



Faculty Scholarship

1996

How to Write a Losing Brief

Coleen M. Barger

University of Arkansas at Little Rock William H. Bowen School of Law, cmbarger@ualr.edu

Follow this and additional works at: http://lawrepository.ualr.edu/faculty_scholarship



Part of the [Legal Writing and Research Commons](#)

Recommended Citation

Collen M. Barger, How to Write a Losing Brief, *Ark. Law.*, SPRING 1996, at 10.

This Article is brought to you for free and open access by Bowen Law Repository: Scholarship & Archives. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Bowen Law Repository: Scholarship & Archives. For more information, please contact mmserfass@ualr.edu.

How to Write a Losing Brief

by Coleen M. Barger

In every appeal one side wins and one side loses.¹ The merits of the case ought to have something to do with it, but sometimes they don't. Instead, the efforts of the lawyer writing the appellate brief influence the outcome of the appeal. You probably know that numerous helpful articles and books already exist to provide guidance on writing the winning brief.² I can't add anything new to all the good advice that's already been published. So I have a different thesis. Will you accept the proposition that appellate judges are very busy people? For every case, they have to decide who wins, and who loses, and why. Will you agree that cases take a long time to go through the appellate process? Is judicial economy a goal to be desired? If you answered "yes" to all these questions, I offer you the following rules to make the judges' decision in your next appeal much easier, much quicker: Write the losing brief.

Rule 1. Don't bother to check the court rules. Following this rule may be the fastest way of all to lose an appeal—you can halt the progress of your brief right at the clerk's office, before a judge ever sees it.³ For example, if you're drafting a brief for an Arkansas appellate court, try submitting a wordy brief whose Argument section runs about 28 pages in length.⁴ Or abstract witness testimony in the third person, or reference several pages of the record at once.⁵ Or try to conserve paper by squeezing in a couple of extra lines per page. Will it matter that your margins are less than one inch? Yes, it will.⁶

For those fascinated with computer technology, try using one of those fancy new fonts that came with the wordprocessor. If you use a font that's small enough, you can fit a 28-page Argument into 24 pages.⁷

If you're drafting a brief for a federal appellate court, though, some of these

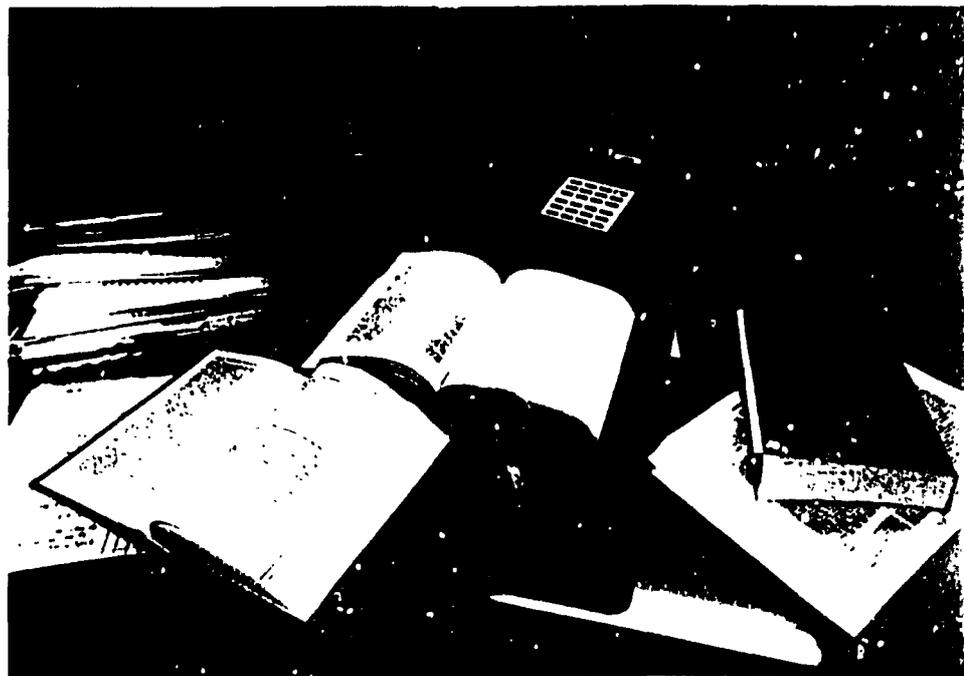
tricks may not work. The federal clerks are more likely to return the brief to you (again and again), until you finally get it right and they can forward it to the judges. So we'd better go to the next rule.

Rule 2. Raise as many issues as possible. Remember how you learned to spot issues on law school exams? The more you found, the more your professors liked your paper. Now you can put that talent to work again. When you represent the appellant, comb the record for every conceivable ruling, objection, instruction, and put each one into its own point of error. No appellate court will buy your argument that the trial judge made that many prejudicial errors. Bury your good point in a haystack of losers. Or save it to use as your last point; the judges' attention will be gone long before they ever make it that far in your brief.

