Common Mistakes on Appeal

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I. Common appellate briefing problems.

1. Don't forget your audience. The appellate judge who is reading your brief doesn't know about your case and is a legal generalist. The judge doesn't know the facts of your case or the specifics of your client's business. The judge also probably is not as well acquainted as you are with the law that applies to your case.

Your job is to educate the judge about the facts of the case, the impact of the case on your client or your client's business, and the applicable law. You may be a recognized expert in your legal field, but don't assume that the court has the same expertise. You must provide the nuts and bolts to allow the judge to do his or her job. A good way to test whether you have pitched your argument correctly is to ask someone who knows nothing about your case or field of law to read your brief before you file it and let you know where it's not understandable.

It also is your job to explain the *record* to the appellate court. Do not assume that the judges and clerks who are working on your case have flyspecked your record and committed it to memory. Be sure to point out the places in the record that support your claims, and quote (sparingly) the parts that assist you the most.

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[1] The author benefited considerably from the suggestions of several recent appellate clerks who are his colleagues at Baker & Daniels, including Matt Albaugh, Jane Dall, Susan Kline, Clay Miller, Matt Morris and Kathy Osborn. Errors are attributable to the author alone.

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2. They call it a brief for a reason. You must explain the law and the facts to the court, but you also must do so as briefly as possible. Do not fall in love with your own writing. Appellate judges have enormous workloads and are required to read many hundreds (sometimes thousands) of pages of briefs per week. They are grateful when lawyers can give clear and thorough explanations in a small number of pages.

Relatedly, you must get to the point quickly. You should convey the essence of your argument early, in the statement of issues. You also can foreshadow your argument (without actually arguing) in the statement of the case and statement of facts. You need to tell the judges early in the brief what the important issues are and why you should prevail on those issues. They do a lot of reading, and they need to be brought to the nub of the argument quickly.

One way to shorten a brief – which relates to the point about explaining the necessary law to the judge – is not to waste time and space on legal issues that the judge *is* familiar with. For example, it's not necessary to cite several cases for the well-recognized principle that appellate courts review issues of law *de novo*. A single citation, or sometimes none at all, is appropriate for such simple points.

3. Pick your issues. Another way to shorten the brief – and to be an effective advocate – is to be selective about the issues you choose to argue. The most important job of the appellate advocate is to select the right issues to argue. Only a rare case presents more than two or three good issues on appeal. The great appellate advocate Robert Jackson, who later became a U.S. Supreme Court justice, described the need for selection this way: "The mind of an appellate judge is habitually receptive to the

suggestion that a lower court committed an error. But receptiveness declines as the number of assigned errors increases."[2] Similarly, Third Circuit Judge Ruggero Aldisert has written in his book, *Winning on Appeal*, that he is initially inclined to take seriously a brief with one or two claims of error, but once that number mounts up to seven or eight he initially assumes that none of the asserted errors is valid.

Many appellate judges say that briefs containing too many arguments are ineffective because the weaker arguments dilute the stronger ones. The advocate's job is to be selective so that the poor arguments are weeded out before the briefs are filed so the judges never have to read them.

4. Argue about the law, not the people. No matter how annoying (or even rude or unethical) opposing counsel was in the trial court, and no matter how condescending (or even boneheaded or biased) the trial judge was, stick to the law and the facts in your brief. Resist the temptation to tell the appellate court that the other side's lawyer is a shyster or can't be trusted. *Definitely* resist the temptation to tell the appellate court that the trial judge is senile or corrupt.

Appellate courts want to hear good legal arguments, and by and large they do not care about offensive behavior in the trial court (which they usually cannot sort out from a printed record anyway). Infrequently, a judge's conduct is actually the subject of the appeal. But even in those cases the argument should be directed to the judge's actions and rulings, not the judge himself.

[2] Robert H. Jackson, *Advocacy Before the United States Supreme Court*, 37 Cornell L.Q. 1, 5 (1951).

5. Remember the court's limits. Just because it's an appellate court, it can't do whatever it wants. Appellate courts are governed by rules – including standards of review that limit what appellate courts can consider when they address trial court errors. You should cite the applicable standards of review in your brief, and you should respect them. Appellate courts ordinarily cannot change trial courts' factual findings, so you should not ask them to (mainly because you will not succeed). Your arguments should be consistent with the applicable standards of review – you should only ask appellate courts for relief that those standards permit them to give.

