

***APPELLATE PRACTICE—INCLUDING LEGAL WRITING
FROM A JUDGE’S PERSPECTIVE***

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“Supposing fishes had the gift of speech, who would listen to a fisherman’s weary discourse on fly casting, the shape and color of the fly, the size of the tackle, the length of the line, the merit of different rod makers, and all the other boring stuff fishermen talk about, if the fish himself could be induced to give his views on the most effective method of approach? For after all it is the fish that the angler is after and all his recondite learning is but the hopeful means to that end.”

John W. Davis, *The Argument of An Appeal* (1940), 26 A.B.A.J. 895.²

In this informal article, I will be the fish. I will not talk much about points of law or rules, just about what hooks or repels this particular judge. Some of these points will seem elementary, especially to those experienced counsel who have handled dozens of appeals. But you would not believe how often some of the mistakes I will mention happen, even to the best attorneys.

First, a few caveats. I have been an appellate judge just over five years, although I was a trial judge for thirteen years and a practitioner for nine before that. These are my observations and opinions only—some of my colleagues may (and probably do) have other opinions.

¹ See biography at conclusion. A previous version of this article appeared in *Ohio Trial* in August 1996. The piece has been substantially updated and lengthened. The most recent revision was 5-1-2000.

² Quoted in “How to Appeal to an Appellate Judge,” (6-22-99) 21 *Litigation* 20. This excellent article by Judge Leonard I. Garth of the Third Circuit gave me the idea for an Ohio adaptation, and I have borrowed Judge Garth’s theme and some of his suggestions. I suggest that article as further reading, along with the book *Appellate Advocacy*, a collection of essays, published by the A.B.A. Section of Litigation, and 25 *Litigation* 20 (1999), a whole issue devoted to appeals. Before you even think of writing a brief, read Bryan Garner’s new book, *The Winning Brief* (Oxford, 1999). Dear reader, this will be the last “talking footnote.” All others will be for citations or reference only, so they can be safely ignored until you want to find the authorities.

Though this article is specifically about appellate practice, the principles apply equally to all writing for courts: memoranda, trial briefs, motions. I have found that using appellate practice to teach discuss legal writing works well, by providing a practical context.

The purpose of your endeavor is to interest the judge—the fish—but the fish has a great amount of bait to consider. In the First District (Hamilton County), there are roughly 1100 appeals filed each year. Some are settled, and some are dismissed for various other reasons, leaving about 650 cases for the court to decide. Because we have the equivalent of two panels (six judges), I participate in half the total—about 325 cases. That means 650 briefs, not to mention reply briefs, motions, and the like. This adds up to about 13,000 pages, in addition to reading transcripts and cases and doing independent research. Then, each judge is assigned to write one of every three cases that he or she hears—more than 100 decisions per year.

I am not telling you this to claim overwork—the workload is bearable, and we do have law clerks—but to emphasize that you have to compete for the fish’s attention. Because you want your cases to receive their fair amount of consideration, you should do everything possible to make it easy for the judge—the fish—to consume your bait. This article will attempt to offer some candid observations of what would make my job easier—all the better to take your bait.

Know Your Court

First, become familiar with the court you are to argue before. Find out how judges are assigned—which judges will read your brief and will be on the bench when you argue. Our court makes up a yearly schedule indicating which judges will be sitting on each day. Of course, this might change because of illness, recusals, or vacations, but these factors are minimal. Attorneys can usually know which judges will hear their case. This knowledge may be only of benefit for oral argument, because the briefs are generally filed before the case is set for argument, but it is surely a comfort factor (or perhaps a *discomfort* factor, depending on the judge). At least you will know the players and be able to formulate your oral argument with this in mind. In addition, knowing who is scheduled to hear your case will be important in the rare case in which there is an issue of possible recusal.

Make sure you have a copy of the local rules. Each of the twelve appellate districts in Ohio has local rules that cover page length, format of briefs, and other procedures, and some courts are not shy about striking your brief if it does not comply.

