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[**APPELLATE** advocacy]

WHAT E-FILEING MEANS FOR APPELLATE ATTORNEYS

by MARTIN SIEGEL

The digital revolution, already in full swing in trial courts, is moving to the courts of appeals. Changes in how lawyers file briefs and how judges and clerks read them offer new opportunities for appellate lawyers to make their case more persuasively. But they also raise important questions about new forms of writing.

Appellate lawyers are not the first to pounce on new fads. While trial lawyers have become adept at using computer programs that play “aha!” video clips and harnessing the wonders of PowerPoint for their closing arguments, appellate practice remains a happy redoubt of Luddites. Yes, we use word processing software to write briefs and tap electronic databases to do legal research, but that’s about it. The record is paper, the end product is paper, and oral argument is just a person talking.

Alas, that comfortable world is changing. The Texas Supreme Court and 5th U.S. Circuit Court of Appeals have joined many trial courts in requiring that lawyers file briefs electronically — that is, convert (not scan) them to PDF files and transmit

up the case or dig through boxes for key documents. Courts do not yet require hyperlinking in e-briefs, but they often welcome the practice, especially in complex cases with voluminous records. Vendors can prepare hyperlinked briefs for a few thousand dollars, or lawyers can bring the technology in house.

Second, if the brief writer expects the judge or law clerks to read her brief on a computer, she can tailor the look and style to such “screen readers.” In his book “Legal Writing for the Rewired Brain: Persuading Readers in a Paperless World,” Houston appellate lawyer Robert Dubose points out that screen readers don’t read linearly but rather jump around, skimming and seizing on bits of text. Eye-tracking studies show they seek content in an F-shaped pattern, looking down the left side for structural cues and then focusing on headings and first sentences of paragraphs. Heaven help the content provider with important text consigned to the bottom right of the screen.

Dubose recommends catering to screen readers by placing the most important content in headings and first sentences of paragraphs, using bullet points and lists, simplifying sentence structure, shortening



and complex works of prose” — might soon need to morph into something else to suit judges and clerks accustomed to reading differently when text is on a computer screen. Over time, good appellate lawyers will adjust to the new reality and modify their writing accordingly, and striving to be concise is always good.

Still, who truly can look forward to the coming age of information chunking? Once, professors taught that multiple writing styles could be effective and that one size didn’t have to fit all. But when lawyers boil down prose to outline form and purge color and variation as distractions, won’t all appellate briefs be essentially alike, just a running list of headings and hyperlinks without much ideation in between? Can tech-rhetoric opinions and thinner decisional law be far behind? Recognizing changes in how judges and clerks read is a valuable insight and a vital first step toward adapting briefs to new circumstances. But weaving artistry and real substance into the new form will be an equally important next one.

Thinking of briefs as blog posts and web design calls to mind the scene from the movie “Amadeus,” when Emperor Joseph II tells Mozart that there “are simply too many notes, that’s all. Just cut a few and it will be perfect.” Mozart asks his patron wearily, “Which few did you have in mind, majesty?” Answering that question increasingly may be the key to successful briefing, but like a true appellate fogley, I don’t have to like it.

END

A SHIFT AWAY FROM READING ON PAPER TO READING ON COMPUTERS RAISES THE QUESTION: DOES E-BRIEFING OFFER APPELLATE ADVOCATES NEW OPPORTUNITIES TO IMPROVE THE PERSUASIVE POWER OF THEIR PRODUCT?

them to the court by e-mail or, in the 5th Circuit, by compact disc if preferred. The intermediate state courts of appeals increasingly are going digital, too.

Appellate litigants still have to file paper copies, but how long can that last? The days of trucks toting legal papers to court clerks inevitably are numbered. The virtues of e-filing are obvious and, in the long run, irresistible: lower storage and handling costs for courts, lower paper and copying costs for litigants, environmental benefits, portability for commuting judges and greater public access to legal files.

Sooner or later, e-filing will lead appellate judges and their staffs to do much of their reading on computers rather than on paper. Law clerks — people with no real memory of a time before the Internet — probably will lead the charge. A shift away from reading on paper to reading on computers raises the question: Does e-briefing offer appellate advocates new opportunities to improve the persuasive power of their product?

Promise, Peril

Yes, in two ways. First, placing a brief on a CD-ROM and hyperlinking cited material from the record or legal authority lets readers immediately see factual or legal support for the lawyer’s argument — no more plunking down the brief to look

paragraphs, using visual aids, avoiding synonyms and adopting other techniques drawn from the study of making websites more user friendly. “Legal writers must enable impatient readers to get to the point of the argument in a matter of minutes,” he writes.

He’s not alone. In a 2003 article in the *New Mexico Law Review*, University of Dayton School of Law professor Maria Crist advocated a similar “tech rhetoric” based on an “online style” of brief-writing that prizes brevity, features short paragraphs and condenses “chunks” of information “into small manageable pieces.”

More sweepingly, some argue the Internet has altered how the human mind works. In a widely cited article in *The Atlantic* in the summer of 2008, Nicholas Carr described his own transformation: “Once I was a scuba diver in the sea of words. Now I zip along the surface like a guy on a Jet Ski.” A developmental psychologist worries in Carr’s piece that the new way of absorbing information, which “puts ‘efficiency’ and ‘immediacy’ above all else, may be weakening our capacity for the kind of deep reading that emerged when an earlier technology, the printing press, made long and complex works of prose commonplace.”

If Carr and others are right, appellate briefs — which until now could well be described as “long



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