Brief Thoughts on Effective Brief Writing

by Christine D. Petruzzell

Despite the image of a successful lawyer as one who handles high-profile cases or presents gripping closing arguments, much of the significant work attorneys do is accomplished methodically and in less dramatic fashion through their writing; for example, in preparing correspondence, memos, briefs and agreements. This essential fact underscores the necessity for skill and clarity in legal writing, and with respect to briefs, writing as an advocate.

The technical requirements of a brief are readily ascertainable by reviewing the relevant Rules of Court of the jurisdiction where the brief will be filed, and are not addressed here. The following thoughts move beyond these technical requirements to the next level of effective brief writing.

Planning is Essential

Preparing a brief affords an opportunity to present the facts and legal arguments of a matter on your own terms and in a light most favorable to your client, without the pressure and time constraints of oral argument on a motion or an appeal. One of the ironies of effective brief writing is that careful planning must precede the process of writing. The effective advocate plans the presentation, the points to be raised, and how each argument will be developed and supported with the relevant law and facts before beginning to write. Such planning will bring focus and clarity to the brief, making it more understandable and persuasive.

Preparing a short outline of the points to be raised and how each will be developed, even if jotted down as brief notes on a legal pad, assists this process. Additionally, it is a useful way to break the ice for attorneys who find it hard to begin writing, since this starts the process. The outline provides the framework that can then be developed into a workable first draft of the brief.

However, there is no need to be irrevocably wedded to the outline as you develop and refine your arguments, add to them, or decide that late night flash of genius now actually makes no sense. Writing and evaluating the arguments being made are fluid processes. One can see what works effectively only after a draft of the brief is prepared. This fact also points to the need to continually revise and edit a brief before it is finalized.

Repeated revisions are not signs of a deficient work product, but rather demonstrate careful thought and consideration of the matter, highlighting the writer's professionalism and dedication to the task. Only after an argument is written can it be read with a critical eye to see if it is sound, well-organized and logical. Invariably, changes will be necessary to make the arguments clear, concise and more persuasive. In the course of editing, it is useful to let a day or so pass before reading the brief again, so it can be approached with a fresh eye to spot typographical and other technical errors, and with a fresh mind to examine and refine arguments that are not well articulated or supported.

The Skill and Strategy of a Preliminary Statement

One of the most powerful, but often overlooked, sections of a brief is the preliminary statement. A preliminary statement allows the attorney to set forth a concise overview of the client's position on the issues being raised, providing a framework for the more detailed arguments that follow. As such, it provides a useful frame of reference for the determinations you seek from the court. This concise overview is particularly important to our Judiciary, given the fact that many briefs are far from brief (for example, a party's initial brief can contain up to 65 pages),[1] and in light of the volume of matters addressed by the courts.

A preliminary statement also provides the opportunity to go beyond merely summarizing the arguments being made, allowing the advocate to get to the essence of the case. As an advocate, you are able to explain in a preliminary statement

what the case is really about, beyond the purely legal arguments being raised, or to elaborate upon the consequences that will follow from granting seemingly innocuous relief sought by the adverse party. It is your chance to speak from the heart. While the Court Rules reference a preliminary statement as an optional section in an appellate brief,[2] it should be viewed by the writer as an essential part of the argument in all briefs.

While the preliminary statement appears as the first section of a brief, preceding the procedural history and statement of facts, it is best written after the brief is completed. It is only at this point that the writer will have a true appreciation of the arguments ultimately made and their nuances, allowing for a powerful preliminary statement.

As a cautionary note, it is important to follow the requirements of Rule 2:6-2(a)(6) for appellate briefs, limiting a preliminary statement to three pages, precluding footnotes, and to the extent practicable, citations as well. This will avoid the possibility that the brief will be rejected by the court as non-conforming, thereby requiring revision and re-submission.

Lead With Your Strongest Argument

A brief is your forum to present the strongest possible argument for your client. Therefore, particularly when representing the movant on a motion or the appellant on an appeal, the attorney should avoid the natural tendency to present arguments in logical or chronological order if that presentation causes your best argument to be made toward the end.

Take, for example, a case in which a defendant's arguments in support of summary judgment on the issue of liability under the Consumer Fraud Act are the assertions that the action is barred by the statute of limitations; the plaintiff lacks standing to assert the claim; and the plaintiff cannot establish one of the necessary elements of the claim asserted as a matter of law. The order stated above is the logical way of conceptualizing the arguments being made. However, if the strongest point supporting summary judgment is the last—the plaintiff cannot establish one of the elements necessary to the claim—that argument should be presented first in the brief.

