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ARTICLE: Appellate Briefing: Some Thoughts on Writing Briefs That Can Clear a Path Through the Jungle

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LEXISNEXIS SUMMARY:
... Raising a dozen issues in a brief on the theory that some of them must be worth something only detracts from the one or two issues that might be winners for your client. ... The judge or law clerk who is taking a first look at the brief by reading the statement of issues now knows, inter alia, that . the witness in question is the plaintiff's expert, not a lay witness; . she is an expert on damages (and specifically, lost profits) - not on, for example, medical causation or engineering; . the argument is not a challenge to the expert's academic qualifications or to the timing of the plaintiff's expert disclosures, but instead, is a challenge to the opinion that the expert gave, based on the facts and information she reviewed. ... In addition to these generic-but-required headings, it helps if the table of contents and the text of the brief contain subheadings to give the reader some description of the argument. ... Short paragraphs with topic sentences and frequent headings and subheadings help the court follow and understand the points you are making." ... She said: followed by a quotation from her testimony, with appropriate citations to the record . ... Jones's two versions of events without additional window-dressing. ... As a reader moves through the jungle that is an appellate record and brief, we hope, as appellate lawyers, that he is on a clearly marked path and that the important points that we want him to notice will stand out along the way. ... The rules allow - for example - fifty pages (or 14,000 words) for a brief on the merits, or twenty-five pages (7000 words) for a reply brief, but there is no rule that says that a brief must use the maximum number of pages or words. ... With a possible 125 pages of briefing per appeal, even without any extensions of page limits, this is more than 125,000 pages of briefs in appeals alone - more legal argument than anyone really wants to read in a year.

TEXT:
[*1]

I. Introduction

Appellate lawyers know there are things we cannot change. We cannot rewrite the trial court record to fix a trial lawyer's failure to make a proffer of excluded evidence. We cannot travel back in time to make sure that the court reporter transcribes a bench conference that included an important voir dire ruling never reflected in the record. We

cannot give a key witness a second chance to testify after opposing counsel performs an Oscar-worthy cross-examination. And we cannot change the verdict that the judge or jury reached. Instead, just as a tortfeasor learns that "you take the plaintiff as you find him or her," n1 we must take the record pretty much as we find it. n2

But there is one thing we can do, either to change the outcome for our client if we are seeking a reversal, or to safeguard a winning result if we are asking the appellate court to affirm. We can write an excellent brief. n3

That brief is likely to be the only chance we have to present our client's position to the appellate court. n4 In 2009, the Mississippi Supreme [*2] Court heard oral argument in only twenty cases out of the 382 it decided. n5 The Mississippi Court of Appeals heard oral argument in just fifty-eight cases out of 639. n6

A great brief can win a case, but if it is less than excellent, it can lose the case, too. Chief Justice John Roberts has said that reading a poorly written brief is "almost like hacking through a jungle with a machete to try to get to the point. You spend all your energy trying to figure out what the argument is, as opposed to putting your arms around it and seeing if it works." n7 Do not send the appellate court into the jungle with a machete. Instead, give the court a way to get through the jungle quickly, on a path that leads to the result that your client wants. For this, the court needs a well-written brief that is concise, persuasive, and clear. To use the Chief Justice's words, when you give the court a well-written brief, you and your client are ahead of the game: the judge who is reading the brief "kind of gets a little bit swept along with the argument," and "can deal with it more clearly, rather than trying to hack through." n8 This Article provides a few ideas and strategies for getting through the wilderness.

II. Provide a Map Through the Jungle: Choosing (And Stating) the Issues, and Other Ways To Establish Some Landmarks.

A. Pick Your Issues in Light of the Standard of Review.

Whether you were the trial lawyer or have taken a case post-verdict to work on the appeal, you may face a different sort of jungle: five, a dozen, or twenty possible issues for appeal. One of the first jobs in constructing a brief is deciding which issues are worth including. No trial is error-free. As our Court of Appeals has written, "no party is entitled to a perfect trial but may insist on one free from error that with some degree of likelihood affected the outcome." n9 There are bound to be a large number of points that you (or your opponent) could claim as error: in admitting evidence, limiting expert testimony, instructing the jury, or denying your post-trial motions, to name a few. But you cannot chase every issue in the limited space allotted to you for a brief, and it is important to resist the temptation to do so.

