

HINTS ON WRITING LAW COURT BRIEFS FROM SOME PEOPLE WHO READ THEM

By Sean T. Carnathan, Esquire and Karen D. Kemble, Esquire

Each year, the Justices on the Law Court decide roughly 350 to 400 cases. As a result, they read upwards of 900 briefs per year. A law clerk to the Supreme Court is usually assigned between six and eight cases per term, therefore, each clerk reads up to 100 briefs per year. Because the Law Court decides about half of its cases "on briefs" with no opportunity for oral argument, the brief may be the advocate's only opportunity to address the Court.

Before reading a brief, the readers will know little, if anything, about the facts of the case and may only have a general acquaintance with the issues of law, particularly if the case involves a specialized area of practice. When preparing a brief for the Law Court, therefore, your goal should be to present the *relevant* facts and explain the *disputed* issues of law as clearly and succinctly as possible.

This article began while we were clerking for the Law Court and was a checklist of things we found helpful or not so helpful in the briefs we read. This list was meant to remind us what to do (and not to do) when we prepare briefs for the Law Court ourselves someday. We thought this list might also interest others facing the same task.

I. The Elements of a Good Brief

A. Table of Contents

1. State the Issues in the Table of Contents

Rather than simply listing "Argument" or "Discussion" as a heading in the table of

contents, we suggest enumerating each issue, carefully formulated, and noting the page on which the discussion of that issue begins. This allows the Justices (and their clerks) to see the entire argument summarized on a single page at the very beginning of the brief. It also allows the reader to locate your discussion of a particular point quickly without having to leaf through the entire brief.

The statement of the issue should convey the heart of the case in one sentence. Including the key facts in the statement of the issue helps to communicate the essentials and, hopefully, to predispose the court to view your position favorably. For example: "Did the trial court err?" is not nearly as helpful

as: "Did the trial court clearly err in admitting Defendant's confession, when the investigating officer obtained the incriminating statement by beating Defendant with a rubber hose?"

On the other hand, do not bog the reader down in factual detail in the issue statement. For instance, if the appeal involves a challenge to the sufficiency of the evidence, focus on the unsupported element without presenting extensive factual detail. You do not need to argue the case in the statement of the issues.

2. Table of Authorities

An accurate table of authorities, including the page numbers where the authority is



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located within the brief, is an enormous help to the reader (as well as being required by M.R. Civ. P. 75A(a) and M.R. Crim. P. 39B(a)). If a particular authority is critical to the Court's decision, providing a way to pinpoint the discussion of that authority will make it easier for the reader to reread and reconsider that portion of your argument.

Some authorities should be included in the addendum.¹ If you include copies of relevant authorities in the addendum, identify the location of those authorities in the table of authorities.

B. The Body

1. Introduction

It is helpful to begin with an introductory paragraph that explains: (1) what kind of action is involved; (2) what action the trial court took; (3) what the appellant is complaining about; and (4) if you are the appellee, how you respond. In this paragraph, establish a functional way to refer to the parties involved and use it consistently. Avoid referring to your client or your opponent as appellee or appellant. Instead, the brief will be more comprehensible if you refer to the parties by name or by functional terms such as employer/employee or wife/husband, etc.

2. Factual and Procedural Background:

The background section should begin with a brief statement of the relevant standard for reviewing the facts. Then, describe the facts accordingly. For example, if you are challenging a conviction based on the sufficiency of the evidence, which requires the Court to consider the facts in the light

most favorable to the State, it does you no good to describe the facts in the light most favorable to your client. Face the facts and argue accordingly.

This section should be as short and simple as the case allows. It should never be argumentative or sarcastic. Your sense of outrage on your client's behalf is not relevant or persuasive in the statement of the facts. This is not to say that the background section is not an opportunity for advocacy, but you should advocate through careful selection and organization of the facts rather than through an emotional, visibly one-sided presentation of the facts. Accordingly, use adverbs and adjectives sparingly.

Be accurate and concise. Cite to the record for every assertion of fact that you make. If it is not in the record, you should not be referring to it. Do not ignore or twist adverse facts. The Court of Appeals for the First Circuit expressed its displeasure with this practice as follows:

In this case, the proper objection is . . . to the various distortions of the record wrought by [counsel's] brief. . . . As is usually the case, these tactics undermine rather than bolster the client's position. The distortions are easily rebutted, and they distract attention from better arguments. *And once it is lost, a court's trust in counsel is not readily restored.*

Lallemand v. University of Rhode Island, 9 F.3d 214, 218 (1st Cir. 1993) (emphasis added).

Be creative. Include charts, diagrams, and family trees if they will be helpful. Timelines are often useful particularly when the case is procedurally complicated.

