

Help your client by helping the appellate court

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As the economy reverberates with the call to do more with less, how can practitioners deliver more value to their clients on appeal? By recognizing that appellate courts, like everyone else, feel the pressure to work more efficiently, and by making the courts' job easier.

How can counsel do that? By writing briefs and presenting oral arguments that reflect the perspective not only of the client but of the court.

When I began my tenure as senior staff counsel to the Supreme Judicial Court in 2003, I arrived having handled scores of appeals at the SJC and Appeals Court as an appellate prosecutor.

Although I was well versed in writing briefs and delivering oral arguments, my focus — like that of most practitioners, I suspect — rarely extended beyond my own cases. The challenges that the appellate courts face in resolving the thousands of appeals filed every year were largely absent from my radar.

Once I began working for the SJC, however, and was required to read other people's briefs, the work of the court became personal. My job included screening hundreds of briefs filed at the Appeals Court to help determine which ones made good candidates for transfer to the SJC sua sponte.

In addition, I reviewed numerous applications for direct and further appellate review. And, for appeals entered at the SJC, I analyzed those briefs as part of my role as advisor to the justices.

At the SJC, I quickly learned that, although some briefs were excellent, many were mediocre and some were downright confounding. Even briefs filed by large firms were sometimes lacking.

There are various reasons for deficient briefs, including a lack of skill, experience or time. What particularly struck me about many of the briefs I read was an inability of counsel to step back from the case and present it in a way that could be grasped quickly by the uninitiated reader.

Working at the SJC brought home the adage that, to be effective, a brief must persuade a reader who knows nothing about your case. I was that reader! And I finally appreciated what it is like to be on the receiving end of all those briefs!

From my perspective at the court, some briefs gave me the sense of walking into the middle of a conversation: I was at a loss to know what the parties were talking about because they had assumed that I was present for the "conversation" (the litigation) from the beginning, when I was not.

My reading suggested that the problem was particularly acute when trial counsel acted as appellate counsel. An attorney who has litigated a case in the trial court for months or years can lose the objective, detached perspective necessary to write an effective appellate brief. A long history with a case can cloud even a conscientious attorney's memory of what was argued in the trial court, or induce counsel to cling to an argument that an appellate court likely would find unconvincing.

In addition, more than a few briefs I read omitted essential facts or legal background that may have been second nature to a specialist, but were largely unfamiliar to generalist appellate judges, their law clerks and their staff attorneys.

And on countless occasions I saw the opposite problem: a brief that over-explained standards of review or other legal matters that are instinctive to appellate judges.

In sum, my time at the SJC showed me that many briefs confuse rather than help the courts, costing both the courts and clients unnecessary time and money.

Here is some of the wisdom that I carry back from the SJC to the trenches.

1. Help direct your case to the right court.

Generally speaking, appeals that are appropriate for resolution by the Appeals Court should be decided there and not need further review by the SJC. Cases presenting significant novel, or other particularly impactful, issues, however, should be decided by the SJC in the first instance.

There may be tactical reasons for directing an appeal to one court or the other. But considerations of efficiency are also relevant.

Counsel can help promote economy in the appellate system, and for his or her client, by filing, in an appropriate case, an application for direct appellate review in the SJC. Practitioners who take the time to carefully consider the propriety of filing a DAR application, according to the criteria of G.L.c. 211A, §10(A), and to write it well, are rewarded by a receptive SJC: nearly half of these applications are allowed.

On the other hand, a party who receives an adverse decision from the Appeals Court and wishes another chance at a victory at the SJC has a far steeper hill to climb: approximately 95 percent of applications for further appellate review are denied.

There are important differences between a brief on the merits and an application seeking review by the SJC. But advocates sometimes mistakenly write the latter in the style of the former — arguing, in a DAR or FAR application, why their client should win rather than why the case is appropriate for decision by the SJC.

An excellent resource for learning how to address the interests of the SJC in a DAR or FAR application is Chapter 3 of the MCLE book, “Appellate Practice in Massachusetts” (2011).

2. Help the court get the law right.

When a party brings a case to an appellate court, the court generally has no choice but to decide it. Put another way, whether a brief is good or bad, the court is still usually going to decide the appeal.

But when a brief fails to accurately explain the legal principles governing an issue raised, it forces the appellate judges and their staff to figure out the issue for themselves — or refuse to address it altogether.

That condition sets up two problems: It wastes the court’s time by making the judges and their staff do counsel’s job; and it leaves solely to the court, rather than also to the advocates, how the court should construe the law.

For instance, providing legislative history, where appropriate, can be particularly important in cases that hinge on statutory interpretation. And yet attorneys too infrequently take the time to do that analysis, leaving the matter to the judges to sort out and forfeiting the opportunity to persuade the court.

At a more basic level, it is critical to select the best issues to argue on appeal and to argue them properly. Any diligent advocate gets a twinge in the gut when he or she reads an appellate decision that says a party did not argue a certain point, or did so insufficiently.

From the perspective of the SJC, I sometimes wondered why a party raised a weak issue when a more fruitful one seemed available. Thinking critically about one’s own case is indispensable to choosing and framing the most promising issues for appeal.

As for legal citations, I often encountered references to cases that did not stand for the proposition cited or that lacked accurate pinpoint cites. More troubling, some briefs left out controlling authority.

3. Help the court by seeking help with your brief.

An effective way to cultivate a brief that convinces rather than confuses the court is to enlist the aid of someone who can provide an outside, fresh perspective. In this vein (and many others), I share the view of Justice Antonin Scalia and Bryan Garner, in their useful book “Making Your Case: The Art of Persuading Judges,” (2008). The perspective of an unbiased reader — simulating that of appellate

judges — can go a long way toward identifying the most worthwhile issues to raise on appeal, and determining how best to organize and couch them.

Finally, make your brief easy on the eyes. A wonderful resource is the recently published book by Matthew Butterick, "Typography for Lawyers," (2010). Butterick offers loads of advice on how to use your word processor to make your briefs more visually appealing and thus more persuasive. He takes on such time-honored, but misdirected, conventions as using all caps for argument headings, and has even created his own monospaced font as an alternative to the Courier font, packaged with many software programs, that most practitioners use in briefs filed at the state appellate courts.

By following these suggestions, I think the courts will thank you, and so will your clients.

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