Also, learn about local practices—the unwritten rules, which are as basic as where to sit. If you have not been to the courtroom, go and observe. In the First District, we used to have desks for those waiting to be called. When a case was ready to be argued, both attorneys were expected to come forward, and to sit on either side of a long table that had a lectern in the center—the table had been there since “the memory of man runneth not to the contrary.”³ I always felt sorry for attorneys who did not know where to sit and had to be told to move. In our new quarters, a more traditional setup prevails.

Briefs—Form

First, follow the rules! This advice should not be necessary, but it is amazing to me how many briefs do not conform. The rules concerning the number of pages, margins, type size, and the like are there for a reason.

Check *each copy* of your brief. It is astonishing how often I see pages upside down or in the wrong order. Such collating mishaps certainly break up the flow of your argument. Your clerical staff may be good, but they can make mistakes—look at *every page* of every copy of each brief that you file. The flow and force of your best argument may be lost when the judge has to hunt around for the next page or turn the brief upside down to try to read your most persuasive passage. Certainly, the fact that pages are out of order should not change the result—but perhaps the only time you have the fish’s full attention is when the judge is reading your brief. Enough said.

In the First District, we now have a rule that briefs must have covers—and have no uncovered staples. This is to prevent the all-too-frequent staple injuries. The best way to comply with this rule is to have a bound cover. But if you use a rib, be sure to staple pages first—if the

³ 1189 A.D.

rib comes off and the pages are loose, they will scatter. At the very least, make sure all staples are firmly in place and have no sharp edges. Blood on the brief might obscure your finest passage.

Briefs—Length

Again, follow the rules. Take the space you need, but not one line more. In the First District, we have a 35-page limit for regular docket cases, and 15 for “accelerated” cases, which are *all* cases unless counsel specifically request the regular docket. Many criminal cases are legally and factually uncomplicated, and the briefs are short; but many civil cases with one issue can easily be explained in ten pages.

The page limit is your friend; it requires you to refine your argument. It is much harder to write a short brief than a long one. Too much space is a temptation to write all (or more than) you know about the subject. Make every word count, and your argument will be much more convincing—the reader might think that you know *more* than you wrote, not less.

Do not try to cheat the page limit by using small-size type. At least in our district (and I assume in all others), your brief will be rejected. One trick that *might* work is the feature on newer word processing programs that will squeeze the text a bit to fit the desired number of pages. If your brief comes out to 36 pages, the “make it fit” feature will cut it down to the 35-page limit, perhaps by adjusting the margins by a tenth of an inch. While it would be better to edit, we probably will not catch a very minor reduction. But you cannot make 50 pages fit onto 35 without drastically shrinking the type and having your brief rejected. The new trend, made possible by word processing, is to impose a *word* limit.

And remember, most appellate judges are over fifty, and some of us are vain and don’t like to wear reading glasses, so you must use at least 12-point type, and 12.5 wouldn’t hurt. Make sure the type is dark enough to be easily read. Your original may be dark enough, but if the copier needed toner at the end of the day, we might receive copies too light to read. This is another reason to check each copy.

Briefs—the Issues

The most important part of your brief is framing the issue. What do you want the court to decide? Do not start writing your brief until you have a succinct statement of what the case is about. And you must do this in 50-75 words. If you can't explain your case in 75 words, you do not understand it very well, and neither will your reader.

“Paula Jones was fired from her job with Environmess, Inc. because she consulted a lawyer about a possible slip-and-fall case against an Environmess client. If Ohio workers may only enter the courthouse in fear of losing their livelihood, they cannot exercise any of their legal rights. But Ohio law mandates that the courthouse door must remain open.” (57 Words)

A short, plain statement of the issue tells the reader what the case is about, and provides context for your argument that follows.

Briefs—Organization

As with all writing, organize your brief to be front-loaded. That is, educate the reader as to what is coming. Put the important material up front. Readers understand much more easily if they have a context. Because readers understand new information in relation to what they already know, tell them a piece of new information that relates to their presumed knowledge. Then, build on that information with each new piece you add.

