

Making Appellate Advocacy More Appealing:
Top Tips for Pleasing Your Appellate Judges

Judge JoAnne F. Kloppenburg
Wisconsin Court of Appeals District IV

- I. Constraints on appellate advocacy
 - A. Personal
 1. Attorney workload.
 2. Resources, client and firm.
 3. Commitment, client and firm.
 - B. Professional
 1. Significance (to the parties, to the case, to the practice, to the law, to the public, to the courts).
 2. Likelihood of winning.
 3. Consequences of losing.
 4. Other?
- II. How it looks from the court of appeals
 - A. Statewide: 3,000 filings per year, about 180 per judge.
 - B. Each judge reads approximately 20 new sets of briefs each month (or at least 60 briefs), in addition to writing and supervising opinions.
- III. Challenge for advocates—writing a brief that is memorable and hits home (in a good way), that makes compelling arguments with compelling facts, that makes sense.
- IV. Tip Number 1—Follow the rules!
 - A. WIS. STAT. RULE 809.19(1) Contents of brief of appellant.
 - B. WIS. STAT. RULE 809.19(2) Contents of appendix.
 - C. WIS. STAT. RULE 809.19(3) Contents of brief of respondent.
 - D. WIS. STAT. RULE 809.19(4) Contents of reply brief.
 - E. Note especially: WIS. STAT. RULE 809.19(1)(i) “Reference to the parties by name, rather than by party designation, throughout the argument section.”

- F. New confidentiality rules: take steps to preserve confidentiality of names and social security numbers in the appendix as well as in the brief.
- G. Helpful
 - 1. Reference to parties by name throughout.
 - 2. No uncommon acronyms, no initials, no unnecessary names (replace with function, like officer/doctor/accountant, if referred to only occasionally or not otherwise necessary for easy reading).
 - 3. Include record cites in table of contents for appendix, and record cite along with appendix page number on each page.
 - 4. Table of contents and table of authorities for reply brief.

- V. Tip Number 2—Introduction to/Summary of Argument
 - A. Who/What/What/What/How/Why/What.
 - 1. Who are the actors?
 - 2. What happened/What is the dispute?
 - 3. What kind of case is this?
 - 4. How did the case get here?
 - 5. Why it is important?
 - 6. What do you want the court to do?
 - B. All in a few brief sentences, using nouns and verbs, or a few brief paragraphs.
 - C. Different from the statement of issues—more concise, more contextual, more narrative. Sets the mood.
 - D. Key that unlocks the organization of the brief.

- VI. Tip Number 3—Substantive Headings
 - A. Use headings and sub-headings to lead the reader through every step of your analysis.
 - B. Specific, descriptive, informative, concrete, sequential.
 - C. Tells the complete story of your argument from start to finish, identifying all the analytical stops along the way.
 - D. Signals when a paragraph is starting a new step in the analysis, or a new topic, rather than continuing the existing analysis or topic.
 - E. Facilitates and reflects good organization.
 - F. Ensures that the reader understands the issues and your position on the issues.

- VII. Tip Number 4—Self-Authentication
 - A. Citations to legal authority for all legal propositions and to the record for all factual statements; pinpoint cites essential.
 - B. Quote source material; paraphrase what the court said for legal citations if quoting is too cumbersome.
 - C. Edited block quotes are great for statements of the applicable law.
 - D. Assures the judge that you're not misrepresenting the law or facts.
 - E. Citations to pages/sections in opponent's brief.

- VIII. Tip Number 5—Context
 - A. Judges are impatient and want to know why they're reading something, so state facts and/or law after providing the context that makes those facts or law relevant.
 - B. In some cases this may mean a more abbreviated statement of the facts, leaving the bulk of the facts for their special place in the argument section.

- IX. Tip Number 6—Visual Impact
 - A. Paper copies: Spaces between paragraphs, and short sentences.
 - B. Electronic copies: In addition, heading and sub-heading numbers that tell the reader where she/he is (so-called scientific numbering, rather than just a B. or a 2.)

- X. Tip Number 7—Pointed Reply Brief
 - A. Identify and respond to response brief point by point with a reply or by directing attention to where already addressed in the initial brief.
 - B. Don't just repeat propositions or arguments already stated in your initial brief.
 - C. Do make sure you've responded to every proposition and argument in the response brief; you concede when you don't respond.

- XI. Tip Number 8—Conclusion
 - A. Put eloquent expression in the body of the argument.
 - B. State what you want the court to conclude and to do.

- XII. Law Clerk's Tip Number 9—Language and Tone
 - A. Persuasive but not overly so.

- B. Statement of facts should not be argumentative in tone.
- C. Avoid hyperbole, sarcasm, rhetorical questions, overconfident language such as “clearly” or “obviously.”
- D. Persuasion can be achieved through word choice, fact choice, and juxtaposition.
- E. Misstating or misleading facts can damage your credibility and taint the rest of your brief.

XIII. Law Clerk’s Tip Number 10—Packaging Arguments

- A. Generally, strongest argument first.
- B. Sometimes not possible because of strategy or logic, but regardless, should correspond with order of issues presented.
- C. Easy to lose sight of what your strongest argument is if poorly organized.
- D. Respondent brief tip: Look below. Were arguments now raised preserved? Were instructional errors properly objected to?