[*3] Our appellate courts handle thousands of cases every year. n10 Even if they were inclined to review every potential error, the courts have neither the time nor the resources to correct every problem, particularly those that do not typically warrant reversal or remand. Raising a dozen issues in a brief on the theory that some of them must be worth something only detracts from the one or two issues that might be winners for your client. Justice Robert Jackson, who read more good briefs than most of us will ever see, warned that "legal contentions, like currency, depreciate through over-issue." n11 He went on:

> The mind of an appellate judge is ... receptive to the suggestion that a lower court committed an error. But receptiveness declines as the number of assigned errors increases... . Multiplying assignments [of error] will dilute and weaken a good cause and will not save a bad one." n12

Many issues may have caused you a sleepless night during the trial. On appeal, you should limit yourself to the

potential winners.

Determining which issues are winners depends, in large part, on the standard of review. As United States Court of Appeals for the Eleventh-Circuit Senior Judge John Godbold wrote, if you do not understand the standard of review, you may be "trying to run for a touchdown when basketball rules are in effect." n13 If you represent the appellant, the most favorable standard of review is de novo, where the appellate court applies the same standard and reviews the evidence under the same lens that the trial court used. This standard applies to a review of purely legal issues - and by extension, to the review of motions to dismiss for failure to state a claim or for summary judgment. n14 At the other end of the scale, an appeal from findings of fact entered by a trial court judge in a bench trial is likely doomed: under the applicable standard of review, an appellate court will set aside such findings only if they are "manifestly wrong." n15

[*4] Somewhere in between is abuse of discretion, another standard that an appellant never loves, but which all too often is the standard that applies. Abuse of discretion applies to all sorts of issues that may be presented on appeal - most evidentiary rulings, decisions on the admission of testimony, rulings on motions to set aside default judgments or for change of venue, and others. n16 Under this standard, the appellate court first considers whether the trial judge applied the proper legal standard. If she did, then the reviewing court must "consider whether the decision was one of those several reasonable ones which could have been made." n17 If so, the trial court's decision must be affirmed unless the reviewing court is left with "a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon weighing of relevant factors." n18

What this means to an appellate lawyer is that, if we can do it consistent with our client's goals, we choose to appeal from errors of law (or from other errors that are reviewed under a de novo or other more searching standard of review). These offer the best chance to overturn the trial court's decision. If we represent the appellee, on the other hand, we will doubtless remind the court when the standard of review is abuse of discretion or clear error, because the appellate court should then be less likely to disturb the trial court's judgment. n19 The importance of this cannot be overstated: in 1993, the last year for which it published such statistics, the Mississippi Supreme Court reversed 135 verdicts. Only four were for errors related to admission or exclusion of evidence; seventeen were reversals in which the Court found the verdict to be against the overwhelming weight of the evidence. By comparison, eighty reversals were for errors of law or procedure, which the court reviewed de novo. n20

B. State the Issues Persuasively, in a Way That Forecasts the Facts and Your Argument.

Having considered each possible issue for appeal in light of its standard of review, the next step is to develop a list - hopefully a short one - of the issues that are really possible winners and which should be included in the brief. This list becomes a part of the brief as the required statement of [*5] the issues, n21 a critical part of developing your theory of the appeal and presenting it to the court. n22 The statement of the issues gives the court a preview of not just the legal issues, but also the standard of review for each and, hopefully, a few relevant facts or other considerations. Compare these two formulations of the same issue:

The issue presented by this appeal is whether the trial court erred in allowing Jane Jones to testify.

versus

The issue is whether the trial court abused its discretion in permitting plaintiff's damages expert, Dr. Jane Jones, to testify about lost profits, where her testimony was impermissibly based on speculation and incorrect data.