Appellate courts exist mainly to correct errors of law. They do not respond well to arguments aimed at emotion or full of overblown rhetoric. Keep your arguments on an intellectual level.

Also, not all trial court errors lead to reversal. The error must have harmed your client if it is to provide a basis for appellate relief. Appellate judges do not exist to make trial courts perfect; they exist to correct errors that actually harm litigants. Don't waste your time and your client's money writing a brief that is fruitless because of the harmless error rule.

6. Don't make big mistakes. The two biggest mistakes you can make in an appellate brief probably are misstating (especially exaggerating) facts and misciting (especially misquoting) law. Your must state the facts in the record with precision and accuracy. If you exaggerate, you lose credibility. Similarly, if you say that a case holds more than it actually holds, you lose credibility. Judges or law clerks usually catch these exaggerations and misstatements. And when they're caught by one judge, that judge

doesn't hesitate to tell other judges on the panel and in the courthouse that she has found a lawyer who can't be trusted.

7. Don't make little mistakes either. Although it's most important to be scrupulously accurate about the record and the law, it is almost as important to be error-free in other, smaller ways that communicate to the court that you are being careful and respectful. You should follow the applicable rules precisely. In the era when appellate rules set page limits for briefs, Ninth Circuit Judge Alex Kozinski wrote that when a lawyer cheats on page limits "[i]t tells the judges that the lawyer is the type of sleaze ball who is willing to cheat on a small procedural rule and therefore probably will lie about the record or forget to cite controlling authority."[3] In other words, small mistakes also affect the judge's opinion of a lawyer's work.

Other items that fall into this category include:

- following proper citation form (as one former law clerk wrote, "if you can't follow a few simple bluebook rules, it's hard to put a lot of faith in your argument");
- binding with the brief all of the items required by applicable rules, and omitting all the items not required or permitted by rule;
- citing the correct record pages for facts;
- proofreading – so that sentences have verbs and simple words are spelled correctly;

[3] Andrew L. Frey & Roy T. Englert, *How To Write a Good Appellate Brief*, 20 Litigation 6, 7-8 (Winter 1994).

- certifying that you have complied with a rule (for example, that you have included everything in your appendix that the rule mandates) only after reading the rule and making sure you have followed it;
- following rules on font and point size (including 12-point footnotes in Indiana appellate briefs);
- including pinpoint references in citations (and citations for all propositions of law).

8. Can you appeal? Before you rush to the appellate court, be sure you have a judgment or order that can be appealed. In federal court, you generally must have a judgment that is final as to all claims and all parties. The state-court standard is similar, but not quite so rigid. *See* Ind. Appellate R. 2(H) (defining final judgments).

Some interlocutory orders can be appealed. In state court, a few orders may be appealed of right (e.g., orders to pay money; orders appealing or denying injunctions). *See* App. R. 14(A). A few such exceptions also exist in the federal system.

In state court, interlocutory orders not appealable of right can only be appealed with permission of both the trial court and the Court of Appeals (this rule will change as of January 1, 2008, when orders certifying or denying certification of classes can be appealed with permission of the Court of Appeals alone).

Fouling up these rules will lead to dismissal of your appeal and embarrassment in front of your client and the relevant courts.

9. Ask for what you want. Once you've convinced the court that you're right, you have to be sure the court will actually give relief that helps you. Decide what relief

you want – simple reversal, remand with instructions, etc. Ask for that relief directly in the conclusion of your brief. Resist the temptation to summarize your argument in the conclusion (that's what the summary of argument is for) and use it to state simply and straightforwardly what relief you want.

10. Engage the other side. If you are writing the appellee's brief or the appellant's reply, you should respond to your opponent's arguments. You are certainly free to make your own arguments, which may be independent of your opponent's. But don't just assume that the judges will understand why you haven't rejoined the other side's arguments or why you don't take them seriously enough to deem a response necessary. Even if your opponent's argument doesn't deserve a response, the court deserves an explanation of your views on it. Even if the other side has criticized you, your client, or your writing in less than professional fashion, you should not respond in kind. Again, follow Rule No. 4, and stick to the law.

