **DO NOT DO THAT**. The clerk will discover your misrepresentations and may tell his or her judge. From that point forward, you will never know why you are not deemed trustworthy.

Your credibility is critical to your success as an appellate advocate. Don't make easily avoidable mistakes that may damage, if not destroy, that invaluable asset.

Tip No. 4

"Get To The Point Quickly."

Because appellate judges read so many briefs, it is imperative that you help them understand—*immediately upon beginning to read your brief*—why the twelve to fourteen thousand words you are requiring them to read are *relevant*. You need to get ~~write~~ right to the point.

Arguably, this should have been Tip No. 1, but I don't think it would have had the same weight without first giving the reader an appreciation for the overwhelming amount of paper that confronts appellate judges every day.

Appellate brief writing is not a comedy routine; do not save the punch line for the conclusion of your brief. Continuing the comedy metaphor, tell the punch line first and then use the rest of your brief to persuade the judges why it is funny, that is, why they should accept your argument. By making your point at the very beginning of your brief, the judges will understand the relevance of the thousands of words that follow as they read them, instead of fuming as they read pages and pages of facts and procedural history without understanding the point. This technique will not produce laughs, but it is effective. Tips 7, 8 and 15 discuss ways to implement this "punch line first" approach.

Tip No. 5

"Don't Be Afraid To Spoon-Feed Judges."

In terms of their backgrounds and legal experience before ascending to the bench, many judges were either legal generalists or had highly specialized practices. Do not assume that the appellate judges who will hear and decide your appeal have expertise germane to your case.

As Judge Richard Posner of the Seventh Circuit Court of Appeals has remarked, do not be afraid to "spoon-feed" judges; they will not bite your hand. Use your brief to educate the appellate judges about basic factual and legal concepts that are central to your appeal, yet may be beyond their area of expertise. They will not be insulted. To the contrary, they will appreciate your efforts to educate them as long as your brief is crisp and not condescending.

For example, imagine that you are handling an appeal involving a question of trademark law. The judges on your panel may have no meaningful experience with intellectual property issues. Before focusing on the specific legal issue in your case, it may be helpful for your brief to include an overview of relevant trademark laws and principles.

Exactly how much basic education your brief should include is a matter of judgment. In exercising your judgment, remember that brief writing isn't

II. The Appellant's Brief

Tip No. 14

"Choose Wisely My Son."
(Or The Importance Of Issue Selection.)

I believe that the single most important quality an appellate advocate must possess is not deep knowledge of appellate rules and procedures, but sound judgment when selecting the issues for appeal. I cannot overstate the importance of issue selection. I know some experienced appellate advocates who tell potential clients, "I select the issues. Period. End of story. If you are not comfortable with letting me select the issues, do not hire me."

By the time a case goes to final judgment in the trial court, including post-verdict or post-judgment motions, the record is filled with dozens and dozens of decisions, orders and judgments that are potential grounds for appeal. Adverse rulings on pre-trial motions to dismiss, discovery motions, motions in limine, evidentiary rulings during trial, jury charges, post-verdict motions, etc.—all constitute possible issues a party could raise on appeal. As the Grail Knight told Indiana Jones when he was confronted with a large selection of chalices, only one of which was the Holy Grail and could save his father's (Sean Connery!) life, "You must choose. But choose wisely . .

. ."[1] Your job when representing an appellant is to separate the wheat from the chaff and identify the handful of issues worth pressing on appeal.

When engaged in that task, it is essential to remember that not all mistakes are legally significant or consequential. For example, perhaps you believe that the trial court erred in overruling your objection to opposing counsel's admission of a particular document or certain testimony in evidence. Even if the appellate court shares that belief, it does not automatically follow that you will win your appeal. You must also persuade the appellate court that the trial court's error was *harmful*. (This is known as the "harmless error" doctrine. A full discussion of the doctrine is beyond the scope of this book, but all appellate advocates need to be well-versed in it.) Only legally harmful errors are worth considering for possible appeal.[2]

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[1] *Indiana Jones and the Last Crusade* (1989).

[2] *See, e.g.,* Fed.R.Evid. 103(a) ("A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party."); Fed.R.Civ.P. 61 ("Harmless error") ("Unless justice requires otherwise, no error in admitting or excluding evidence—or any other error by the court or a party—is ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order. At every stage of the proceeding, the court must disregard all errors and

Issue selection can be scary. Lawyers often fear that if they limit the number of issues they raise on appeal, they risk losing their appeal because they forwent a potential winning argument. That is a risk, but it is a small risk and one well worth taking.

When an appellate judge picks up an appellant's brief in a civil case and sees a statement of the issues with more than several issues, her reaction is: "Oy, here's yet another attorney who hasn't really thought about issue selection and is hoping and praying that one of his issues will happen to resonate with us." By contrast, when an appellate judge picks up a brief with only one, two or three issues, her reaction is: "Excellent! This attorney has really thought about this case and is only presenting the few issues that are worthy of my limited time and attention. This lawyer has clearly exercised *professional judgment*." You want appellate judges to place you within the second category of attorneys *because it contains the attorneys to whom appellate judges pay the most attention*. In a close case, that attention can mean the difference between winning and losing.

In civil cases, I work hard to limit myself to 2 or 3 issues. This is a rule of thumb, so by all means break it if you really think you have more issues worthy of appellate consideration. Remember though, appellate rules in all federal and state courts impose

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defects that do not affect any party's substantial rights.")

arguments through bullet points or arguments numbered simply "1., 2., 3.," etc.