Start by analyzing your audience—for whom are you writing? In an appellate brief, the answer is easy—for the judges and law clerks who will read your brief and decide your case (the judges will, of course, but with input from their clerks). First, ask yourself how much your audience already knows—about the facts and the law of your case. The answer to the former is *nothing*—the judge knows nothing about your case until that judge picks up the brief. Your problem is that you know so much about your case. You have lived with it for perhaps five years. But you must explain it to someone who knows nothing about it.

Strive to explain your case in two pages at most. If you cannot explain the essence of the dispute in two pages, you probably already have lost your first and best chance to persuade. Have a non-lawyer read your fact statement and see if that reader can tell you what the case is about.

You must build a “container”—context—in the reader’s mind, so when you pour in the facts and law of your case, the reader has the container to hold the information. Otherwise, it leaks out.

As part of the “container,” have headings that tell the reader what is coming. If possible, headings should convey information. “Facts” says nothing. “The Fire and Aftermath” tells the reader what type of facts are coming. Headings are signposts that guide the reader. If the argument portion of your brief is five pages, you might not need to break it up, but if more, separate it into numbered headings. Headings do not just give context, they also signal the reader when to safely take a break. The reader needs breaks in digesting complex material. That is also the reason for using short paragraphs.

Avoid overchronicling. Too many briefs start out by reciting a chronology of facts: “On March 23, 1999, this happened, then on May 6, 1999, this happened.” This approach confuses the reader, because we don’t know what facts are important, and what, if any, dates we should remember. As a general rule, most dates are not important. Unless an exact date is important, leave it out. Instead, tell us what the case is about—only the material facts, and why they are important.

Briefs—Language & Style

Use footnotes sparingly, if at all. Footnotes are sometimes necessary, but in general, if the point is important enough to be in a footnote, it is sufficiently important to be included in your argument. Footnotes detract from readability. Do not let footnotes almost swallow the page from the bottom, as in a law review article. The purpose of your brief is to persuade, not to build your resume. If you make it look like a law review article, it might be just as unreadable. The only proper use of footnotes is to contain your citations—sweep them out of the brief and into footnotes at the bottom. More about this later.

Edit, edit, edit, and edit again. Typos, bad grammar, and misplaced paragraphs (which were not such a problem before computers) simply take away from your argument. Remember—the only time you have the full attention of the “fish” you are trying to catch is when the judge is reading your brief. Keep a copy of Bryan Garner’s excellent book, *A Dictionary of Modern Legal Usage*⁴ at your side to answer grammar, syntax, and punctuation questions.

Do not use two or three or four words for one (“devise and bequeath”; “grant, bargain, and sell”; “right, title, and interest”; “make, ordain, constitute, and appoint”). This goofiness originated with the Norman Conquest, after which it was necessary to use both the English and French words so that all could understand. Most of us now understand plain English. A related tendency of lawyers is to use many words when one is more understandable (“sufficient number of”= enough, “that point in time” = then, “for the reason that” = because).

Eschew legalese. “Hereinafter,” “aforesaid,” and the like do not add anything but wordiness and detract from readability. Many studies show that legalese is the number one complaint of appellate judges and clerks. Use Latin phrases sparingly. A few—*res ipsa loquitur*, *sua sponte*—are perhaps acceptable, but do not litter your brief with what Daniel Webster called “mangled pieces of murdered Latin.”

Write short, crisp sentences. Use active voice—but not exclusively—there is a place for passive voice. A good rule is to keep passive sentences under 20% of your brief. Read Cardozo (usually) and Holmes for examples of to-the-point sentences.⁵ The period is the most underused punctuation in legal writing. Keep sentence length to an average of no more than 15-18 words. I use the “18-18” rule—average no more than 18 words per sentence, and 18% passive sentences. (This article is 17-6.)

⁴ Garner, Bryan A., *A Dictionary of Modern Legal Usage*, Second Edition (Oxford, 1995). See, also, Williams, Joseph M., *Style: Ten Lessons in Clarity and Grace*, Fourth Edition (HarperCollins, 1994); Gordon, Karen Elizabeth, *The Deluxe Transitive Vampire* (Pantheon, 1993); and Garner’s other, smaller book, *Elements of Legal Style* (Oxford, 1991).

