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Effective Appellate Brief Writing

Clyde H. Hamilton
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EFFECTIVE APPELLATE BRIEF WRITING

THE HONORABLE CLYDE H. HAMILTON*

I. INTRODUCTION

I enjoy drinking iced tea. And from my perspective, a well-written appellate brief is as refreshing as a glass of freshly brewed iced tea on a hot, July day. Unfortunately, if I depended upon reading well-written briefs for refreshment, I would die of thirst. Why? I wish I knew. While preparing a well-written appellate brief requires a great deal of time and effort, in my view the exercise is amazingly straightforward. Thorough preparation is the key—know the record backwards and forwards, know the relevant legal authority, know the applicable Federal Rules of Appellate Procedure, and know that your client is depending upon you to present his or her case to the appellate court in the most persuasive manner possible.

Federal Rule of Appellate Procedure 28(a), entitled "Appellant's Brief," outlines the required components of an appellant's brief to be submitted to a United States court of appeals.[1] Briefly listed in order, these components are: (1) "a corporate disclosure statement if required by Rule 26.1;" (2) "a table of contents, with page references;" (3) "a table of authorities;" (4) "a jurisdictional statement;" (5) "a statement of the issues presented for review;" (6) "a statement of the case;" (7) "a statement of facts;" (8) "a summary of the argument;" (9) "the argument;" (10) "a short conclusion stating the precise relief sought;" and (11) "the certificate of compliance, if required by Rule 32(a)(7)."[2] Rule 28(b) provides that an "appellee's brief must conform to the requirements of Rule 28(a)(1)-(9) and (11), except that . . . (1) the jurisdictional statement; (2) the statement of the issues; (3) statement of the case; (4) statement of the facts; and (5) statement of the standard of review" need not appear "unless the appellee is dissatisfied with the appellant's" version of these components.[3] The purpose of this Article is to offer practical advice from the perspective of one federal appellate judge regarding how to draft effectively the seven components constituting the heart of the appellate brief—components

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* Judge, United States Court of Appeals for the Fourth Circuit. Any opinions and preferences concerning the topics in this Article constitute the personal opinions and preferences of Judge Hamilton and are not intended to reflect the personal opinions or preferences of any other judge.

Without the able assistance of my career law clerk, Robin Reid Tidwell, this Article would not have been so thorough and complete. She has labored through many ill-prepared appellate briefs. Her insights and observations gleaned from her experience have contributed greatly to this Article.

1. *See* FED. R. APP. P. 28(a).
2. *Id.* 28(a)(1)-(11).
3. *Id.* 28(b).

four through ten.

II. THE JURISDICTIONAL STATEMENT

Rule 28(a)(4) provides that an appellant's brief must contain, under an appropriate heading, a jurisdictional statement, including:

> (A) the basis for the district court's or agency's subject-matter jurisdiction, with citations to applicable statutory provisions and stating relevant facts establishing jurisdiction;
> (B) the basis for the court of appeals' jurisdiction, with citations to applicable statutory provisions and stating relevant facts establishing jurisdiction;
> (C) the filing dates establishing the timeliness of the appeal or petition for review; and
> (D) an assertion that the appeal is from a final order or judgment that disposes of all parties' claims, or information establishing the court of appeals' jurisdiction on some other basis.[4]

The jurisdictional component is one of the most important in the appellate brief because whether subject matter jurisdiction exists and whether appellate jurisdiction exists are threshold issues in every federal appeal.[5] In many cases the requirements of Rule 28(a)(4) may be readily satisfied, but in other cases they may not. For example, Rule 28(a)(4)(B)-(D)'s requirements may be readily satisfied by: (1) stating that a final decision under § 1291 of Title 28 of the United States Code[6] was entered in the form of a judgment disposing of all claims and providing a citation to the page of the appendix[7] evidencing the entry of the final decision; and (2) stating that the appellant filed a timely notice of appeal on the applicable date and providing a citation to the page of the appendix evidencing the filing of the notice of appeal. In contrast, an appellant seeking to rely on a more elaborate theory of finality, such as the collateral-order doctrine, will find this component of the brief considerably more demanding.