The first statement of the issue is unremarkable and conforms to the rules. But the second version (which also will appear in the brief's table of contents, helping to provide a more detailed road map to the argument) is both more informative and more persuasive. It lets the court know that the writer understands the standard of review, and it gives the court some valuable information. The judge or law clerk who is taking a first look at the brief by reading the statement of issues now knows, inter alia, that

. the witness in question is the plaintiff's expert, not a lay witness;

. she is an expert on damages (and specifically, lost profits) - not on, for example, medical causation or engineering;

. the argument is not a challenge to the expert's academic qualifications or to the timing of the plaintiff's expert disclosures, but instead, is a challenge to the opinion that the expert gave, based on the facts and information she reviewed.

[*6] The second version, in other words, sets up the argument better, and gives the court a preview of how it will unfold. With only sixteen words more than the first version, it is a much better use of not much more space.

One last point regarding setting out the issues for appeal: the appellee has the option to adopt the appellant's statement of the issues. n23 Although this may be somewhat rare, in appropriate cases, it can save the appellee some valuable space in a brief where pages or words are limited. It also can be a gift to the court in not having to sort through two competing versions of what went wrong (or right) in the trial court.

C. Establish Other Landmarks Wherever You Can.

Besides the statement of the issues, an appellate brief also has - or should have - other navigation tools, including the table of contents and the subheadings for the argument. These are important tools to refresh the judge's memory or to help the judge navigate a brief that is dozens of pages long and that may not be read at one sitting.

Thus, a good table of contents gives the reader more than the "plain vanilla" headings that designate the required sections of the brief (e.g., in Mississippi practice, the "Statement of the Issues," "Statement of the Case," "Summary of the Argument," "Argument," and "Conclusion"). n24 In addition to these generic-but-required headings, it helps if the table of contents and the text of the brief contain subheadings to give the reader some description of the argument. This is helpful not only for someone who is looking for a preview of the argument by skimming the table of contents, but also for someone who is reading the brief itself, or who is returning to it after having put it down for a time. As the Practitioner's Guide to the U.S. Court of Appeals for the Fifth Circuit puts it, "little is more discouraging to the judicial eye than a great expanse of print with no guideposts and little paragraphing. Short paragraphs with topic sentences and frequent headings and subheadings help the court follow and understand the points you are making." n25

To put this in more concrete terms, compare these two headings that one might find in a brief to the Mississippi Supreme Court:

The Contract at Issue.

versus

The 2005 Contract Was Invalid Because No Officer of Acme Ever Signed It.

Not only does the second version make the text of the brief easier to follow, but it also turns the table of contents into more than just an index. [*7] An index is enough to help a reader to find the particular page on which the conclusion, for instance, or some other required portion of the brief appears, but a good table of contents is more than that. It gives the court an outline of the argument. It can help to tell the court why the other side's arguments are incorrect (consider, for example, a subheading that says "The Baker Decision," compared to one that says, "Contrary to Acme Company's Argument, the Baker Decision Supports the Plaintiff's Claims."). The table of contents and subheadings within it also can set out the specific relief that the party is requesting. n26 All of these are important landmarks as the court explores the arguments that the brief presents.

III. State the Case Persuasively and Honestly.

Once again, the rules provide that an appellee need not reinvent the wheel if satisfied with the appellant's statement of the case (including the procedural history and disposition below) or statement of the facts; these are optional for the appellee. n27 Adopting the appellant's statement of the case or of the facts - entirely, or with the exception of one or two points that the appellee believes the appellant has mischaracterized or which bear further scrutiny - can be a powerful way to highlight one point that is central. This also can save the appellee valuable pages in a brief where space is limited. That said, however, just as the appellant should craft the statement of the case and of the facts carefully, an appellee should be cautious about giving up what may be its best opportunity to present its case.

