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Appellate Practice in the Second Circuit Court of Appeals

Roger J. Miner '56

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Roger J. Miner
U.S. Circuit Judge

Appellate Practice in the United States Court of Appeals
for the Second Circuit
New York State Bar Association Program

New York County Lawyers' Association
14 Vesey Street
New York City
November 18, 1988
11:00 A.M.

Briefs

I am a great believer in the value of oral argument. I am in favor of allowing more time for argument in our court. I think that argument is very important for any number of good reasons I shall not go into because my topic is Briefs. The Brief is the more important part of appellate advocacy, because we judges have it in hand both before and after oral argument. It is physically with us after the argument evaporates and is forgotten. The Briefs are the first thing I look at, even before the decision of the trial court or any part of the Appendix or Record. The Briefs are what I refer to when writing an opinion or before signing off on a colleague's opinion. A good Brief is essential to effective appellate advocacy, but it is all too rare.

In the beginning of the Republic the Brief was merely an adjunct to unlimited oral argument. I was able to get some of the flavor of those times when I sat with a Court of Appeal in England. The Briefs there were not much more than a list of applicable precedents and authorities, but the oral argument proceeded at a leisurely pace, with many questions and answers.

The sheer bulk of cases makes it impossible to proceed before our Court in this manner. The time for appellate argument is strictly limited, and it is important that the Brief be as persuasive as possible. It should never be forgotten that the purpose of all appellate advocacy is to persuade.

On pages 18 through 20 of your coursebook, in my outline on Federal Civil Appellate Practice in the Second Circuit, you will find some information on Briefs. My outline on Criminal Appellate Practice in the Second Circuit is found in the State Bar's Federal Criminal Coursebook, but the section on Briefs is the same in both outlines. The very last item in your coursebook, starting at page 121, is my article "The Don'ts of Oral Argument." My senior colleague, Ed Lumbard, asked why I had twenty-five rules for oral argument and John W. Davis had only ten. You all know Ed Lumbard. He once reversed a conviction. I think the answer to his question is that we have learned a lot more since the days of John W. Davis. At any rate I have prepared a list of twenty-five "Do's" for Briefwriting. Here they are, in no particular order:

1. Review the Brief to correct inaccurate citations, typographical and grammatical errors or citations to outdated authority. We frequently see Briefs containing one or more of these deficiencies. What a loss of credibility that causes for the Brief writer! The clerks carry these Briefs about the chambers, holding them far away from their bodies, between thumb

and forefinger, while holding their noses with the other hand. They are trying to give me a message, I think. [Example].

2. Adhere to the prescribed format; the standard format of a Brief is prescribed in our Court by the Federal Rules of Appellate Procedure and the rules of our Circuit, and we insist on strict adherence to the rules. Failure to adhere to the required format may be a cause for rejection of the Brief in the Clerk's office or by the staff attorneys. If a Brief in improper form gets past them, it certainly will lose you points with the panel. The simple format prescribed by the Federal Rules of Appellate Procedure is found on page 18 of your coursebook.

3. Make certain that the Brief says what you want it to say. To accomplish this, you must go over what you have written a number of times and ask somebody else to look it over as well. Be careful in your use of language. When I was a district court judge, an appeal was taken from one of my decisions. The Brief to the Circuit opened this way: "This is an appeal from a decision by Judge Miner, and there are other grounds for reversal as well." I don't think counsel intended to say that. (Maybe they did).

4. Be sure that your citations are in point. A few weeks ago, I read two Briefs that provided a study in contrasts. One Brief included six separate points, each point written on one page. There were no citations of authority in any one of the points. The other Brief was chockfull of citations -- citations to Supreme Court cases, Circuit Court cases and even to some

State cases. Each and every one of the citations was totally unrelated to the case on appeal; try to give some authorities in the Brief, but make sure that they support your contention.

5. Deal with authority that contradicts, or seems to contradict, your position. First of all, it is the attorney's obligation to bring to the court's attention any pertinent authority, even, or especially, contradictory authority. An effective Brief will seek to distinguish unfavorable precedent or argue that it should be modified or overruled. Second, the Court will discover the unfavorable precedent anyway, so it is to your interest to deal with it in the Brief.

6. Eliminate adverbs such as "clearly" and "obviously." If things are so damn clear or obvious, how come you lost in the trial court? The use of such words does not improve the quality of the Brief or add to its persuasiveness, in any event. And persuasion, of course, is the name of the game.

7. Write in concise, unambiguous and understandable language. When I practiced law, I always submitted a draft of the Brief to the client. Who knows more about the case than the client? If he or she understood what I wrote, then I felt the judges would understand it as well. You can get some good suggestions that way also. Long, rambling, convoluted sentences and ten dollar words should be avoided. Nobody can understand them.

8. Restrict the Brief to issues raised in the trial court. Many times we find a well-briefed argument, supported by law and

logic, that we can't consider because it was not raised below. No matter how good a point is, don't include it in the Brief unless it pertains to an issue properly before the Appellate Court.

9. Carefully prepare the statement of facts. It is a very critical part of the Brief. It should not be incomplete. Neither should it be too lengthy. It should cover only those facts necessary to the development of the legal issues in the case. A bad habit of some lawyers is to present the facts by summarizing the testimony of each witness. We much prefer a narrative of the facts.