An appellee should carefully review the appellant's jurisdictional statement and include his or her own jurisdictional statement if dissatisfied with the appellant's. If an appellee does include a jurisdictional statement, the appellant should address any inconsistencies between the two in the reply brief.

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4. *Id.* 28(a)(4).

5. *See* Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 68 (1978); Brown Shoe Co. v. United States, 370 U.S. 294, 305-06 (1962).

6. 28 U.S.C. § 1291 (1994).

7. Pursuant to Rule 30, the record on appeal is termed the "appendix." *See* FED. R. APP. P. 30.

III. THE STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Rule 28(a)(5) provides that an appellant's brief must contain, under an appropriate heading, "a statement of the issues presented for review."[8] This statement serves as notice to the appellate court of the specific actions by the district court or the relevant administrative body that an appellant seeks to challenge on appeal.

Personally, I find that issues stated at a medium level of particularity are most effective at introducing the issues sought to be raised on appeal. Take for example a negligence action in which a man named John Smith sued a woman named Susan White, and the district court granted White's motion for summary judgment on the ground that Smith had failed to proffer evidence of damages sufficient to survive a motion for summary judgment. The issue on appeal should be framed as follows: Did the district court err in granting White's motion for summary judgment on Smith's negligence claim on the ground that Smith had failed to proffer evidence of damages sufficient to survive a motion for summary judgment; when Smith had proffered evidence, from which, when viewed in the light most favorable to him, a reasonable jury could find by a preponderance of the evidence that Smith had suffered damages proximately caused by White's breach of her duty of due care?

In addition to stating the issues at a medium level of particularity, in my opinion, parties should state the issues as objectively as possible and in a manner consistent with the applicable standard of review. The quicker an appellate judge can grasp the complete picture of the issues on appeal, the more time the appellate judge has to spend considering the parties' legal arguments with respect to those issues. This is not to say that the art of persuasion has no place in formulating the statement of the issues. Be as persuasive as possible, but not at the expense of the objectivity with which appellate judges are required to analyze the issues on appeal. As for an appellee, I recommend deferring to the appellant's statement of the issues unless, as the rule states, the appellant's statement of the issues is unsatisfactory.[9]

Another point worth mentioning with respect to Rule 28(a)(5) is that failure to comply scrupulously with it could result in a federal appellate court considering a particular issue abandoned by the appellant.[10]

IV. THE STATEMENT OF THE CASE

Rule 28(a)(6) provides that an appellant's brief must contain, under an appropriate heading, "a statement of the case briefly indicating the nature of the

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8. *Id.* 28(a)(5).
9. *See id.* 28(b).
10. *See* International Ass'n of Machinists v. Eastern Airlines, Inc., 925 F.2d 6, 10 (1st Cir. 1991).

case, the course of proceedings, and the disposition below."[11] This rule is intended to provide the appellate court with a procedural road map that allows it to track the path the case took to the steps of the appellate courthouse. Thus, the procedural history should be set forth in chronological order with relevant dates. Furthermore, although Rule 28(a)(6) does not require corresponding citations to the appendix to be included with respect to each item of procedural history, I consider it wise to include these citations.

In my view, for example, in the typical civil appeal, the appellant should always include in the statement of the case: (1) the filing of the complaint, whether in state or federal court; (2) the removal of the case to federal court, if applicable; (3) the filing of a motion to remand to state court, if applicable; (4) a general statement regarding whether discovery was conducted; (5) the filing of all dispositive motions such as motions to dismiss, motions for summary judgment, and motions for entry of judgment as a matter of law; (6) the filing of any orders and any accompanying memorandum opinions filed by the district court in response to any dispositive motions; (7) the entry of final judgment; (8) the filing of any post-trial or post-judgment motions and the district court's rulings on these motions; (9) the filing of any notice of appeal; and (10) the filing of any motion to stay the effect of the district court's entry of final judgment pending appeal and the district court's ruling on these motions. Furthermore, unless any of the following items are relevant to the issues on appeal, an appellant should not include: (1) the filing of an answer; (2) the details of discovery proceedings, including discovery motions and the district court's rulings on these motions; and (3) motions to continue and the district court's rulings on these motions. In sum, after reading the appellant's statement of the case, the appellate court should have a clear picture of the case's procedural history.