Only list those procedural events that are

essential to understand your arguments and the basic procedural posture of the case. It is rarely necessary to list every motion filed by every party since the inception of the case. Include in the procedural background section, a brief explanation of the trial court's decision.

If extensive factual or procedural detail is required for a full understanding of the issues, carefully consider the organization of those items so that their relevance is clear to the reader. You may want to mention certain facts very briefly in the statement of facts but provide more detail in the discussion section when the relevance of the fact to your argument is clear.

Finally, if you are the appellee, and you agree with the appellant's rendition of the facts or procedural history, simply say so.

C. Discussion

1. The Standard of Review

Identify the standard of review, e.g., clear error, in one or two sentences at the beginning of the discussion for each issue. Besides making the clerk's job easier, this will also help you to frame your argument accordingly. Because the Justices are familiar with the various standards of review, you need not describe the standard of review in great detail.

In your discussion of the standard of review, acknowledge how the trial court resolved the issue. If you are the appellant, be clear about what you are up against. If you are the appellee, do not let the work of the trial court go to waste. At times, as the appellee, you may think that the trial court's rationale contains some weaknesses although you agree with the ultimate conclusion. If so, you may argue alternative rationales to reach the same conclusion. Nevertheless, it is usually worthwhile to defend the trial court's approach as well as you can. Focussing on the trial court's rationale will give you the full advantage of the standard of review.

2. Focus on Your Best Arguments

If you can, focus on a few issues and direct your energies accordingly. This tactic trains the attention of the Justices on the strongest issues of the case. Raising a large number of issues on appeal not only dilutes the brief, it also often looks like you are simply stabbing in the dark. As the United States Supreme Court has stated, "[e]xperienced advocates since time beyond memory have emphasized the importance of winnowing



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out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." *Jones v. Barnes*, 463 U.S. 745, 751-52 (1983). The Court quoted Justice Jackson saying:

The mind of an appellate judge is habitually receptive to the suggestion that a lower court committed an error. But receptiveness declines as the number of assigned errors increases. Multiplicity hints at lack of confidence in any one. . . . [E]xperience on the bench convinces me that multiplying assignments of error will dilute and weaken a good case and will not save a bad one.

Id. (quoting Robert H. Jackson, *Advocacy Before the United States Supreme Court*, 25 Temple L. Q. 115, 119 (1951)). "There can hardly be any question about the importance of having the appellate advocate examine the record with a view to selecting the most promising issues for further review." *Jones*, 463 U.S. at 752.

3. Raise Your Best Argument First

Your most compelling argument should appear in simple, forceful language, early in the brief. If you hide your winning argument deep in a sea of prose, the reader may have lost his or her concentration before ever reaching your big point. Certainly, it is not always easy to decide which argument will be most persuasive to the Court; if you have more than one potential winner, organize your arguments so that they appear in a logical order, for example, chronological order.

4. Keep It Short

Length does not impress readers; brevity does. There is nothing more admirable than a short brief that covers the necessary points and spares the court long-winded discussion of every conceivable point of fact and law.

This is probably the single most common failing of otherwise well-written briefs. If you question the validity of this advice, we suggest you pick up a fairly long brief and try to read it all in one sitting. How much of it did you retain? Imagine a Justice on the

HAVE YOU HEARD?

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Court who may read almost 100 briefs in a month.

Do not be afraid to concede points you cannot hope to win; do not needlessly belabor your sure winners. An advocate must often make several alternative arguments and this is understandable. If your case is truly complex and requires a long brief, rest assured that the Court will put in the time needed to digest it all; but never write more than you need.

We add a caveat: write enough to explain each legal issue that you raise. We have seen entire legal theories tossed off in a single sentence or less. Sometimes new theories appear for the first time in the "Conclusion" section. For example, "For the foregoing reasons, and because the statute violates the appellant's right to equal protection, the decision of the Superior Court should be vacated." That's a little too short.

5. Discuss Each Issue Separately

Your readers will be grateful if you break issues into separate sections and use headings. The most common offense in this category is to liberally mix together various constitutional doctrines. Split them up and keep them straight.

6. Be Clear

Clarity is everything. No matter how complex the issue, your position should be clear enough so that any reasonably bright person can understand it on the first read through.

7. Read the Cases Cited

The overwhelming majority of the people reading this article are saying to themselves, "I always read the cases I cite." Each session, however, we saw a number of citations that did not support the assertion they accompanied. Worse still, some citations actually supported the other side. This pitfall probably arises from problems of time and money. It is worth your time, however, to read the whole case. If a case supports your position indirectly, use a parenthetical to explain how the case applies. This makes the citation more useful and straightforward.