⁵ See, e.g., *Fiocco v. Carver* (1922), 234 N.Y.219, 137 N.E. 309; *Meinhard v. Salmon* (1928), 249 N.Y. 458, 164 N.E. 545.

Readability is the goal! Keep in mind Will Rogers's all-too-often-true comment about legal writing: "The minute you read something and you can't understand it you can almost be sure that it was drawn up by a lawyer. Then if you give it to another lawyer to read and he don't know just what it means, why then you can be sure it was drawn up by a lawyer. If it's in a few words and is plain and understandable only one way, it was written by a non-lawyer."⁶

And do not be afraid to start sentences with "and" or "but." This signifies good writing. The reason your grammar-school teacher told you not to start a sentence with "and" was because you wrote, "I have a mother. And a father. And a dog." Use "but" rather than "however" to start a sentence, and see how much better it reads.

Especially irritating is the practice of spelling out numbers and then attaching parenthetical numerals—a habit learned when scribes used quill pens to copy documents. The real reason for this is to prevent fraud, by making it difficult to alter documents. A brief that states "There were two (2) defendants and three (3) police officers present" is extremely hard to read, and also looks silly. Unless you are writing your brief in longhand—and unless you believe the judges will alter your numbers—skip this "noxious habit."⁷

One caveat to young lawyers: change comes slowly to our profession. I once made the mistake of teaching legal drafting, and tried to convince the students to eschew legalisms and write plainly. Of course, one student immediately followed my advice and submitted a draft to a senior partner, who sent it back with instructions to make it more "lawyerlike," *i.e.*, more unreadable.

With new technology always comes new pitfalls—because the word processor creates such a finished-looking, pretty document, it is easy to mistake form for content. In addition, if you compose on the computer, be sure to print out successive drafts. Because you see only a page or two at a time, it is easy to skimp on the overall organization of the brief. Look at your draft as a whole.

⁶ Rogers, Will, "The Lawyers Talking," 28 July 1935, in *Will Rogers' Weekly Archives* 6:243-244 (Steven K. Graggert ed. 1982), quoted in Shapiro, Fred R., *The Oxford Dictionary of Legal Quotations* (Oxford, 1993).

⁷ Garner, *A Dictionary of Modern Legal Usage*, at 606.

Another pitfall of technology is following the “spellcheck” or “grammarcheck” blindly, which leads to some weird words and constructions. If you have a staff member do the word processing, it is even more important to read every word. Another hint is to program your spellcheck to highlight “trail” so you can decide if you actually mean *trial*. This is probably the most common mistake we see—“the trail judge” was in error. As the late Roy Rogers would say, “Happy trails.”

Briefs—Facts

Be honest! Do not make the case out to be *two* cases—one in the brief and another in the record. You are stuck with the facts in the record of the trial court. Unfortunately, too many lawyers embellish the facts in their brief. It is perfectly permissible to highlight or emphasize the facts that are in your favor, but you will lose credibility if you add, subtract or alter facts. If you state in the brief that a witness testified to certain facts, the record had darn well better contain just that testimony. Too often it does not, and to say that the lawyer loses credibility with the court is an understatement.

Be concise. If you have had some experience writing media copy, you will have learned that you can say what you need with fewer words. Use only material facts—it does not matter if your client was going to or from the grocery when the accident occurred—usually. There are some exceptions, as when a prosecutor put in her brief the obviously irrelevant fact that, after the verdict, the defendant exclaimed to the judge and jury that he would kill them all when he got out. That statement is clearly irrelevant to the issues on appeal, but surely did not improve the defendant’s prospects of having his conviction overturned.

Don’t do what one lawyer did recently, and I quote from the facts section of his brief: “Plaintiff-Appellant refers for its statement of facts to its motion for summary judgment (T.d. 15) with affidavits and exhibits attached and to Defendant-Appellee’s memorandum in opposition to Plaintiff-Appellant’s motion for summary judgment together with affidavits attached (T.d. 17).” Gee, I do not have that at my fingertips—if I am reading briefs at the office, the full record of the case is about a half block away, and if I am at home or perhaps traveling,

it is not available at all. Of course, that attorney also lost the opportunity to state the facts—to emphasize the ones favorable to his client.

