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Honing a brief to knife-like sharpness

After the dawn of the new year, we continue our journey through the appellate brief writing process. Our focus will be on the heart of the brief: the “argument” section. It is in this section that you have the opportunity to explain why the court of review should rule in favor of your client, and to persuade the court to do so. All of the other parts of the brief we have previously discussed lead up to this pivotal moment.

Illinois Supreme Court Rule 341(h)(7) sets forth the requirements for the argument section of the brief and provides that it “shall contain the contentions of the appellant and the reasons therefore, with citation of the authorities and the pages of the record relied on. Evidence shall not be copied at length, but reference shall be made to the pages of the record on appeal or abstract, if any, where evidence may be found. Citation of numerous authorities in support of the same point is not favored. Points not argued are waived and shall not be raised in the reply brief, in oral argument or on petition for rehearing.”

Supreme Court Rule 361(i) applies these same rules to the brief filed by the appellee.

The argument section of your brief showcases the principles of law applicable to your case, applies these principles to the facts at hand and explains your suggested disposition. The persuasiveness of your argument is undermined if the reasoning underpinning the suggested outcome of the case is not stated clearly.

If the readers — i.e. the justices on your panel — cannot understand your reasoning, the validity of your suggested resolution of the case will be questioned and it is unlikely you will prevail.

An effective way to begin the argument section is to restate

the issues presented in the case. Depending upon the specific circumstances, you may either use the same issue statement set forth at the outset of the document, or you may take this opportunity to expand the statement of the issue. Restating the issue at this juncture of the brief serves to refocus the reader's attention upon the question to be answered in this case.

Also, identify the standard of review for each issue you present. As we have previously discussed in prior articles, the standard of review is the lens through which the appellate court views your claims, and Supreme Court Rule 341(h)(3) requires inclusion of “a concise statement of the applicable standard of review for each issue, with citation to authority, either in the discussion of the issue in the argument or under a separate heading placed before the discussion in the argument.”

The issue and its standard of review go hand-in-hand. If the standard is not favorable to your case, you cannot avoid it and must deal with it the best you can. If it is favorable to your position, make sure to remind the court of this when appropriate.

As stated, the heart of the argument section is the discussion of the relevant legal principles and the application of those principles to the specific facts in your case. You must lead your readers through the steps necessary to understand, apply and dispose of the issues presented.

Accordingly, it is a good practice to begin this section by setting forth the controlling legal principles. It is best to start with an initial introduction to broad legal concepts early in the discussion in order for the reader to understand the specific legal issue.

As your next step, dust the cobwebs off of your memories

ON APPEAL



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from your law school legal writing class, and recall the importance of IRAC. A variation of IRAC used for persuasive writing is CRAC — use this structure every time you draft your argument:

C — State your “conclusion,” which is the outcome you desire in the appeal;

R — Set forth and discuss the applicable rule[s] of law;

A — Apply these rules to the facts in your case, analogizing and distinguishing them where appropriate; and

C — Restate your conclusion and explain why your suggested disposition is the one the court should adopt.

This analytical framework permits you to explain at the outset how the court can get from Point A to Point B in a reasonable and logical manner. As stated in previous articles, providing your reader with a road map helps to set the stage for the analysis and conclusion that follow.

As the appellant, it makes sense to begin your argument with your strongest issue first.

Starting this way leaves the reader with a positive impression and enhances your credibility with respect to the remaining issues. You know the weaknesses in your argument and where your opponent will attack — do not run from them. Instead, address them head-on and take the wind out of the sails of the response brief.

During an interview with legal writing expert Bryan Garner, U.S. Supreme Court Justice Ruth Bader Ginsburg shared her view from the bench regarding effective appellant briefs:

“If you’re on the petitioner’s side, anticipate what is likely to come from the respondent and account for it in your brief. Make it part of your main argument. You know the vulnerable points, so deal with them. Don’t wait for the reply brief; just incorporate in the main brief as part of your affirmative statement answers to what you think you will most likely find in the responsive brief.”

If you are the appellee, there is no requirement to organize your arguments in the same manner as your opponent did in the opening document. Accordingly, consider presenting your client’s strongest arguments first, then respond to others. However, you must always respond to relevant and material arguments made in the opening document. A failure to do so may be taken by the court as a concession on that point.

Finally, some additional general points to remember are to avoid long, convoluted sentences that skirt the issues instead of addressing them directly; never cite cases without explaining how they apply; do not combine several issues into one vague discussion; and never make personal attacks against opposing counsel.

Next time, we will look at additional, specific points to be included in the argument section of your brief.