Rule 3. Get a head start on your argument by attacking the trial court in the Statement of the Case. Belittle the trial judge. Accuse the judge of fol-

lowing his own agenda. That's the strategy used by counsel in one Arkansas case, and it worked.⁸ If you're rude enough, the court may even strike your entire brief, a result that really shortcuts the court's time in making a decision.⁹ And you can certainly put the court in the proper frame of mind to rule against your client if your Statement of the Case distorts the facts, omits material information that favors your opponent, or argues the significance of facts on your own client's side.

Rule 4. Distort the standard(s) of review. There are several ways to distort the standard of review. One, you can pretend it doesn't exist, and simply argue whatever seems to work, whether the appellate court can give you that relief or not. Two, you can misstate the standard. For example, did the trial judge exclude your proffered evidence as more prejudicial than probative? Argue a *de novo* standard (Latin always sounds educated).¹⁰ Three, for a multi-issue appeal, state a



single standard of review, even though each issue you raised obtains review under a different test. Let the appellate judges sort it out. They ought to know their job.

Rule 5. Don't include any point headings within the brief, or if you must draft some, make them as non-specific and topical as possible. Some judges have the silly notion that by skimming your argumentative headings, they can get a sense of your argument's scheme and structure. Such judges find it extremely helpful to encounter headings like this one: "The trial court abused its discretion by admitting twenty-five gory and repetitive photographs of the corpse." Rather than draft a heading that clearly asserts your position on the issue, keep your headings simple: "Admission of photographs." Drafting this kind of heading works whether you're the appellant or the appellee, so you don't even have to keep up with which side you're on.¹¹

Rule 6. Quote whatever you like, as much as you can. The writer whose brief is resplendent with quotations, stitched together by citations, not only persuades the appellate court that he or she has done no original thinking, but also, if the quotations are long enough to merit block format, gives the judges a handy way to skip reading large sections of the brief. Here's an example:

Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(3), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction which has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

See how easy it is to just skip that entire paragraph?¹²

And here's another tip: Quote from headnotes, even though their author is a publishing company's employee, not the judge who wrote the opinion of the court. After all, the language of the headnote might mean something distinctly different in the actual context of the reported case.

Rule 7. Be wordy, verbose, loquacious, prolix, and long-winded. To fol-



low this rule properly, it helps if you'll forget that the typical appellate judge reads scores of briefs per year. (Don't think of the possibility that if we recycled all the paper in those briefs, we could save at least a half-acre of pulpwood per judge.¹³) Unfortunately, judges don't get to choose which briefs they'll read. After all, aren't they paid to read every single word and the next word and the next word, too?

It's a simple matter of psychology, really. When you were in law school, did you prefer reading the four-page tort cases or the twelve-page constitutional law cases? Quick, tell me the facts of *Palsgraf*. Now tell me the facts of *Marbury v. Madison*. Judges are no different. As between the ten-page brief that succinctly addresses the issues and the thirty-five page brief that rambles on and on, which one will the judges read? The losing brief is the one that stays on the desk.

Rule 8. Don't worry about constructing the table of contents or the table of authorities. No one ever looks at them. If you provide inaccurate tables—whether because of citation errors, wrong page numbers, omissions, or incomplete information—you've found another sure-fire way to reinforce the judges' notion that you don't know what you're doing. Type or dictate "S.W.2d" when the case was in the Southern Reporter 2d. Get the volume number wrong. Never Shepardize anything. Make

the judges' law clerks hunt for the case. After all, they were probably some of those law review geeks who earned all the A's and memorized the Bluebook. Serves them right.

No point in making the tables easy to read either. Run the citation all the way across the page so that the page numbers, date of decision, statute numbers, and pages of the brief are in the same visual field. Guaranteed to irritate.

Rule 9. Do not - I repete - do not proofread. This rule is important because even though you want to write the losing brief, it's nice to give the judges a good laugh while they're ruling against you.¹⁴ Make enough mistakes, and you increase your chances of distracting the judges from noticing anything meritorious that you might have inadvertently included in the brief.

Rule 10. Make 'em work for it. This rule may seem contrary to my opening thesis—that you can save the legal system a lot of time by writing a brief so bad that the judges will quit reading in disgust and quickly rule in favor of your opponent—but it's here for an important reason. Some judges are so stubborn that they will persist in reading your brief, looking for any kernel of insight, despite your best efforts to follow my first nine rules. For these judges, then, you must turn to your ultimate weapon: fog.

Think about it. Fog is gray, dense,

See *Writing a Losing Brief*
Page 36

Writing a Losing Brief
Continued from Page 11

uncomfortable. With very little effort, you can achieve the same effect on paper and in the reader's brain. Put text into long, long paragraphs. There's nothing like turning a page and seeing a mass of words, unbroken by indentation or white space. But don't stop there. Fog your sentences, too. Use of the passive voice and insertion of strings of long prepositional phrases, coupled with the particularly effective technique of using many, many words to separate the subject of the sentence from its verb, are among the most successful methods employed by the masters of fog.

So there you have it, ten proven ways to keep your brief from being read. Choose from a panoply of technical violations of the court rules. Employ clumsy, wooden writing. Dull the attention of appellate readers, who will find it far easier to put down the brief than to scour it for some redeeming value. Do your part to accelerate the appellate process. Write the losing brief.