10. Make sure that the testimony and exhibits referred to in the Brief are included in the Appendix, and that you cite to the Appendix in the Brief. There is nothing quite so frustrating to me as to find some reference in the Brief to a piece of evidence not included in the Appendix. I must then go to the original record in our clerk's office or possibly back to the district court clerk's office to find what I am looking for. Equally as frustrating is a reference in the Brief to evidence included in the Appendix without any indication in the Brief as to where it is located.

11. Choose three or four or five strong points, preface them with concise point headings and proceed to argue how the trial court erred or didn't err. Support your conclusions with appropriate authorities and reasoned arguments. Meet your adversary's arguments head-on, describe where you agree and where

you differ, and if you are short on authority for some point you are making, say so. Weave the facts of your case into the law cited in your points, using sentences having subjects and verbs, and you'll have the making of a winning Brief. The inclusion of a great number of points may suggest to us that none of the points is any good.

12. Remember that a Brief is different from most other forms of writing in that it has as its only purpose the persuasion of the reader. It is not written to amuse or entertain or even to edify. We don't look for a prize-winning literary style in a Brief. We do expect clarity, well-organized argument and understandable sentence structure. All too often, we find rambling narratives, repetitive discussions, and conclusions unsupported by law or logic. A Brief that does not persuade is ineffective.

13. Remove from the Brief any long quotations of testimony or precedent. Short quotations are acceptable, but remember that we can find the full text of the precedent in the library and the full testimony in the record. I have seen page after page of quoted materials in some Briefs, and have thought: "What a waste of precious space!" Principal Briefs are limited to fifty pages in our court, and Reply Briefs cannot exceed twenty-five pages, all exclusive of the pages containing the tables and addenda containing statutes, rules and regulations. Excessive quotation leaves little space for persuasion.

Paraphrase! And woe to the excessive quoter who moves for leave to file an oversized Brief! One other comment on this point -- it is not necessary to use all the pages allotted to you.

14. Edit the Brief with a view toward excising most or all of the footnotes you have inserted. We are well aware of efforts to increase the number of words in the Brief by extensive use of footnotes. We take a very dim view of such efforts. I have a colleague who refuses to read footnotes in a Brief. He abjures footnotes in opinions as well, and each year furnishes a report on judges who are the worst footnote offenders. Don't try to fool us with small print. Also, italics are unnecessary.

15. Restrain yourself from attempting to sneak matter outside the record into your Brief. Earlier, I spoke of an appellate court being constrained to consider only legal issues raised in the trial court. This applies to factual matters as well. From time to time, a Brief will draw to our attention a fact that cannot be found in the record before us. Opposing counsel will note the omission soon enough, but I have seen judges take counsel to task for this type of deficiency even before opposing counsel became aware of it. In either event, the credibility of a Brief is seriously impaired by the inclusion of matters outside the record.

16. Bring to our attention pertinent authorities that come to your attention after the Brief is filed. The Federal Rules of Appellate Procedure allow you to do this. Rather than merely giving supplemental citations and the reasons for them, some

lawyers improperly take advantage of the occasion by presenting further argument with their supplementary material.

17. Pack the Brief with lively arguments, using your own voice and style of expression. We expect the Brief to be argumentative but not pompous, dull or bureaucratic. The active voice always is preferred.

18. Structure your Brief as you would desire the opinion to be structured. This is a real inside tip on how you can pique the interest of the judges. We are always interested in having some good help to do our job. You may even see your own deathless prose immortalized in one of our decisions.

19. Be truthful in exposing all the difficulties in your case. Tell us what they are and how you expect us to deal with them. Dissimulation in a Brief is to be avoided at all costs.

20. Solicit some sympathy for your cause in the Brief. Don't overdo it, but don't be afraid to show how an injustice may occur if we don't decide in your client's favor. Sometimes the law requires an unjust result, but we certainly try to avoid it.

21. Develop, if possible, a central theme leading to a sensible result in the case. This is especially important in a case of first impression. Where there is no precedent, try logic. The higher the court, the less interested it is in precedent anyway.

22. Refer to parties by name or description, rather than as "appellant" or "appellee." It is much easier for us to follow

the Brief if this is done. Moreover, there is a rule that requires it.

23. Make every effort to provide appropriate citations without cluttering up the Brief with a mass of duplicative authorities. Where there is one authoritative case in point supporting your argument, there is no need to give us six. Save the space for persuasive argument. Avoid string citations!

24. Use the Reply Brief to reply. Most Reply Briefs merely repeat the arguments put forward in the appellant's original Brief. The opportunity should be used to answer the appellee's Brief by specific, rather than scattershot, responses. The Reply Brief presents the opportunity to have the last word in a very effective way. Most reply Briefs are worthless, in my opinion.

25. Omit: irrelevancies, slang, sarcasm, and personal attacks. These serve only to weaken the Brief. Ad Hominem attacks are particularly distasteful to appellate judges. Attacks in the Brief on brothers and sisters at the bar rarely bring you anything but condemnation by an appellate court. All that scorched earth, take no prisoner, give no quarter, hardball stuff is out. A personal note: Rambo litigators make me sick. Watch for my article on the subject.