Top Ten Tips for Appellate Brief Writing from Appellate Law Clerks
"Help Us Help You"

1. **Be direct and concise.** Be thorough, but avoid lengthy examples, voluminous case law without explanatory parentheticals, and extraneous information. Remember your arguments are posed to seasoned, learned Judges and their staff. We want objective facts, supportive case law, and concise analysis.

2. **Include: relevant facts, law, and analysis.** Avoid offering opinions, using flowery, informal, or emotional language, changing the font or bolding language for emphasis. Distracting your reader only detracts from the credibility of your argument.

    - **Capitalization & Punctuation: #1:** "DO WE HAVE TWO SYSTEMS OF JUSTICE?" **#2:** "The significant lapse of time . . . has not resulted in the ability of the Court to ascertain the truth nor to do justice to all the parties!!!!" **Why:** This seems like you are shouting at the court.
    - **Language Choice:** "Only by the event of the appellant showing up . . . did the plaintiff do anything . . . some 51 months or four years after official notice by the tax office of a PROBLEM and being told by them that she should get an attorney. In other words, HELLO, this is a serious matter!" **Why:** We recognize your issues are serious matters, that's why they're before the court in the first place.
    - **Quotations to Unpersuasive Sources:** "As Willie Sutton, one of the most notorious bank robbers in the USA stated when asked, 'Why do you keep robbing banks?' he stated, 'Because that's where all the money is.'" **Why:** We may be amused by your discovery of notable quotes from figures throughout history, but it does not help us resolve the issue.
    - **Flowery Language:** "If there is any room for the milk of human kindness in the Financial Responsibility Law, this is the case."

3. **Avoid using unpersuasive, conclusory language (i.e., "clearly").** If the issue were "clear" or "obvious," it would not be on appeal.

4. **Cite to the Record on Appeal.** When asking the court to consider certain facts contained within the record, cite to the proper pages in the record, not the original transcript. We always have to double check facts and case law, so help us expedite the process!

5. **Avoid misconstruing facts.** Give an objective review of the facts. Objectivity can coexist with persuasive writing. Let the law do the talking. Misconstruing facts will only lessen your argument's credibility.

6. **Avoid using incompetent sources as authority.** Find a competent source, avoid citing to Wikipedia. We recognize sources are not always legal in nature, just make sure they are widely accepted and able to be validated.

    - **We've even gone off the beaten path before – we're not opposed to creativity, just make sure it's accurate authority:** From State v. Claypoole, 371 S.C. 473, 639 S.E.2d 466 (Ct. App. 2006): E.H.'s journal entry, which she read during her testimony, reflects her disdain over her mother's indifference towards Kermit's illicit relationship with K.H. The court reporter, unfamiliar with the slang term "wack," misquoted E.H. The absence of "h" in "wack" differentiates it from "whack," which means "to strike with a smart or resounding blow." See Merriam Webster's Collegiate Dictionary 1344 (10th ed. 1993). "Wack," as defined in the Urban Dictionary and used in this context, means "appalling." See The Urban Dictionary 331 (2005).

7. **Provide an Index to the Record on Appeal.** This expedites the review of your appeal. The more specific the index, the easier it is for review, i.e., "Order dated January 1, 2000" or "John Doe's Testimony" with subsections for "Direct-Examination, Cross-Examination, and In Camera."

8. **Avoid using your briefs to attack your opponent or the court.** Attacking your opponent's strategy or credibility only operates to diminish your own.

    - Even if it's after the court has rendered its decision, be thoughtful in how you try to persuade the Court that your position is correct.
    - **Don't say this:**
        - "In reality, the record could not be any clearer … any contrary assertion suggests that the record was never thoroughly reviewed."
        - "As it stands, the Court's published, precedent-setting Opinion is inadequately considered and incorrect on several points. The Appellant strongly believes that if its petition is not granted and this Opinion is allowed to stand, the Opinion risks being overturned by a thorough, attentive, and objective Supreme Court on several important issues."

9. **Avoid being ultra specific in your statement on appeal.** Using broad statements, such as "The trial court erred in refusing to direct a verdict" or "The trial court erred in granting summary judgment" does not restrict your argument.

10. **Standard of Review will make or break your case.** Remember to properly utilize your standard of review. If your issue is primarily factual and you

have difficulty finding supportive authority, examine your standard of review for legal support.

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S.C. Court of Appeals
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November 1, 2012

This is a thought that is shared by other appellate judges and it has application to both the Masters and the lawyers. Because of caseloads, trial judges must rely on attys to draft orders. The winning atty is thrilled to get the word that he or she has won and is asked to prepare the order. What frequently happens is the atty drafts the order as an atty drafts a memo—it's simply advocacy—and the order bears little of the characteristics of a legal opinion. The most common manifestation of this comes from the phrase "no evidence." The order will say that, for example, plaintiff has won and that defendant presented "no evidence." On appeal, that defendant, as the appellant, presents the appellate court with plenty of evidence it presented at trial. Invariably, the losing party presented evidence, but the trial judge found the conflicting evidence to preponderate in favor of one party, as the trial judge determined issues of credibility. Yet we are confronted with an order that says the losing party presented absolutely no evidence. A lawyer who drafted such an order may say it's the trial judge's fault for signing the order. And there may be some merit to that position, but let me offer two quick points. The trial judge may get that proposed order a month or longer after the trial and in the interim has heard many more cases. The second, and more important, point is that you, as the lawyer, want to win in the end, including upholding your judgment on appeal. So draft the order in a way that maximizes your chance of success on appeal. To the lawyers, I say, take off the advocacy hat and admit the other side presented evidence—throw the other side a bone. When we receive an order where one side wins every little issue, with the phrase "no evidence was presented," and the losing party is castigated at every turn, our antennas go up and that case will receive extra scrutiny. When we see a thoughtful order that reflects a measured judicial response acknowledging that both sides presented evidence, it sends a completely different message.

October 12, 2007
MLE Bench/Bar CLE
Judge John Kittredge