Personalize your client. Do not go through your whole brief calling parties Plaintiff-Appellant and Defendant-Appellee or the like. Appellant would be enough, but calling the parties by name is better—your client has a name. If you are representing an individual, call your client Jones; if a corporation, “XYZ Corp.”

A name is always easier for the reader than a procedural label—only lawyers would label people by their procedural status. Naming the parties not only personalizes the case, but saves a great deal of space if you are up against the page limit. And your brief will be so much more readable. Be sure to be consistent and not switch back and forth between “appellant,” “Jones,” and “plaintiff.” Skip the “hereinafter called.” It is not necessary—a parenthesis at most, but you don’t always need even that—if you start calling the party “Jones,” we will understand.

The Record

Stick to the record. Remember the old line, “When does the appeal begin? With the filing of the complaint!” If something is not in the record, it simply does not exist as far as the court of appeals is concerned. Make your record in the trial court. If there is a conference in chambers without a court reporter, then at least have the judge put what happened on the record, or you do it when you come out. Most trial judges are good at this, but if the judge forgets, make sure to do something—if the record is silent, you cannot claim error.

In civil cases, if you do not object to evidence or jury charges, you generally will not be able to argue any error on appeal. Many times I have seen good lawyers try a great case, only to lose when the judge gives the jury misleading or just plain wrong instructions. Do not think, “That’s the judge’s job.” Too many lawyers just assume that the judge will take care of that part of the case—“it’s not my problem.” It sure is, because you will be stuck with whatever the judge gives if you do not object and if you have not submitted your own version. The formbook *Ohio Jury Instructions* (OJI) is a guide only; it does not have the force of law and is not always accurate. Of course, even the suggested

instructions must be tailored to the case. Always proffer your own instructions, and make sure they are made part of the record.

In any event, making the record is up to you. Also, making sure the record *arrives* at the appellate court is your responsibility. There are four parts to a complete record: (1) the original papers filed in the trial court; (2) the exhibits; (3) the transcript of proceedings; and (4) the certified copy of entries in the trial docket. Make sure we get everything we need. Go to the clerk's office and look.

We often have cases where the absence of all of the record dooms the appeal. An example is a magistrate's hearing without a reporter, or even a tape without a transcript. In one case, the judge later adopted the magistrate's written findings of fact. In that case, a very important fact to the appellants was, *they said*, adduced in the hearing, but not mentioned in the findings of fact. Unfortunately for the appellant, who would have gained a reversal if the evidence had been in the record, anything not in the record just does not exist. Another example was an objection to jury instructions made in chambers and not renewed on the record. For preserving the issue on appeal, it just did not happen. A third case was an insurance coverage issue where, to save money I assume, counsel ordered only part of the transcript. Unfortunately, a major point was in a part of the transcript that we did not have—a major and fatal mistake, discovered too late to remedy.

It is also possible that a slick appellant will only file part of the record, and the appellee will be stuck without essential information upon which the judgment was founded. When in doubt, or perhaps even when not, certify the whole record.

Citations

Use the Ohio Supreme Court system of citation. For whatever reason, Ohio has its own form, *not* the Uniform System. (The "Bluebook" is only used when the Ohio form doesn't cover an issue—remember the *sixteenth* edition is now out and makes some important changes.) Ohio's system is not wholly different—the most immediately apparent change is that the date is before the reporter, e.g., *Blanton v. Internat'l Minerals and Chem. Corp.* (1997), 125 Ohio App.3d 22, 707 N.E.2d 960. Note that there is no space between App. and 3d—the

period serves as separation. Also, write R.C., not O.R.C. (We know it's Ohio.) Every reported case in Ohio is published in the Ohio Supreme Court form—your brief must be also. Because appellate judges are used to reading cases in the correct form, briefs that are wrong are more difficult to read. The reporter's office of the Supreme Court will send you a copy of their formbook—call or write for one, or get it online at their website, and be sure to follow it.