If the appellant does a good job on the statement of the case, the appellee should not have to include one. However, inclusion may be necessary to correct any distortions of the procedural history or to present any necessary information the appellant neglected to include. On both sides clarity and conciseness are key.

V. THE STATEMENT OF FACTS

Rule 28(a)(7) provides that an appellant's brief must contain, under an appropriate heading, "a statement of facts relevant to the issues submitted for review with appropriate references to the record."[12] In my view, the importance of meticulously complying with this rule cannot be overstressed. Because experienced federal appellate judges are familiar with almost all well-worn areas of the law, the facts often speak for themselves before the party has a

11. FED. R. APP. P. 28(a)(6).
12. *Id.* 28(a)(7).

chance to do so in the argument component of the brief. Thus, the opportunity to persuade actually begins with the statement of the facts.

Sadly, I am continually amazed at the poor quality of the statements of facts that I read in appellate briefs. The shortcomings fall into four major categories: (1) failing to present all relevant facts; (2) cluttering the brief with irrelevant facts; (3) failing to present the facts in a manner consistent with the appropriate standard of review; and (4) failing to make appropriate citations to the appendix.

A statement of facts that omits relevant facts seriously undermines the omitting party's credibility, leaving the appellate judges assigned the appeal with the impression that the party does not believe it can win if the judge learns of the omitted facts. The omission of relevant facts also leaves appellate judges with the impression that the party's brief *in toto* is sloppy and ill-conceived.

Equally troublesome is a statement of facts that is cluttered with irrelevant facts. Such a statement of facts channels attention away from the relevant facts, leaving appellate judges in a factual wasteland. To avoid these grave errors, stick to the facts relevant to the issues on appeal and any other facts necessary to put the relevant facts in perspective. The facts should always be stated in chronological order and, if at all possible, woven together in narrative form. A story is always more interesting to read than a dry reporting of the facts.

The statement of facts must be presented in a manner consistent with the appropriate standard of review. For example, in an appeal from the grant of summary judgment, the facts must be stated in a light most favorable to the nonmoving party.[13] All too often, each party ignores this mandate, leaving the appellate judges assigned the appeal with the same negative impressions mentioned earlier with respect to a party omitting relevant facts. Although difficult to do, advocates must state the facts in a manner consistent with the applicable standard of review.

To this point, the general lesson to be learned is to give a great deal of thought to what facts will be included in the statement of facts and to how those facts should be woven together to tell a story. On this point, I share the sentiments of Senior United States Circuit Judge Ruggero J. Aldisert for the United States Court of Appeals for the Third Circuit.

> The statement of facts is as important as any portion of the brief. The statement should be written, rewritten[,] and then rewritten again before being placed in final form. The statement is designed to inform. But a good statement does more; it engages the reader's interest, making the judge look forward to working on the case. The statement of facts tells

13. *See* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).

> the story of your case. This does not give you a license to embellish or to throw in irrelevant but juicy facts to liven up the plot. Stick to the essentials. But remember, it is not unconstitutional to be interesting.[14]

The fourth major shortcoming from which I have found statements of facts consistently suffer is a lack of appropriate citations to the appendix. This cannot be overemphasized. Little else makes my blood boil quicker than reading an appellate brief that lacks appropriate citations to the appendix in the statement of facts and the argument components. Apparently, the parties submitting these briefs are under the serious misimpression that appellate judges have endless hours to spend combing the appendix in an effort to match up scattered pieces of evidence with a party's unreferenced factual assertions. Rules 28(a)(7) and (a)(9) squarely relieve appellate judges of this burden and put it on the parties where it belongs.[15]

VI. THE SUMMARY OF THE ARGUMENT

Rule 28(a)(8) mandates that an appellant's brief contain, under an appropriate heading, "a summary of the argument, which must contain a succinct, clear, and accurate statement of the arguments made in the body of the brief, and which must not merely repeat the argument headings."[16] Rule 28(b) requires the same of the appellee's brief.[17] Although short, the summary of the argument component is significant on several levels. First, it is the party's first opportunity to put a legal gloss on the facts. Second, it is the

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14. RUGGERO J. ALDISERT, WINNING ON APPEAL: BETTER BRIEFS AND ORAL ARGUMENT 151-52 (rev. 1st ed. 1996).