Great Solicitor General John W. Davis said that the statement of facts "is not merely a part of the argument, it is more often than not the argument itself." n28 This is really true: if the facts are clear, or if you can make them clear through the way you present them in your brief, it is much easier to predict the outcome and for the court to reach the result for which you advocate. "If you marshal the facts well and state them clearly, the relevant points of law often develop naturally. An effective statement summarizes the facts and persuades the reader that both justice and precedent require a decision for your client." n29

[*8] Saying that the statement of facts is "the argument itself," however, is not license to write a statement of facts that is argumentative in tone. As appellate counsel, you serve your client best by providing a statement of facts that appears objective and that is presented in an understated way. You will certainly use your facts to set the framework for your argument, but they should be neutral and clear - "simple declarative sentences," as the Fifth Circuit's Judge John Minor Wisdom advised. n30 Pay attention to the record: each statement of fact must be supported by citations to the record, and those record citations must be completely accurate. The judge, or law clerk, will check, and your credibility and that of your case will suffer, if the record does not bear out each factual assertion.

The same care should be taken to exercise moderation - for instance, avoiding words like "ridiculous" or "misguided," resisting the urge to use exclamation points, and "distrusting adjectives," as Ezra Pound famously advised Ernest Hemingway. n31 Equally, use "obviously" or "absolutely" with caution. If a fact is obvious, it should be obvious without having to characterize it as such. If a witness's testimony was contradictory, the best way to demonstrate that is to let the court read the testimony itself, rather than your characterization of it: over-promising is deadly, but understatement, and letting the record speak for itself, is very powerful. You might say something like this:

Dr. Jones testified in her direct examination that the plaintiff's injury was caused by drug interaction. She said: [followed by a quotation from her testimony, with appropriate citations to the record].

On cross-examination, however, she testified, [followed by a quotation from the cross-examination testimony, showing how the testimony on direct and cross is inconsistent - that the injury was caused, instead, by some pre-existing condition, for example. Again, be sure to include appropriate citation to the record.].

This way, the testimony speaks for itself - the writer need not say, "Dr. Jones's hired-gun testimony was completely unbelievable and full of outrageous contradictions," because the quoted testimony will point out the differences between Dr. Jones's two versions of events without additional window-dressing. All the adverbs, underlining, and boldface type in the world will not convince a reader that facts are outrageous or that an error was egregious. In fact, these flourishes may very well make a critical [*9] reader suspect that the writer is trying to add some weight to an argument with words like "incredible" or with boldface type, because there's not much substance to the argument otherwise. n32

The facts set out in a brief also should be germane to the arguments presented. A trial probably included any number of pretrial motions that took a lot of time and energy, but the appellate court does not need to know about them - even in the "course of proceedings" section - unless they are relevant to the issues on appeal. Likewise, if a brief includes specific dates on which something occurred, a reader justifiably may assume that the dates are important. If the dates do not matter, they are a distraction - leave them out. On the other hand, do not leave out facts unfavorable to your position. The other side should not get an opportunity to say that you are misstating the facts, and you are in a better position to explain those facts away if you do it first.

Indeed, your reputation with the court, and the court's view of the merits of your case, rest on how honest a brief you write. The other side can score unanswered points simply by pointing out that the record does not say what you represented it to say. n33 But being "honest" does not require us to admit that we, too, believe that the trial judge made a mistake, or (conversely) that we also take a dim view of the possibility that an appeal will succeed. It means, instead, that a party on appeal has credibility at stake in every sentence of a brief, and particularly in every citation to the record or to the law. As advocates, we are there to persuade. n34 We are not there to exaggerate, to perpetuate an ad hominem attack on our opponents or, worse, the trial judge. And we are not there, most of all, to mischaracterize the record or the law.

[*10]

IV. Keep the Argument Readable and Make the Authorities Work Harder.

A brief persuades no one if it is confusing or dull. A sentence of argument followed by a lengthy string cite, then another sentence of argument and another long citation, invites the reader's mind to wander. Boilerplate citations for well-known principles of law take up space that is better used to argue a position or to shorten the brief. The Mississippi Supreme Court knows the standard for summary judgment, and does not need six cases citing Celotex v. Catrett n35 and Brown v. Credit Center n36.