If you use citations in the text, construct your sentences so that a cite is at the end, not in the middle. We lawyers long ago forfeited much readability by including cites in the body of the text, rather than in footnotes. We can at least attempt to ameliorate this tragedy by placing them where they will least harm the flow. If you are really daring, make all citations in footnotes. You will be amazed at the increased readability. Four of our six judges are now doing this in opinions.⁸ I cannot overemphasize how much better it is to put your citations in footnotes. But make sure you put *only* citations in footnotes. The reader must know that she does not need to read the footnotes—they are for reference only.

Also, know what reporters your court uses. In the First District, we use *Northeast 2d Ohio Cases*. Each judge has a set in chambers. If your brief only cites to the Ohio reporter and doesn't have the parallel cite, you have (1) made it more difficult for the judge to look up your citations and (2) subtracted from your credibility by not following the proper form. Your cites are your "bait"—do not make it more difficult for us to take your bait.

Do not use lengthy quotations—a few lines at most. The judges are perfectly able to read the cases. Unless the case you are quoting from is *exactly* on point (which is very seldom true), just quote the most relevant and persuasive part. I have seen too many briefs that consist of strings of quotations and very little argument. The brief should explain how the cited cases support your theory of *your* case.

⁸ See, e.g., *U.S. Playing Card Co. v. The Bicycle Club* (1997), 119 Ohio App.3d 597, 695 N.E.2d 1197; *Nusekabel v. Pub. School Emp. Cr. Union* (1997), 125 Ohio App.3d 427, 708 N.E.2d 1015.

Briefs—Argument

Be honest. As with your statement of the facts, be candid.

Concede what you must. Do not beat a dead-horse argument—concede a losing point and move on to your best argument. Cover all of your opponent’s arguments—even by conceding. By conceding a clearly losing point, you gain credibility, and the judge may give more weight to your *good* arguments. This is not to say you should concede arguable issues, just clearly losing ones. What you think is a weak but arguable point might be just the lure to catch one or more of us fish. I have certainly seen it happen.

Do not cite cases that do not say what you cite them for. Dozens of times I have pulled down the cited case only to find that it does not remotely apply, but might only mention some of the key words. Also, when the case you cite for a certain proposition cites another case for *its* authority, you might look at that and discover that the same thing happened—sloppy work by one court followed by sloppy work by another has allowed a whole string of case law to grow up, and all founded on one original misconception.⁹ This type of research is especially helpful if you are trying to distinguish a case against you—go back to its roots and maybe you can show the fallacy in the whole line of cases.

Distinguish cases against your theory of the case. Do not just ignore them and hope they will go away. If you do not mention an Ohio case close or on point that is against you, you can bet your opponent will. Even in the unlikely event your opponent does not, the court will. Either distinguish the case, or just assert that it’s *wrong*—many cases are wrongly decided (unless of course it is an Ohio Supreme Court case, which may very well be wrong, but both you and the appellate court are stuck with it). We are not afraid to say that we disagree with another district and have done so at least three times in the last six months. But, if you just don’t mention the case, you give the impression that you (1) didn’t do your research, or (2) are disingenuous, or (3) think both we and your opponent are stupid.

⁹ See *Grace v. Koch* (Oct. 9, 1996), Hamilton App. No. C950802, unreported, 1996 Ohio App. LEXIS 4432, affirmed (1998), 81 Ohio St.3d 577, 692 N.E.2d 1009.

Continue your research! Briefs may be filed months before argument and way before the case is decided. It has happened more than once in my short tenure that a new Ohio Supreme Court case has appeared in the interim.

In one instance, the case meant that the appellee (an insurance company) simply won hands down, end of argument. But neither side had noticed the case. I vaguely remembered it and asked appellee's counsel—he had not heard of it! It meant he won automatically and did not know it! So, continue your research—do an update on whatever computer system you use every few weeks while you are waiting for oral argument, and surely run a Lexis or Westlaw search a few days before *and* that morning. With the sheer number of unreported cases now available within hours, you might just hit paydirt—and at least you will not be embarrassed.