15. *See* FED. R. APP. P. 28(a)(7), (9). Parenthetically, I note that Rule 30(a)(2) allows parties to rely on parts of the record below even though not included in the appendix. *See id.* 30(a)(2). This provision of Rule 30 must be read, however, in connection with Rule 30(a)(1), which provides:

> Contents of the Appendix. The appellant must prepare and file an appendix to the briefs containing:
> (A) the relevant docket entries in the proceeding below;
> (B) the relevant portions of the pleadings, charge, findings, or opinion;
> (C) the judgment, order, or decision in question; and
> (D) other parts of the record to which the parties wish to direct the court's attention.

Id. 30(a)(1). My advice to all parties is to include in the appendix all portions of the record below relied upon on appeal. Common sense dictates that a party would want any portion of the record below, upon which he or she relies, to be literally at the fingertips of the appellate judges who will hear the appeal. Unless the parties include these portions in the appendix, they will not be at the fingertips of these appellate judges.

16. *Id.* 28(a)(8).

17. *See id.* 28(b).

party's first opportunity to orient the appellate judges assigned the appeal to the theme of the party's argument. Third, and most importantly, it serves as the party's official opening statement, previewing and summarizing the key legal points the party wants to make in the argument component of the brief. With respect to all these levels, I find it difficult to formulate a better recipe for the summary of the argument component than the one expressly given in Rule 28(a)(8)—"a succinct, clear, and accurate statement of the arguments made in the body of the brief, and which must not merely repeat the argument headings."[18]

VII. THE ARGUMENT

Federal Rule of Appellate Procedure 28(a)(9) provides that the argument component of an appellant's brief must contain:

> (A) appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies; and
> (B) for each issue, a concise statement of the applicable standard of review (which may appear in the discussion of the issue or under a separate heading placed before the discussion of the issues)[.][19]

Rule 28(b) provides the same with respect to an appellee's brief.[20]

Undeniably, of the hundreds of appellate briefs I have read, the most persuasively written argument components were those written with the precision of a neurosurgeon—not a millisecond of time was wasted getting in, doing precisely what needed to be done, and getting out. In the bulk of these briefs, the parties: (1) led with their best argument; (2) quickly followed it with a concise discussion of their best supporting case law or statutory authority; (3) if appropriate, given the nature of the issues on appeal, succinctly listed the evidence relied upon with corresponding citations to the appendix; and (4) addressed head-on the opponent's best responsive argument, best supporting case law or statutory authority, and, if at issue, the opponent's listing of contrary evidence.

In these cases the parties kept the number of secondary arguments to an extreme minimum. Thus, these briefs did not divert my attention from a party's best arguments to several weaker arguments having no legitimate chance of success. Further, the parties avoided the shot-gun approach with respect to the number of alleged errors appealed. Rather, the parties wisely appealed the one, two, or three alleged errors having the best chance of triggering the relief

18. *Id.* 28(a)(8).
19. *Id.* 28(a)(9).
20. *See id.* 28(b).

sought.

Furthermore, in these cases the parties did not raise issues unaccompanied by thorough briefing. Inadequate briefing fails to comply with Rule 28(a)(9) and will trigger abandonment of issues.[21] Inadequate briefing of an issue raised includes failing to make legal arguments in support of the issue,[22] failing to include citations to relevant legal authority in support of the issue,[23] and failing to include appropriate citations to the appendix in support of the issue.[24] Likewise, the practice of burying issues in footnotes is unacceptable. As the Seventh Circuit observed in *United States v. Dunkel*,[25] "[j]udges are not like pigs, hunting for truffles buried in briefs."[26]