That said, there may be a few legitimate reasons to use a long string citation, in ways that make those authorities work to support an argument. For example, in a case of first impression in this jurisdiction, a string cite could help to show that forty-two of the fifty states follow approach x (which the appellee endorses), while only a small minority follow approach y, suggested by the appellant. Even in that instance, the appellee may be better served to find one or two of those cases that point this out, and to cite only those two cases. A citation to one of these (fictional) cases might be something like this:

See Smith v. Acme Co., 999 F. Supp. 3d 111, 116-17 (S.D. Miss. 2010) (summarizing cases from multiple jurisdictions, and concluding that forty-two states follow the rule endorsed by the district court, while the minority follow the opposite approach) (citations omitted).

This accomplishes the result that the appellee wants - proving that its approach is the majority rule - without weighing down the brief with citations to dozens of opinions from fifty states.

As this example also demonstrates, a parenthetical can be a critical way to summarize, to tell the court what a case is about, and to demonstrate how that case supports a position. Quoting the case itself is an even better way. Work the quotation into a sentence so that the quotation from the case becomes a part of the argument. If there is no way around a lengthy quote, be cautious about interpolating it. n37 Instead, consider breaking it up into several shorter quotations: a "block quote" may be an invitation for the reader's eye to skip the important point that the writer wants the quotation to make.

Although the Fifth Circuit Practitioner's Guide cautions against extensive use of footnotes, n38 these, too, used sparingly, are a helpful place to park extra authorities so that they do not get in the way of the text. Very occasionally, a footnote can even be a way to include an argument related [*11] to one of the main issues, but which is subsidiary or has a less favorable standard of review. For example, the appellant may argue that the trial court made a serious error with respect to a particular jury instruction, and that there was a smaller, related error with respect to an evidentiary ruling on the same issue. The brief could include a footnote that sets out the basic argument and authority about that evidentiary ruling, without making this a separate issue. An argument is not waived by virtue of the fact that it is raised only in a footnote, n39 but it may more be difficult to find.

V. Give Readers Not a Machete, But a Spotlight: Some Suggestions for How to Focus the Court on Important Parts of the Record.

As a reader moves through the jungle that is an appellate record and brief, we hope, as appellate lawyers, that he is on a clearly marked path and that the important points that we want him to notice will stand out along the way. The easiest way to be sure that a reader does not get lost is to prune the shrubbery away from the path. The single best way to do this is to make the brief as concise as possible. The rules allow - for example - fifty pages (or 14,000 words) for a brief on the merits, or twenty-five pages (7000 words) for a reply brief, n40 but there is no rule that says that a brief must use the maximum number of pages or words.

Any appellate court will appreciate brevity: the Mississippi Supreme Court and Court of Appeals together decided more than a thousand cases in 2009, not to mention more than 7000 motions and petitions for interlocutory appeal, certiorari, or rehearing. n41 With a possible 125 pages of briefing per appeal, even without any extensions of page limits, this is more than 125,000 pages of briefs in appeals alone - more legal argument than anyone really wants to read in a year. I will wager a large amount of money that any appellate judge would tell you that the best briefs are the short ones.

Before you submit your brief, therefore, edit carefully. Take some time to see that it is interesting to read, and that a reader focuses quickly on critical points. Have a colleague who has not worked on the case read the draft. He or she will come to the brief from a perspective more like that of the judge or law clerk who is its true audience. Give some thought, also, to how and where a judge will probably read the brief. She may read it in the quiet, well-lighted atmosphere of her chambers, with a computer handy to call up a case on the Internet and a clerk standing by to bring the appropriate volume of the record. But equally, she might take it home and read it sitting in front of the evening news. She may or may not have the record or the record excerpts handy; if she does have them, they may be in her briefcase on the floor, or in the garage in the trunk of the car.

[*12] If the key point in the brief is the interpretation of two paragraphs in a four-page lease document, then when the judge gets to the discussion of those paragraphs, she may naturally want to look at the lease. Do we really want to make Her Honor close the brief, holding her finger on the page to keep her place, while digging in her briefcase with the other hand to fish out our record excerpts so that she can then find the appropriate page? Or worse, to decide it is too

much trouble, and not look at those important pages, which would have proved our point?