Use persuasive language. If you do not believe in your case, how can you expect the judges to? Similes or metaphors are very effective to illustrate an argument. In one recent case, the issue was whether a pizza delivery driver was an employee or an independent contractor. The appellant argued that because he paid for his own gas, used his own vehicle, and could use whatever route he wished, he was an independent contractor. The appellee stated that servers in the restaurant, admittedly employees, also were not told which way to go between tables to deliver their orders—the driver was simply a “waiter on wheels.” That phrase found its way into the opinion.¹⁰

You may use humor if you can do so creatively. Do not ridicule your opponent's argument, unless it is truly absurd. A good example of humor (at least I found it humorous): “X (Insurance Company)'s argument that it is entitled to subrogation fails not only because it is not legally entitled, but also because, under the facts here, *it would be subrogated to (and against) itself*. X does not need a lawsuit to pay itself any amount it pleases.” It was true. To accept a theory that would permit subrogation, the company would have to collect from itself! I see nothing wrong with pointing out the flaws in opposing arguments; but do not just say, “Jones's argument is asinine.” Say why it is, and let the court conclude, just as you want your juries to make conclusions themselves.

¹⁰ See *James v. Murphy* (1995), 106 Ohio App.3d 627, 666 N.E.2d 1147.

Be precise. Do not quote some rambling language in a case as a “holding.” A holding is precise. Go ahead and use dicta, but do not contend that the court *held* thus and so.

Use parentheticals rather than discussing details of a case you cite, especially when you are arguing that other courts have ruled your way in similar cases.

Draft your brief according to the applicable standard of review. Obviously, an entire treatise would be necessary to cover the subject in depth, so I will offer only a few comments here. Know the standard of review. Do not ask the court to do the impossible, but just what it can. State the proper standard, and unless your case is an unusual proceeding, assume the court knows the standard—state it and move on.

For instance, the standard for a 12(B)(6) motion to dismiss is whether the plaintiff can prove any set of facts pursuant to his complaint that would establish a cause of action—for those of us old enough, the erstwhile demurrer. Just state the standard in one or two lines and move on—the issue is almost always a legal issue—statute of limitations for example. The standard of review for the trial court is the same as in the appellate court.

Another example—the standard for granting summary judgment—is the same for the trial court or the appellate court: whether there is a genuine issue of material fact. Just state that in two lines, with a citation, and move on. We really do not need a four or five page treatise on the law of summary judgment—but we get one in about 20% of the briefs. If your appellate judge does not understand the standard on summary judgment, then that particular judge will not understand *any* of your argument.

Of course, you had better start out by understanding summary judgment yourself. You simply cannot rest on your pleadings. I am sure many of you have won cases on summary judgment that you probably should not have, just because the other side did not present any evidentiary material. As a trial judge, I saw it time and time again—and now, I see it in so many cases—the attorney simply did not read Rule 56!

Where the standard of review becomes more difficult is on motions for a new trial, motions for continuance, motions for withdrawal of a plea, and many others, which apply an abuse-of-discretion standard. That standard is more than an error of law or judgment, it must be “unreasonable, unconscionable, or arbitrary.” Usually, unreasonable is your best bet. The abuse of discretion standard is very high, but appellate courts can find abuse if they want to.

Oral Argument

In my opinion, oral argument is *not the most important* part of the appellate process. The great era of oral argument has passed—probably about the time that judges stopped delivering their opinions from the bench. This is partly or perhaps mainly because of the volume of cases. The time available for oral discourse is limited. I can read briefs on four cases in the time it takes to argue one. But sometimes oral argument might be important. The problem for most lawyers is that it is difficult to tell when this might be true.