I now offer my personal views on the weight and use of legal authorities. If on-point Supreme Court or circuit precedent exists, hammer it home. If neither exists, candidly say so and analogize to the closest Supreme Court or circuit precedent you can find. If possible, also follow up with on-point precedent from other circuits. In the absence of any of these types of authorities, cite to a published district court opinion that contains a particularly scholarly discourse upon the issue or cite to a well-regarded treatise such as Charles Alan Wright and Arthur R. Miller's *Federal Practice and Procedure*,[27] *Collier's on Bankruptcy*,[28] and *Prosser and Keeton on the Law of Torts*.[29]

I now turn to the topic of the appropriate length of an appellate brief. An appellate brief should be no longer than necessary to present persuasively and completely the required components of Rule 28(a), in the case of an appellant, and Rule 28(b), in the case of an appellee. Pursuant to Rule 32(a)(7)(A), a principal brief may not exceed thirty pages in length, and a reply brief may not exceed fifteen pages in length unless compliance with Rules 32(a)(7)(B) and (C) is certified.[30] In the final analysis, one should always err on the side of

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21. *See, e.g.*, Green v. State Bar, 27 F.3d 1083, 1089 (5th Cir. 1994) ("A party who inadequately briefs an issue is considered to have abandoned the claim.").

22. *See* 11126 Baltimore Boulevard, Inc. v. Prince George's County, 58 F.3d 988, 993 n.7 (4th Cir. 1995).

23. *See* United States v. Toney, 27 F.3d 1245, 1249 (7th Cir. 1994) (citing Varhol v. National R.R. Passenger Corp., 909 F.2d 1557, 1566 (7th Cir. 1990) (per curiam)).

24. *See* Sands v. Runyon, 28 F.3d 1323, 1332 (2d Cir. 1994).

25. 927 F.2d 955 (7th Cir. 1991) (per curiam).

26. *Id.* at 956.

27. CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE (2d ed. 1987).

28. COLLIER ON BANKRUPTCY (Lawrence P. King et al. eds., 15th ed. 1996).

29. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS (5th ed. 1984).

30. FED. R. APP. P. 32(a)(7)(A)-(B). Rule 32(a)(7)(B)(i) provides a type-volume limitation upon the length of a principal brief of 14,000 words or use of monospaced face with no more than 1,300 lines of text. *Id.* 32(a)(7)(B)(ii). Rule 32(a)(7)(B)(ii) provides a type-volume limitation on a reply brief of no more than half of the type-volume limitation of a principal brief. *Id.* 32(a)(7)(B)(ii).

Rule 32(a)(7)(C) requires that:

> A brief submitted under Rule 32(a)(7)(B) must

brevity. With careful editing, this should not be a problem.

Finally, I offer a couple of personal thoughts about the content of reply briefs. An appellant should always address in a reply brief any responsive arguments made by the appellee. However, a reply brief is not the place to reiterate arguments already made in the principal brief.

VIII. SHORT CONCLUSION

Rule 28(a)(10) provides that an appellant's brief must contain, under an appropriate heading, "a short conclusion stating the precise relief sought."[31] This is the part of the brief where an appellant should specify, for example, that he or she seeks a vacatur of the district court's judgment and a remand for further proceedings. Do some research to determine the type of relief appellate courts have given under the same or similar circumstances. Appellees should carefully scrutinize the relief sought and address in their brief any inherent problems with the relief sought.

IX. MY OWN CONCLUSION

There is no doubt that appellate brief writing is a labor intensive undertaking. It should be. The words appearing in appellate briefs, more than any other factor, affect the outcome of the appeal involved. Thus, the principles and guidelines set forth in this Article are given straight from the shoulder with the hope that the quality of the appellate briefs coming across my desk, and the desks of my fellow appellate judges, will contain the best possible presentation of the competing legal interests of the parties involved.

> include a certificate by the attorney, or an unrepresented party, that the brief complies with the type-volume limitation. The person preparing the certificate may rely on the word or line count of the word-processing system used to prepare the brief. The certificate must state either:
>
> (i) the number of words in the brief; or
>
> (ii) the number of lines of monospaced type in the brief.

Id. 32(a)(7)(C).

31. *Id.* 28(a)(10).