Of course not. "'It is not the function of the Court of Appeals to comb the record for possible error, but rather it is counsel's responsibility to point out distinctly and specifically the precise matters complained of, with appropriate citations to the page or pages in the record where the matters appear.'" n42 Likewise, it is counsel's responsibility to make finding that precise information as simple as possible.

What any of us should do, therefore, is to put those two critical paragraphs of the lease right into the brief. Standard computer technology can insert a .pdf or other image of the actual paragraphs into the text of the brief. Or the brief can simply quote the paragraphs, but set them off from the text in some way (perhaps with a box or a different typeface). Or a copy of the whole lease document can be appended to the brief itself - perhaps with a tab at the back of the brief, but bound together with it. (Of course, these key documents also must appear in the record excerpts.)

Our reader also might be reading the brief at her computer, from the CD or USB drive we filed or from the court's electronic filing system. To add a level of convenience for these readers, lawyers increasingly use hyperlinked briefs. In this format, the electronic document can include hyperlinks to the cases cited and to exhibits or videotaped trial or deposition testimony. In a personal-injury case where the accident was caught on videotape, for example, this might be a particularly effective way to put the appellate judge in the shoes of the trial judge or jury. By clicking on a link in the brief, the reader can be taken to a clip of the video as it was presented as a trial exhibit. Or if the case depends on not just the words a witness said, but how he or she said them - threateningly? with hesitation? sarcastically? - the brief might include a link to the witness's videotaped testimony. n43

One need not rely entirely on high-tech wizardry, however. Just as our reader will appreciate the signposts of subheadings to find her way through the landscape of the brief, she also will be grateful for some simple variety in format, especially where that makes important points or critical portions of the record more accessible. Bullet points or a chart can be useful ways [*13] to summarize or to compare and contrast. n44 Including an important photograph may be worth the proverbial thousand words of description, provided that it reproduces well and is accompanied by a citation to the record. The more appealing (no pun intended) the brief is - both with respect to formatting and with respect to the simplicity and clarity of its writing - the better chance that a judge or law clerk will read the whole brief with concentration and will be, in Chief Justice Roberts's words, "a little bit swept along with the argument." n45

VI. Pay Attention to the Technicalities.

To finish an appellate brief, we need not have only a persuasive statement of the facts, a well-supported argument, and a compelling prayer for relief. We also must be sure to comply with lots of other rules governing the brief's contents and format. Just as an appellate lawyer's role at trial includes making sure that the technical requirements - such as renewed objections or rulings on admission of exhibits - are properly followed to preserve the record for appeal, much of our work in preparing a brief involves a painstaking care for small details. While the details of typeface, format, and the number of copies to file may be the last things a lawyer thinks about late in the afternoon when the brief must go out the door, these technicalities matter, and can be the difference between a successful appeal and one that is delayed or even dismissed.

Mississippi Rules of Appellate Procedure 28 and 32 and *Federal Rules of Appellate Procedure 28* and *32* address what goes in a brief and what it should look like. They set out some particulars that must be included (the certificate of interested persons, for example) and provide rules on formatting, page limits, type sizes, margins, color of the cover, and so on. n46 The rules also govern how to file your brief, whether electronically or by physically filing a specified number of paper copies of the brief (together with an electronic version on a CD or USB drive) with the clerk's office. n47 To work through these requirements, a checklist such as those in Mississippi Appellate Practice n48 or available from the Fifth Circuit Clerk's office n49 may help, but however you do it, be sure to double-check these requirements every time. The clerk's office may reject a brief or send a deficiency notice for failure to comply with one or more of these rules. Or some careless error [*14] could give your opponent an excuse to file a motion to strike the brief or seek

other relief. Such motions are not often successful, but they can be embarrassing, and, more importantly, can cost your client money and can cost you time in responding or filing a corrected brief.