At last count, of the twelve appellate districts in Ohio, six regularly schedule oral argument, and six only do so upon request. Whether you should waive argument, or not request it, is a difficult question. My own opinion (not shared by many of my colleagues) is that usually argument may be safely waived. The majority of cases (we could find disagreement over whether 55% or 75%) could be rightly decided by a third-year law student. If you have a clear winner or loser, you may safely forgo argument, and in the latter case, embarrassment. Also, judges will appreciate your not wasting their time arguing a case that is unwinnable. A case in the middle probably should be argued, because the judges will most likely have questions to ask, and you will have a chance to emphasize your most important points.

Some advocates will argue that because people (even judges) learn differently, oral argument is important. They have a point. Some people learn better by reading, some by hearing and discussing, some by a combination of both. Oral argument gives you another chance to persuade.

In argument, do not recite the facts again (you have done so in your brief). Judges cringe when a lawyer starts out with “this case began when Mary Smith was hit by a vehicle driven by.” They have read your brief. In the First District, and I assume in most others, the judges have not only read the briefs, but have met before argument to discuss the case and formulate any questions of counsel. Tell us why you should win and why your case is important. Be prepared to cite the exact page of the record that supports your factual statements. And explain how the cases you cite fit your facts.

Stick to the time limits. One part of knowing your court is knowing whether the judges will ask a lot of questions. Some judges question counsel more than others. Rehearse every conceivable question and formulate an answer. Do not feel you have to take up all the allotted time. Make your point and sit down. Fifteen minutes is more than enough to argue the average case.

Conclusion

I have set out a few practical, and very basic, suggestions. Remember that these are from the viewpoint of the “fish,” which you are trying to catch with your “bait.” The most important attributes of attractive written bait are (1) brevity, (2) clarity, (3) honesty, and (4) readability. Appellate judges read a great deal of material and appreciate a brief with some bite, some force and, when appropriate, some humor. Follow the rules, but do not be afraid to be innovative and even to have fun. Above all, take pride in your writing.

This article is mainly about form—but don’t forget that message is paramount. Dressing your message in the best clothes will not make it eloquent; it will only make it presentable.

“Law is not just a bunch of dusty old precepts to be applied with humdrum objectivity. It is alive; blood courses through its veins. As often as not, to apply legal rules you must weigh, judge, and argue about human folkways and human foibles. And to do that well, you must have a heart.”¹¹

¹¹ Garner, Bryan A., *Elements of Legal Style*, at 174.

To persuade a court, tell us why you should win. Not just in dry legal terms, but in language that brings alive the human issues. “For in the end, the law has something to do with justice.”¹²

Judge Mark Painter was elected to the Court of Appeals in November 1994. For the previous 13 years, Judge Painter served on the Hamilton County Municipal Court.

A Cincinnati native, Judge Painter attended the University of Cincinnati, where he was elected Student Body President in 1969, receiving a B.A. in 1970, and a J.D. in 1973. He practiced law for nine years before becoming a judge.



Judge Painter is recognized as one of the outstanding legal scholars in Ohio, and, as a municipal court judge, was the most-published trial judge in the state. To date, 180 of Judge Painter's decisions have been published nationally, and he is co-author of *Ohio Driving Under the Influence Law* (WestGroup, now in its ninth edition, 2000), the only legal textbook on DUI in Ohio. Judge Painter has also authored 28 articles for legal journals.

As an Adjunct Professor at the University of Cincinnati College of Law, Judge Painter has taught Agency and Partnership since 1990, and teaches DUI law, appellate practice, legal writing, and legal ethics to judges and lawyers throughout Ohio. He has lectured at more than 75 seminars for, among others, the Ohio Judicial College, the Ohio Association of Criminal Defense Lawyers, the Ohio Academy of Trial Lawyers, and the Ohio Continuing Legal Education Institute.

Judge Painter has served as a Trustee of the Cincinnati Freestore/Foodbank, the Cincinnati Bar Association, and the Citizens School Committee. He is a Master of the Bench Emeritus of the Potter Stewart Inn of Court, and served for three years as a member of the Ohio Supreme Court Board of Commissioners on Grievances and Discipline. Judge Painter is a member of the Cincinnati, Ohio State, and American Bar Associations and the American Judicature Society.

¹² Id.