Coleen M. Barger is an instructor at the University of Arkansas at Little Rock School of Law, where she teaches first-year legal writing and upper-level appellate advocacy, and in her spare time, coaches moot court teams.

ENDNOTES

1. I couldn't find a case that said this, but for some reason I think it's true. Write a letter to the *Arkansas Lawyer* if you find an authority that says otherwise.

2. Here are just a few examples: Andrew L. Frey & Roy T. Englert, Jr., *How to Write a Good Appellate Brief*, LITIG., Winter 1994, at 6; Girvan Peck, WRITING PERSUASIVE BRIEFS (1984); Robert Barr Smith, *Persuasion on Appeal*, 41 OKLA. L. REV. 463 (1988).

3. See, e.g., Ark. R. S. Ct. 4-1(d): "Non-compliance. Briefs not in compliance with this Rule shall not be accepted by the Clerk." Or try this one, Ark. R. S. Ct. 4-2(c), which says it a little differently: "Non-Compliance. Briefs not in compliance with the format required by this Rule shall not be accepted for filing by the Clerk."

4. For Arkansas rules governing the length of the argument, see Ark. S. Ct. R. 4-1(b) (civil) and 4-3(e) (criminal). For federal appeals, see Fed. R. App. P. 28(g).

5. See Ark. R. S. Ct. 4-2(a)(6).

6. See Ark. R. S. Ct. 4-1(a): "The margin at the top, outer edge, and bottom of each page shall not be less than one inch" The feds make you subtract fractions to figure out the margins: "[Briefs] shall be bound in volumes having pages not exceeding 8 1/2 by 11 inches and typed matter not exceeding 6 1/2 by 9 1/2 inches" Fed. R. App. P. 32(a).

7. See *Jones v. Jones*, 320 Ark. 157, 896 S.W.2d 431 (1995). After deciding *Jones*, the Arkansas Supreme Court amended Rule 4-1(a) to read: "The style of print shall be either mono-spaced, measured in characters per inch, not to exceed 10 characters per inch, or produced in a proportional serif font, measured in point sizes, not to be less than 12 points...."

8. See *Henry v. Eberhard*, 309 Ark. 336, 832 S.W.2d 467 (1992) (striking all pages in the brief that contained language offensive and disrespectful to the trial judge).

9. See *McLemore v. Elliott*, 272 Ark. 306, 614 S.W.2d 226 (1981) (striking brief in its entirety).

10. Your opponent's brief will probably respond that in such instances, the standard of review is abuse of discretion, but this just means that he or she had to put in some research time to find out what the heck the correct

standard was. The court gets the right information, and you get to avoid a trip to the library.

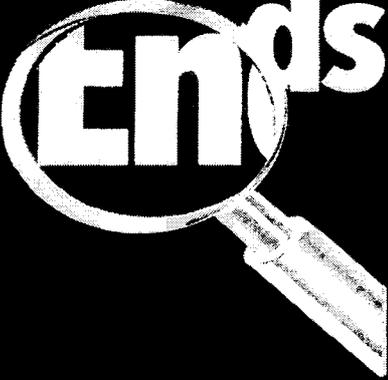
11. The Federal Rules of Appellate Procedure suggest that you use names or descriptive nouns instead of the potentially confusing terms "appellant" and "appellee." See Fed. R. App. P. 28(e). But don't give in.

12. The quotation comes from the Comment to Rule 3.3 of the Arkansas Model Rules of Professional Conduct.

13. I have absolutely no authority for the foregoing statistic, but you get the idea.

14. Rumor has it that some courts actually put these goofs on a *bulletin board* for the amusement of all court personnel.

Your Search Ends Here.



Need We Say More.....

(800) 460-9044

Toll Free / North America

(214) 404-9005 Main Office (214) 404-1842 Fax Line

<p>SKIP TRACING & LOCATION OF WITNESSES, DEFENDANTS & HEIRS AT REASONABLE FLAT RATE FEES</p> <p>UNLISTED TELEPHONE SEARCHES</p> <p>CRIMINAL DEFENSE REPRESENTATION (Former 1984 '60 Minutes' Segment - Lynell Geter Case)</p> <p>BACKGROUND INVESTIGATIONS (For Pre-Employment, Marital, Business Investment Or Any Other Legitimate Reason)</p> <p>WORLDWIDE PROCESS SERVING HANDLED IN OVER 450 CITIES AND 97 COUNTRIES</p>	<p>BANK ACCOUNTS LOCATED ANYWHERE INCLUDING ACCOUNT NUMBERS AND BALANCES AS OF THE DATE OF OUR INQUIRY (Individuals Or Companies)</p> <p>STOCK, BOND & MUTUAL FUND PORTFOLIOS LOCATED ON ANYONE IN THE UNITED STATES (Including Accounts & Balances)</p> <p>EXECUTIVE PROTECTION AGENTS AVAILABLE FOR DIPLOMATS & EXECUTIVES</p> <p>COPYRIGHT & TRADEMARK INFRINGEMENT CASES (Former 1983 '60 Minutes' Segment - Jordache Case)</p>
---	---