Frame the Brief in the Context of the Relief Sought

All parts of a brief should work toward the relief sought. This means more than simply stating the nature of the relief sought and asking the court to grant it. The relief sought should guide the brief in its entirety. For example, on a motion for summary judgment, entitlement to that relief exists only if the material facts are not in dispute, and the movant is entitled to judgment under the law.[3] The brief of the moving party should present, cleanly and precisely, the key facts, whether based upon oral testimony or documentary evidence, on which there is no dispute.

The proper approach would not be to state and discuss at length additional facts that are not relevant to the issues presented on the motion. Such an approach runs the risk of detracting from the issues on which the motion is based, creating the impression that the case is a fact-intensive one that warrants determination only after a plenary hearing, and provides the opportunity for your adversary to raise fact disputes that may exist regarding these additional facts. Conversely, in opposing summary judgment, the focus should be upon the fact-intensive nature of the matter and the legitimate factual disputes in the record, warranting determination of credibility and other issues at trial.

Similarly, if a temporary restraining order is sought, the brief should consistently highlight the urgency of the matter and the immediate and irreparable harm that will occur in the absence of the requested restraint. The standards for the grant of such relief are established and well known to our courts, and need not be discussed at length.[4] What is important to the motion is the application of those standards to the facts of the matter at hand, particularly on the issue of immediate and irreparable injury.

State Explicitly the Relief Sought

While this sounds like an obvious point, it can be lost in the complexities of the facts or the law being argued. The brief should end with a separate conclusion section that explicitly states the relief being sought. For example, on a pre-trial motion, the conclusion should go beyond stating simply that the relief sought "should be granted."

The writer should elaborate to specify the particular relief being sought (*i.e.*, on a motion to dismiss, "the complaint should be dismissed;" on a discovery motion, "the deponent should be ordered to appear for deposition within 10 days and to produce the documents identified in the notice to produce served by the defendant;" on a motion for a preliminary injunction, "the defendant should be preliminarily enjoined during the course of this case from performing the following specified activities [which should then be specifically set forth])."

Without such specificity, the risk exists that not all of the relief needed will be granted, particularly when so many pre-trial motions are decided on the motion papers submitted, and without oral argument offering the opportunity to elaborate on the relief being sought.

Be an Advocate at All Times

Every first-year associate in a law firm litigation department hears the same lecture: You are writing a brief as an

advocate for your client, not a law review article providing a neutral assessment of the law and an intellectual discussion of legal principles. This is advice that must be taken to heart, applied, and refined with each brief that is written.

Advocacy means more than simply referencing cases that support the position being advanced. It is not accomplished by simply string-citing cases, or blandly reciting the facts and holdings of a series of cases as was done in briefing cases for law school classes. It means addressing the key aspects of a cited case, explaining how it is exactly on point (or dissimilar, if one is the opponent of the motion or appeal), and constitutes controlling or persuasive authority (or not, if one is opposing the relief sought).

Similarly, if the case contains specific language worthy of note, advocacy is not accomplished by quoting wholesale from the case at length. Quote only the pertinent and most powerful language and integrate it into your argument, demonstrating that the language is particularly relevant to your case. Lengthy, rambling quotes lose the reader.

The fact that contrary authority may exist and should be disclosed to the court does not impair the mandate to be an advocate. While the adverse authority, at first blush, may contradict your client's position, it often can be distinguished in order to demonstrate that the authority is not pertinent to the issue at hand. If this is not possible, you may be able to respectfully argue that the authority is wrongly decided and should not be followed.

In the event you are sure an argument against your position will be made by your adversary, it may be appropriate to address and rebut the argument or case in advance, rather than waiting for it to be stated in opposition to your position. Doing so has the benefit of defusing the argument when it is raised by your opponent.

On a more subtle basis, advocacy should also be used in presenting the statement of facts in a brief. An effective factual statement is one that is presented in narrative form, as a story, with a central focus supporting the theme of your client's position.

For example, in a matter involving misappropriation of a company's trade secrets, the facts should tell the story of why the information at issue is proprietary, the steps taken by the company to maintain its confidentiality, and the facts that lead to the belief the information was wrongfully acquired by the defendant.