11. Write your own brief. Many judges and clerks have seen cases in which the lawyer has copied large portions of a previous brief into the brief she is writing on a current case – and they can tell because she fails to change names or facts from the prior case when she copies from it. This practice reveals an advocate who is unengaged, cuts corners, and is sloppy. In one recent case, the Indiana Court of Appeals found that a brief's argument section plagiarized (without citation) an order from another court and contained no original advocacy. *Keeney v. State*, 873 N.E.2d 187, 189 (Ind. Ct. App. 2007). Such a stunt deprives an advocate of credibility. (By the same token, don't plagiarize yourself – your summary judgment brief is not your best brief on appeal.)

12. Jurisdictional statement. Because we are in the Seventh Circuit, this topic bears special mention. All federal court briefs require a statement explaining why there is federal jurisdiction and why the particular appellate court has jurisdiction. The circuit rule explaining these requirements is Seventh Circuit Rule 28(a). You must follow it precisely, at the risk of a sanction or a nasty mention in a published opinion, or both. You should read the rule carefully each time you file a brief, read the relevant sections of the Seventh Circuit Practitioner's Handbook, and follow the rule step-by-step to ensure compliance.

II. Common appellate oral argument errors.

Oral argument should be a conversation between the advocate and the bench about legal issues. Do not approach oral argument like a prepared speech. If you're lucky, and the court has many questions for you, you'll never have a chance to give your speech. Instead you'll be responding to questions, which give you the chance to learn the judges' concerns and respond to them.

Never, ever read your argument from a manuscript. Don't read long quotations either. And if you're going to read something brief, have it at the ready. Don't spend 15 seconds looking for it.

Be prepared for questions. Think through the case beforehand to anticipate questions (including questions about potential weak points in your argument). Discuss the case with someone who doesn't know about it already, and see what questions they have.

Listen carefully to the questions. Be sure you understand what the judge is trying to find out. Sometimes judges ask friendly or "softball" questions; don't assume all questions are hostile.

Answer questions as directly as you can. Avoiding questions on oral argument is usually unsuccessful. A persistent judge will keep after you until you answer, and the time wasted in avoiding a question is lost forever, as is any appearance that you're trying to assist the court with your answers.

III. Preserving error in the trial court.

Different kinds of trial error are preserved in different ways. Not only are there different preservation methods for different kinds of errors, but sometimes these preservation methods vary from state court to federal court. For example, in Indiana state court, while it is possible to raise an evidentiary question pretrial by motion in limine, that objection is only preserved if it is raised again at the proper point in trial, *Fricke v. Gray*, 705 N.E.2d 1027, 1030 (Ind. Ct. App. 1999); in federal court, by contrast, evidentiary objections may be preserved by definitive rulings on motions in limine without reassertion at trial, *U.S. v. Gajo,* 290 F.3d 922, 927 (7th Cir. 2002).

With that caveat, keep the following in mind:

- Make a timely objection at trial to evidence you wish to exclude, and cite the correct ground (or grounds) for the objection.
- When an objection to your evidence is sustained by the trial court and you cannot find another way to get the evidence admitted, make an offer to prove on the record stating what you would prove if your evidence were admitted.

- Put on the record any objections to jury instructions the court intends to offer, and provide the court with a correct instruction that covers the subject matter of the instruction you object to.
- Make motions for judgment as a matter of law at the close of your opponent's case; renew the motion at the close of your case; and renew it again *after the jury has come back with a verdict against you.*

Remember that if your objection isn't in the trial court's transcript, it's as if you never made it at all.

IV. In summary, and if the court has no further questions . . .

As you prepare your appeal, don't forget to look for help. Unlike the trial court, where you have one judge (and possibly one clerk) reviewing your legal arguments and conduct, in the appellate world you face anywhere from three to a dozen judges and three to a dozen clerks scouring, scrutinizing, and, literally, judging your work. An experienced appellate lawyer can provide additional perspective to assist with evaluating your legal argument, reviewing your legal writing, proofreading your brief, and mooting your oral argument, allowing you to fine-tune your presentation and gain the confidence which comes from being thoroughly prepared . . . as your clients and the court expect you to be.