8. Avoid Adverbs such as "Clearly" or "Obviously"

We often found that when an advocate claimed that a point was clear, it was actually anything but clear. These assertions have been reduced to red flags that actually signal a need for closer scrutiny. We suggest, therefore, that you delete "clearly" (when used to mean "obviously") from the beginning of the sentence and provide instead a short explanation of why your point is true or simply make the statement and provide a citation.

In a similar vein, do not simply say that a point of law is "well-settled" without providing a citation. If it really is well-settled, finding a citation should not be difficult.

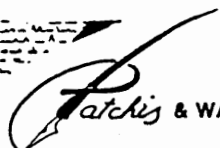
9. Offer a Citation for Every Point of Law

Statements of law are considerably more persuasive when accompanied by a citation to authority. If there is a Maine case on point, there is no need to cite to other jurisdictions. More recent decisions are generally better than older ones. String citations, however, do not generally improve your position. If there is no Maine case directly on point, then you may want to point out emerging trends in other jurisdictions. It may also be helpful to include the Restatement position. It is more important, however, to analyze how Maine courts have treated similar issues and make an analogy to the case now before the Court than to raise authority from other jurisdictions.

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PETER BENNETT of the law firm of Herbert H. Bennett and Associates, P.A. in Portland, has been appointed to serve a second term as Chair of the ABA's Committee on Employer-Employee Relations of the Tort and Insurance Practice Section.

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On a related point, once you have identified the relevant law, take the time to argue the policy behind that law. Explain how the suggested holding would be consistent with the policy objective that justifies the statute or doctrine at issue.

10. Avoid Footnotes

As a general matter, footnotes mentioning side points should be avoided. If an argument or fact is important, put it in the body of the brief; if not, leave it out. Citations should always be in the body of the brief. They are often more important than the actual text and should never be relegated to the obscurity of a footnote. Footnotes may, however, be very useful for quoting relevant statutes and rules, particularly if the text of the statute or rule has been amended or changed and would therefore be difficult to locate. Footnotes (and parentheticals) used to snipe at the opposing parties are not helpful and leave a bad impression.

D. The Addendum

It is helpful to include in an addendum, either at the end of the brief or in a separate pamphlet, a copy of any authority on which

you rely that may not be readily available to all of the Justices. For example, if the appeal involves a municipal ordinance, a decision or regulation of a municipal body or of an agency (e.g., the Maine Labor Relations Board), you should always include these authorities in the addendum. Also, in this era of tight state budgets, it is not always safe to assume that the Law Court has ready access to computer research facilities. If you rely on an authority available only on Lexis or Westlaw, it is safer to include a copy.

Also, if the appeal is assigned to a Justice whose chambers are not in Portland or Augusta, the Court's library resources will be limited. Therefore, some references, such as statutes from other states or law reviews other than the University of Maine Law Review, are often not available in the remote libraries. If these references are important to your argument, you should probably include a copy of these in the addendum as well.

If you decide not to include the material in the addendum, at least be sure to return it to the library. It does nothing to endear you to the Court when a trip to the library discloses only that the resource you cite is still signed out under your name.

D. The Appendix

Unfortunately, the preparation of the appendix does not always receive the attention it deserves. The Justice assigned to the case has the full record available in chambers. For other Justices, however, the record is not as readily at their disposal.

1. Format

For criminal appeals, the appendix is included in the brief. M.R. Crim. P. 39B(a). In a civil case, the appendix is bound separately in white. M.R. Civ. P. 74C(g). The civil appendix must be bound. The Law Court does not accept appendices in three-ring binders. Always include a table of contents and NUMBER THE PAGES. Appendices without either table of contents or page numbers are virtually useless.

2. Contents

The appendices in civil and criminal cases must include the docket sheets from previous proceedings. M.R. Civ. P. 74C(a); M.R. Crim. P. 39B(6). The Clerk of the Law Court tells us that there may be some confu-

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sion about what this includes. The docket sheets are the chronological list of the procedural events of a case. The docket sheets do not include the clerk's file index which lists the file documents numerically.

An appendix in a civil case must also include:

- * the complaint in its entirety;
- * any relevant pleadings, jury instructions, findings, and opinions; and
- * the judgment, order, or decision being appealed.

M.R. Civ. P. 74C(a).

An appendix in a criminal appeal must include, in addition to the docket entries:

- * a copy of the charging instrument; and
- * the judgment, order, or ruling being appealed.

M.R. Crim. P. 39B. You should not simply copy the entire record and bind it in white. This approach usually results in an unruly appendix with numerous unnecessary documents and sometimes multiple copies of documents.

