

Effective Written Advocacy

Thoughts on Presenting Well-Considered Written Legal Argument

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Introduction

Written advocacy is often the appellate lawyer's most powerful—and sometimes only—opportunity to persuade. Unlike oral argument, a brief allows uninterrupted communication with the court. As a result, judges learn a great deal about the lawyer as well as the case from the written product. Careful, precise writing signals credibility; careless or overstated writing does the opposite.

Justice Antonin Scalia observed that lawyers possess only one tool to convey their thoughts—language. How that tool is used determines not just whether an argument is persuasive, but whether the advocate themselves is trusted.

Quick takeaways

- Your brief communicates the merits *and* your credibility.
- Precision and restraint persuade; overstatement backfires.
- Write so the court can readily adopt your reasoning.

Writing Is Advocacy

Judges read briefs with two questions in mind:

1. Is this argument correct?
2. Can I trust this lawyer?

As Judge Raymond Kethledge has explained, judges quickly form impressions about a lawyer's care, candor, and competence based on the quality of the writing. Those impressions influence how receptive the court will be to the substance of the argument.

Bottom line: Good writing enhances credibility; poor writing diminishes it.

Know Your Audience

Effective appellate writing begins with understanding the court that will decide the case.

- Be familiar with the court’s recent decisions and doctrinal trends
- Frame arguments in a way that fits the court’s analytic approach
- Avoid overstating claims or presenting issues at a higher level than necessary
- Demonstrate respect for the court’s institutional role and constraints

A persuasive brief meets the court where it is, not where the lawyer wishes it to be.

Analyze the Case the Way a Court Will

There is rarely a truly novel issue on appeal. Courts decide cases by applying familiar frameworks to new fact patterns.

- Read cases not just for holdings, but for structure and reasoning
- Use clear, straightforward language—avoid unnecessary flourish
- Organize the argument so the court can easily follow and adopt it

An effective brief often reads like the draft opinion the court could issue.

Decorum and Professionalism Matter

Respect the Court

Refer to “the Court” or “the District Court,” not individual judges by name unless context requires it. Casual or dismissive references undermine credibility.

Respect the Opposition

Use neutral terms such as “the Government” or “the United States.” Disagreement does not require disparagement.

Justice Ruth Bader Ginsburg cautioned that attacking opposing counsel distracts from the merits. If the other side is wrong, the court will see it without personal commentary. Appellate courts consistently warn that impugning motives or integrity weakens, rather than strengthens, advocacy.

Have a Point—and Make It Early

A brief should have a clear through-line.

- Begin with an introduction that acts as a roadmap
- Identify a central theme explaining *why the error matters*
- Be explicit about the relief you are seeking

Judges should never wonder why they are being asked to care about an error.

Continue to Defend—Without Conceding

Appellate advocacy remains advocacy.

- Do not concede facts beyond the record
- In trial cases, rely on testimony and verdicts
- In plea cases, adhere to the agreed statement of facts
- Tell the story in a way that highlights why the legal error warrants relief

Be especially careful with language. Casual phrasing can inadvertently concede facts or legal conclusions. Use precise verbs—“alleges,” “claims,” or “asserts”—when appropriate.

Focus on What Actually Matters

Courts do not need a primer on settled law.

- Avoid “100-level” explanations of blackletter doctrine
- Spend time on how the law applies to your facts
- Use fewer cases, and explain them well
- Avoid string citations without analysis

Depth is more persuasive than breadth.

Authority, Accuracy, and Candor

Credibility depends on accuracy.

- Stay current on the law
- Address adverse authority directly and strategically
- Quote cases faithfully and in context

Courts check citations. Misquoting or selectively editing language can damage both the case and the lawyer’s reputation.

Reply Briefs Are Not Optional Formalities

Reply briefs matter.

- Respond directly to attacks on your argument
- Correct misstatements of fact or law
- Distinguish unfavorable authority raised by the other side
- Reinforce why relief is appropriate

Leaving a strong argument unanswered suggests weakness.

Editing Is Core Advocacy

No court filing should be a first draft.

Editing improves:

- Organization
- Clarity
- Precision
- Persuasiveness

Strong editing often does more for a brief than additional research.

Keep the Big Picture in Mind

Effective appellate advocacy is selective.

- Fewer, stronger issues enhance credibility
- Multiple weak claims dilute strong ones
- The question is not whether an error occurred, but whether it warrants relief

As Chief Judge Jeffrey Sutton has observed, a long list of alleged reversible errors often says more about the lawyer than the judge.

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