A word of caution: Some appellate judges prefer reply briefs that contain enough background information about a case and the issues on appeal to allow them to read the reply brief *first* and understand what the appeal is about. Other judges think that including such background information in a reply brief is unnecessary.

Personally, I agree with the latter group of judges and I write my reply briefs with them in mind. (Hey, you can't please everyone all of the time.) However, local knowledge about the preferences of the judges who will hear your case is always invaluable. If you know that the judges before whom you will appear like reply briefs with background information, give them what they want. For such judges, however, an abbreviated introduction and/or restatement of the issues should be sufficient.

PART THREE: ORAL ARGUMENT TIPS

Tip No. 21

"Questions Are Your Friends."[7] (Or Why Oral Argument Is About The Judges, Not You.)

I spent many years as an associate drafting appellate briefs for partners who then enjoyed the fame and glory that comes with standing before a panel of appellate judges, making an argument with wit and aplomb and, hopefully, winning the appeal. I yearned for the day when I would appear before an appellate panel and enjoy that same fame and glory.

Admit it, we trial and appellate lawyers like, no love, the sound of our own voices. We love to hear ourselves talk. We are comfortable in front of an audience. We want people to listen to what *we* have to say.

My advice? Lose that attitude before your next oral argument.

Before technology made it relatively easy and inexpensive to prepare elaborate written briefs for judges, oral argument was *the* way advocates conveyed their arguments to judges. Oral arguments

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[7] Thanks to appellate advocate Linda Morkan, of Robinson & Cole LLP, for the title of this tip.

often lasted for hours, even days. In the famous case of *McCulloch v. Maryland*, 17 U.S. 319 (1819), oral argument before the United States Supreme Court lasted nine days!

Those days are long gone. Briefs are now the primary vehicle for conveying legal arguments to appellate judges. The purpose of oral argument today is to give the judges who will decide your appeal the opportunity to ask the questions that are on their minds after having read the briefs in your case. Instead of viewing judges' questions as inconvenient things you need to answer and as unpleasant interruptions in your well-rehearsed legal soliloquy, view them as your friends.

You can learn a lot from judges' questions. For example, you may learn that a judge has misinterpreted the trial record, which gives you the opportunity to educate the judge about the correct interpretation. You may learn that a judge has a fundamental misconception about your appeal, which again gives you the opportunity correct the misconception. You may learn that a judge has a different understanding of a key legal precedent than you, which gives you the opportunity to persuade the judge the think differently about the precedent.

Sometimes a question is intended to help you, for example, by suggesting an answer to another judge's hostile question. Sometimes a question suggests an alternative theory that still leads to the result you

want, albeit via a different legal or factual route than you had proposed in your brief. Lawyers are often so wedded to their own arguments that they don't recognize when a judge is saying through a question, "Counselor, there is another way for you to win that you may not have considered." Don't reject a helping hand.

In sum, oral argument is your one shot as an advocate to learn what is on the judges' minds, your one opportunity to learn what *they*—the ultimate decision makers—care about. Better to know what is troubling them about your case while you still have a chance to persuade them. Once oral argument is over and they are gone, they are gone.

Tip No. 22

"Listen, Think, Talk—In That Order." (Or Why Lawyers Should Take A Moment To Listen And Think Before Answering Judges' Questions.)

This tip follows naturally from the preceding one. Because oral argument is usually your first, last and only opportunity to learn what is on the minds of the judges who will decide your appeal, you need to listen carefully to their questions. This is easier than it sounds, but it becomes natural with experience.

Especially for young lawyers, but also for older lawyers with limited experience appearing before appellate tribunals, the pressure of the "clock," i.e., the limited time allotted for oral argument, and concerns about awkward silences between questions and answers, often leads to speaking without listening and thinking. Answers tend to be rushed, which inversely correlates with their quality.

Except when offered in response to the simplest of questions, good answers require active listening and a moment or two of reflection. Judges want quality answers to their questions and have no problem with (and indeed prefer) advocates who take a moment to think before answering. The advocate who understands this about judges does not feel pressured to begin formulating the answer to a question while the judge is still asking it. Instead, the advocate focuses all of his or her attention on the

question while it is being asked, then pauses and thinks about it for a moment before answering.

I'm not suggesting that appellate lawyers routinely allow five to ten seconds of silence to fill the courtroom after each question from a judge. However, taking a couple of seconds to think before answering judges' questions will improve your listening skills and the quality of your answers.

Tip No. 23

"Will You Please Answer The Damn Question!"

One criticism I hear appellate judges repeatedly levy against inexperienced appellate advocates is that they refuse to give direct answers to direct questions. Instead, the advocate serves up an answer that dances around the question or, worse, doesn't address it at all.

This drives appellate judges nuts. It also makes them angry. When a judge becomes angry with an advocate, the judge starts to close her ears (and her mind) to anything else the advocate has to say. So, when a judge asks you a direct question, you should give a direct answer—at least initially. (I'll explain my caveat momentarily.)

Although I am not a psychologist (and have never played one on TV), I think advocates refuse to answer direct questions with direct answers when they are worried that the direct answer may be bad for their client. That worry is understandable and may be warranted in any given instance, but it does not justify dodging a judge's question.

What should you do when a judge asks you a question, the answer to which may be unhelpful, if not downright damaging, to your client's case? First, answer the question directly. Then, and only then, do your best to explain why the answer is not as

damaging as it may initially appear. In short, answer first, explain second. If you answer the question directly, the judge will be happy and usually will allow you to explain your answer. If you try to explain first, the judge will reasonably interpret your conduct as evasive and may get upset. (See Tip 35 for related advice on what to do if a judge asks you a question you are prepared to answer directly, but planned to address later in your argument.)

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