If you rely on exhibits, such as contracts, or surveyor maps and deeds in land disputes, include a copy of these documents in the appendix. Also include relevant portions of the transcript. Be careful when providing excerpts from trial transcripts. If you refer to a particular witness's testimony or the opposing counsel's closing argument, it is often helpful to have all of the witness's testimony or all of the closing. Also, do not place a series of transcript excerpts together without breaks to alert the reader when a new witness is speaking. Consider, for example, inserting a blank page between different excerpts.

E. Reply Briefs

Avoid the temptation to rehash your main argument in a reply brief. Reply briefs are intended only for "replying to new matter raised in the brief of the appellee." M.R.

Crim. P. 39B(c); M.R. Civ. P. 75A(c). In fact, do not feel compelled to file a reply brief at all. Only about one-half of all appellants file reply briefs and many of these simply repeat earlier arguments. Reply briefs are, of course, appropriate and helpful in some circumstances, for example, when the opposing party has raised new authority or has brought a cross appeal.

II. The Nuts and Bolts

A. Binding

No matter what method of binding you decide to use to bind the brief and appendix, be sure that it is easy to handle and that the bound pages are easy to read. As a test, try reading a few pages of the bound version for yourself. Does it stay together? Can you easily open the pages? The cheapest method is the staple-and-tape approach. This works well, especially for smaller documents. On the larger documents, however, a spiral binding works much better. Permanent binding systems have become popular, however, some of these bindings tend to be too stiff and difficult to handle. Do not use the plastic report covers with the binders that slip over the left edge; these binders inevitably fall apart. The Law Court will not accept for filing briefs in three-ring binders.

The cover of your brief must comply with requirements of M.R. Civ. P. 75A(g) and M.R. Crim. P. 39B(g). When the case involves multiple appellants or appellees, be sure that the cover of the brief clearly indicates which parties are represented by whom and for which party the brief is being submitted.

B. Format

Make your brief easy for tired eyes to read. Always use double-spacing. Avoid the temptation to experiment with new fonts, instead use a basic font. Also be sure that the type is a reasonable size. There is currently

no page limit for briefs filed with the Law Court so there is no need for cramped, hard-to-read briefs.

C. Style and Method of Citation

1. A Note on Citation

The Law Court is now using the Fifteenth Edition of the Bluebook, first printed in 1991.² This edition has some significant changes from earlier editions and is worth the investment. When citing a Maine authority that the Bluebook does not address, consult *Uniform Maine Citations* for the appropriate format. If you are unable to find a proper citation format, simply provide enough information to make the source easy to find.

Although proper citation form is not critical, some citation forms are particularly inconvenient for the reader and should be avoided if possible. For example, avoid using *supra* altogether. Never use *supra* unless the earlier full citation falls in the same general discussion and it will be easy for the reader to find, i.e., in the same paragraph. Instead, use the short form. Never refer to an unofficial reporter when an official citation is available. For example, do not cite to the Bankruptcy Reporter when the case is also reported in the Federal Reporter.

2. Grammar and Style

For questions of grammar and style, the Law Court relies on the Fourteenth Edition of the Chicago Manual of Style. Repeated typographical, spelling, or grammatical errors impair your credibility. Proofread. Running a computerized spell-checking program is a good start, but it is no replacement for careful proofreading. Ask someone who has not done extensive work on the brief to proofread it for you.

Frank Coffin has said that briefs can be "tools of extraordinary efficiency [that enable] an appellate court . . . to comprehend the essential facts, legal authorities, and issues of a case that may have taken a month

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DID YOU KNOW?

That when the Maine members of the United States Supreme Court Historical Society held their first-ever Summer Luncheon at Scarborough their guest was Justice David H. Souter, of New Hampshire. Hugh G. E. MacMahon, Esquire and former Maine Supreme Judicial Court Chief Justice Vincent L. McKusick, both of Portland, co-chaired the event.

or more to try in the court below." Frank M. Coffin, *The Ways of a Judge* 55 (1980). Although this is no easy task, preparing a brief that lives up to these expectations will be a great asset to the Court and to your case. We hope this has been some help.

¹The contents of the addendum are discussed in section D.

²Note that the Court retains a few citation forms not consistent with The Bluebook. These include using "___ M.R.S.A. § ___" rather than "Me. Rev. Stat. Ann. tit. ___, § ___" and using "M.R." rather than "Me. R." when citing rules of procedure and evidence.

We are thankful to a number of people providing suggestions and guidance. These include: Justice Paul Rudman, Jim Chute, Linda Putnam, Nancy Gildred, Jonathan Harris, John Anderson, Laura Beliveau, Kara Cunningham, Ivy Frignoca, Todd Holbrook, Donald Kreis, Paul Pietropaoli, David Sherman, James Stolley, Elizabeth Wallace, John Bisson, Jonathan Mansfield, and Matthew Herrington.

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