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5 Tips For In-House Counsel Reviewing Appellate Briefs

Law360, New York (March 10, 2014, 4:31 PM ET) -- As an in-house lawyer, you probably rely on outside counsel to draft your appellate briefs. Most likely, you receive a draft about a week before the filing deadline. Your goal is to ensure that the brief presents your case in the strongest possible light given the record and the governing law. You want to capture the panel's attention and maintain it from cover-to-cover — and you certainly don't want to turn the panel off.

So, what do judges like and dislike — and what kinds of things should you be looking for in a draft? Opinions abound and, unfortunately, casual discussions with colleagues probably won't give you an accurate picture of what appellate judges think.

But what if you could ask hundreds of judges what they want — and don't want — to see in appellate briefs? What if their answers revealed consistent patterns? Fortunately, academic researchers have done just that. Drawing from surveys taken over the last 14 years, we've identified five red flags that judges consistently identify as significant deficiencies commonly seen in appellate briefs.

Red Flag No. 1: Stilted Writing

It's true that appellate briefing tends to be more formal than briefing in the trial court — but that doesn't mean it has to be ponderous. In responding to surveys, appellate judges consistently complain about basic writing style and readability. Like most people, judges hate legalese. They want clear, plainspoken writing that's easy to follow.

Generally speaking, they're less bothered by age-old taboos, such as avoiding passive voice or split infinitives, than they are by stuffy writing that follows all the traditional rules. In fact, many judges, but certainly not all, report they would accept a less formal writing style as long as it gets the point across and doesn't veer into the inappropriate or barely literate.

Writing in plain English requires more than simply eliminating the "heretofores" and other such dross. Your brief must be easy to follow and to digest. Remember, although you've lived the case for years, the panel has not. The judges may have little expertise in the appeal's subject matter. So pay attention when you review the draft.

If you have to read a sentence, paragraph or footnote more than once, so will the judges and their law clerks — or worse, they'll just move on, without fully appreciating your point. Rewrite any offending passages. Use concise headings to help focus the reader's attention and to reinforce your arguments. Many judges also welcome bullet points (and even charts) if they will help clarify the argument.

Red Flag No. 2: Lack of Focus

Appellate judges value concision far more than most lawyers do. Judges consistently report that appellate briefs — especially in civil cases — are just too long and try to cover too much ground. Such briefs lack focus. If your brief has a long series of arguments, tread carefully. The best appellate briefs revolve around two or three strong arguments, and argue those points cohesively and as succinctly as the circumstances allow.

Before you have your outside counsel draft an appellate brief, take the time to discuss which arguments have a realistic chance of success and add the most value to your position on appeal and focus on those. Make sure the statement of facts is a readable narrative, if not a compelling story, and omit any facts that aren't genuinely relevant to your appellate arguments. Dates can be particularly troublesome, since the reader generally considers them material and feels the need to keep a mental chronology. A statement of facts that presents a steady barrage of unimportant dates risks diluting the important facts.

Red Flag No. 3: The Standard of Review is Missing in Action

Another way to deprive your panel of a focused, winning brief is to give the standard of review short shrift. If the standard appears once at the outset of the brief, never to be mentioned again, your brief will almost certainly miss the mark. In an appellate brief, the standard of review is not just a formality to be observed in the opening pages; rather, it is the very lens through which the court will view your arguments.

When considering your brief, the panel will focus on isolating the kinds of questions they must answer. Are they deciding whether the trial court abused its discretion? Whether the trial court committed clear error? Are they free to decide a legal issue *de novo*?

The governing standard of review forms the very fabric of your appellate briefing, and should be fully integrated into every argument in the brief.

Red Flag No. 4: Compromised Credibility

Judges consistently report that they use briefs to help assess the reliability of the parties' arguments. For example, basic errors, such as typographical errors, improper grammar or punctuation and erroneous citations occur with alarming frequency, even in today's computer-assisted world.

Not surprisingly, such mistakes diminish a brief's reliability in the eyes of appellate judges. Many judges are also suspicious of case citations that lack pinpoint cites or fail to follow a consistent citation style. Insist that your outside counsel use quality-control measures that eliminate sloppy mistakes before the brief reaches your desk. There's no excuse for ignoring such basic details — especially when such omissions are so easily avoided and can invite the panel's scorn.

Red Flag No 5: Misunderstanding the Audience

You cannot present your best appellate case simply by parroting the arguments you've made below, particularly if those arguments involved emotional appeals designed to persuade the trial judge to exercise discretion in your favor. To appellate judges, such tactics are distractions.

The appellate court's job is different from the trial court's, and panels don't want to be distracted by arguments that don't help them do that job. For example, the appellate court will be more sensitive to the case's public-policy implications than the trial court, since it

must consider how its decision will affect an entire state or circuit.

On the other hand, unlike a trial court, an appellate court is less constrained by its own precedents; it may distinguish them or, more rarely, overrule them. So if your appellate brief simply rehashes the arguments you made in the trial court, give it a second look — it may be aimed at the wrong audience.

As the in-house counsel reviewing a draft appellate brief, you're among the final gatekeepers. You know your company better than anyone, and you know the case intimately. If you have not been the main brief-writer, you can view a draft appellate brief with a fresh eye. Paying attention to the red flags above can help you shape the brief into a forceful piece of advocacy that is more likely to catch the panel's attention and enhance the credibility of your arguments.

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