The telling of such a story engages the reader, and advocates the plaintiff's position more effectively than a disjointed witness-by-witness account of the facts summarizing the testimony of each witness.[5] As stated by Justice Oliver Wendell Holmes: "Make the facts live." As a respondent on a motion or an appeal, it may be useful to include a counter-statement of facts, setting forth your client's version of the facts rather than simply stating that you adopt and rely upon the acts stated by your adversary.

Effective advocacy is accomplished with a clear and well-organized brief. Each paragraph should make a point, and the sentences should not be lengthy or complex. If the arguments are sound and easy to comprehend, the brief has inherent strength.

Each legal argument made should contain a point heading that identifies the argument. The argument itself should start with a brief introduction. This can be as simple as stating: "It is well recognized that the discovery rule tolls the running of the statute of limitations under N.J.S.A. 2A:14-1. As demonstrated below, the discovery rule is applicable here and demonstrates that the plaintiff's claim is timely brought."

Each separately stated legal argument should then end with a brief concluding sentence or two, summarizing the position just argued.

Retain Your Credibility

As an advocate, your credibility is a key element of your professionalism and the service you provide to a client. Once compromised, credibility is not easily regained, and unfortunately may not be restored to a viable level during the case in which it was lost. Your credibility should, therefore, permeate your brief.

Arguments should not be overstated, and the facts and holdings of cited cases should never be misstated. The same is true of references to documents in the record, or to deposition or trial testimony. On appeal, references to facts outside of the record are inappropriate and may result in the imposition of sanctions.[6] Such misstatements will likely be caught by your adversary, and addressed to your embarrassment, or worse, will be noticed disapprovingly by the court.

Credibility is also inherent in the particular arguments made in a brief. In arguing a point, the writer should not misstate the law or take a position that is without reasonable basis in fact or law, or based upon a reasonable argument for an extension of the law.

Lastly, your written product reflects upon your credibility. It should be free of typographical errors and improper grammatical usage. The use of a spell check program does not ensure a brief free from errors, since the word used may be spelled correctly but is an inappropriate usage.

The technical rules that govern preparation of a brief or a motion should be satisfied.[7] Errors in following these rules suggest the writer is not a careful attorney, raising the question whether such carelessness extends to the attorney's analysis and argument of the law. This slippery slope can easily be avoided by careful attention to the writ-

ten form of the brief, and is well worth the effort.

An Effective Brief Takes Time, Skill and Effort

An effective brief does not just happen. As the observations above demonstrate, it takes time, skill and effort. Additionally, it is much harder to prepare a pointed, concise and powerful brief than it is to write a lengthy brief that meanders endlessly through the facts and law, telling it all in a case without theme or focus. Leaving sufficient time to prepare, think about and edit a brief before it is filed is also essential. The good news is that with each brief prepared, additional skill is acquired, and the task becomes a more enjoyable challenge. ⚖

Endnotes

1. *See* Rule 2:6-7, setting page limits for briefs submitted on an appeal and on a cross-appeal to the Appellate Division, including a limit of up to 65 pages for the parties' initial briefs on appeal, and up to 90 pages for briefs where a cross-appeal has been filed.
2. *See* Rule 2:6-2(a)(6).
3. *See Brill v. Guardian Life Ins. Co. of America*, 142 N.J. 520 (1995).
4. *See Crowe v. DeGioia*, 90 N.J. 126 (1982).
5. For example, Rule 2:6-2(a)(4), governing briefs submitted to the Appellate Division, cautions against presenting a statement of facts as a summary of all of the evidence adduced at trial, witness by witness.
6. *See, e.g., Cherry Hill Dodge, Inc. v. Chrysler Credit Corp.*, 194 N.J. Super. 282, 283 (App. Div. 1984)(dismissing appeal for numerous violations and observing that it was "completely improper" to include in appendix numerous documents that were not in evidence before the trial court); *Drake v. Human Services Dept.*, 186 N.J. Super. 532, 537 (App. Div. 1982)(reliance on appeal upon material not before the lower tribunal can trigger censure for violation of the appellate practice rules).
7. *See, e.g.,* with respect to briefs to the Appellate Division: Rule 2:6-2; Rule 2:6-4; Rule 2:6-5; Rule 2:6-6; Rule 2:6-7; Rule 2:6-8; with respect to a motion for summary judgment before the trial court: Rule 4:46-1 and Rule 4:46-2; and with respect to discovery motions before the trial court: Rule 1:6-2(c).

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