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[APPELLATE advocacy]

Avoid Racing Through Brief's Introduction, Conclusion

by MARTIN J. SIEGEL

"'Begin at the beginning,' the King said gravely, 'and go on till you come to the end: then stop.'"

"Alice's Adventures in Wonderland" may not be a standard guide to appellate brief writing, however much litigation can seem like a journey though the looking glass. But the king's words bear remembering. Lawyers too often fail to write high quality beginnings and endings of appellate briefs, assuming that what matters lies in between. Yet the introduction and the conclusion play important roles in a brief's overall persuasiveness. They merit real attention by the appellate advocate.

First things first. In the beginning, there was: the identity of party and counsel? The corporate disclosure statement? Check the Texas and federal rules specifying what appellate briefs must contain, and these are the first things mentioned. Many other items follow, but the rules don't mention the component that ordinarily begins any written work: the introduction. As a result, many otherwise perfectly acceptable briefs make the mistake of foregoing one.

Just because the rules don't list the introduction among the required elements of appellate briefs doesn't mean a lawyer can't include one. In fact, a 2009 poll of Texas appellate judges by the State Bar of Texas Appellate Section found that most judges surveyed prefer to see an introduction before the statement of facts. The survey is at http://tex-app.org/judicialsurvey.pdf.

A WELL-CRAFTED INTRODUCTION SHOULD BE SHORT — NEVER LONGER THAN TWO PAGES IN COMPLEX CASES AND SHORTER IF AT ALL POSSIBLE.

A properly crafted introduction frames the entire case for the judges, who are getting their first glimpse of it. In the trial court, where a succession of motions and conferences might familiarize the court with the parties' positions before a dispositive motion arrives, an introduction may have less importance. On appeal, there are no such preliminaries, and the introduction represents an initial, invaluable opportunity to hammer home the core theme of the case.

An effective appellate lawyer boils down that theme to a few powerful sentences for the beginning of the introduction, just like a trial lawyer carefully calculates the first sentences of an opening statement to grab the jury's attention and emphasize the basic fairness compelling a particular result.

In framing those sentences and determining the focus of the remainder of the introduction, remember the rule all lawyers learn somewhere along the line: If the law is with you, argue the law; if the facts are with you, argue the facts. The same advice works here.

In some cases, the legal points are iffy, but the facts are so outrageous that the court might be more inclined than usual to resolve debatable questions of law in a way that avoids an obviously unappealing result. In that case, the introduction should lean heavily on the favorable facts, even if they are technically irrelevant to the legal dispute and if the law understandably will occupy the bulk of the brief. Do not assume the appellate panel will be uninterested in compelling (if peripheral) facts. Appellate judges are human too — most of the time, anyway.

In other cases, the law clearly commands a particular result even if sympathetic facts point the other way. In this event, of course, stress unshakeable legal rules that determine the outcome. Briefly neutralize the bad facts only if they are so toxic that doing so can't wait.

After delivering a dynamite beginning that frames the appeal and points to the inevitable outcome, identify the parties and briefly sketch the nature of the case and the decision below. This will enable the court to make sense of the rest of the introduction. Then, finish by summarizing the arguments to be developed in the brief. This will foreshadow the "summary of argument" section to some degree but with greater license to ignore secondary points and intermediate steps in the analysis and home in on what most persuades.

A well-crafted introduction should be short — never longer than two pages in complex cases and shorter if at all possible. It's better to write it after drafting the rest of the brief so the evolution and mutation of the arguments that often happens as writing proceeds is complete.

While all parts of any brief require several rounds of editing, the introduction should be pored over closely to make sure each sentence is as tight as possible and adds something irreplaceable to the whole. When the judges have finished reading the introduction, they should understand perfectly why they will be ruling in your favor, with nothing more to follow but the necessary detail.

In Closing

Unlike the introduction, the rules specifically require a conclusion (or prayer in Texas parlance). Often, it can be as simple as: "For the foregoing reasons, the judgment of the district court should be affirmed." Keep in mind, however, that state and federal rules require a statement of the specific relief sought. A conclusion asking only for reversal at the end of a brief arguing for remand of certain claims doesn't cut it.

Occasionally, the conclusion might also include one or two sentences echoing the introduction, recapping the core theme and reminding the court why it should rule as requested. This is especially advisable if the brief is unavoidably long and covers several disconnected points, and if it therefore seems as if the major theme hasn't been heard from in a while.

Finally, having given the introduction and conclusion the care and feeding they deserve, as the king said, stop.

Martin J. Siegel handles complex civil appeals and trial court briefing and argument with the Law Offices of Martin J. Siegel. He can be reached at martin@siegelfirm.com.