Moreover, some of these rules are more than merely cosmetic: they have very substantive components. Consider the requirements for service of a brief. In Mississippi's appellate courts, for example, counsel must provide the brief to the court in a particular electronic format, as well as filing paper copies, n50 and must serve the brief on the trial judge, as well as the district attorney in a criminal case. n51 Importantly, if the brief raises a question about the validity of a statute or ordinance (and if the state, city, etc. is not already a party to the case), counsel must serve the brief on the Attorney General, city attorney, or other legal officer. n52 This is not a technicality: the failure to serve these officers can result in a waiver of the challenge to the statute or ordinance. n53 A prudent appellate lawyer sets aside time to be sure that she can review and address each of these requirements carefully.

VII. Conclusion

When you think you have finished your brief - hopefully, several days ahead of your deadline, though of course that's not always realistic - put it down, walk away for a day or an afternoon, and then come back and read it once more. Chances are you will find a typographical error, a missing parenthesis or record citation, or a place where changing just a few words will better emphasize your point. Edit, and then edit some more. Most of all, strive for brevity. As the old saying (attributed variously to Cicero, Blaise Pascal, Abraham Lincoln, Mark Twain, T.S. Eliot, and others) puts it, "if I had more time, I would have written a shorter letter." The same should be said of briefs (and, probably, also of law review articles).

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceTestimonyExpertsGeneral OverviewGovernmentsCourtsCourt PersonnelGovernmentsCourtsCourt Records

FOOTNOTES:

n1. *City of Jackson v. Estate of Stewart ex rel. Womack, 908 So. 2d 703, 715 (Miss. 2005)* (discussing so-called "eggshell plaintiff" rule).

n2. For useful advice on how to create and preserve a record during the trial, and to improve the record that will be the basis for an eventual appeal, see Scott Burnett Smith, Ten Tips to Improve Your Case on Appeal, The Ala. Law., Nov. 2008, at 443-46.

n3. As Luther Munford puts it in his invaluable treatise on Mississippi appellate law, "briefs decide cases. Good briefs win cases." Luther T. Munford et al., Mississippi Appellate Practice 14.1, at 14-1 (Miss. L. Inst. Press rev. 2006) (citation omitted); see also Munford, supra, at 14-1 n.1.

n4. The Practitioners' Guide to the United States Court of Appeals for the Fifth Circuit provided by the Fifth Circuit Clerk's office is an extremely helpful resource, and is cited frequently in this Article. It reminds

advocates:

The court is duty-bound to do substantial justice in deciding the cases before it. Judges, however, must necessarily rely upon the advocates to point out the facts of record, the applicable rules of law, and the equities of the particular case that compel a just decision. You will have greater success in persuading the court to decide in your favor if you have an effective and carefully prepared brief. In writing the brief, remember that briefs are the first step in persuasion, and that our judges read briefs in advance of oral argument. However, because fewer than 25% of briefed cases overall are given oral argument, the brief may be your only chance to argue your position. Briefs should be written so that you get your important contentions before the court.

Fifth Cir., The Practitioners' Guide to the United States Court of Appeals for the Fifth Circuit, 57-58 (emphasis added), http://www.ca5.uscourts.gov/clerk/docs/pracguide.pdf.

n5. Miss. Sup. Ct., Annual Report 14 (2009), http://www.mssc.state.ms.us/reports/reports. html. The Fifth Circuit's oral argument statistics, at least for 2008-2009, are higher, with 28.6% of cases placed on the oral argument calendar during the year ending June 30, 2009. Fifth Cir., Statistical Snapshot for the 12 month period which ended June 30, 2009, http://www.ca5.uscourts.gov/Clerk Docs.aspx.

n6. Miss. Sup. Ct., supra note 5. The Fifth Circuit's oral argument statistics, at least for 2008-2009, are higher, with 28.6% of cases placed on the oral argument calendar during the year ending June 30, 2009. United States Court of Appeals for the Fifth Federal Circuit, Statistical Snapshot for the 12 Month Period Which Ended June 30, 2009, available at http://www.ca5.uscourts.gov/ClerkDocs.aspx.

n7. Interview by Bryan A. Garner with the Honorable John G. Roberts, C.J. of the United States Supreme Court, in Washington, D.C. (2006-2007), http://www.lawprose.org/interviews/supreme court. php.

n8. Interview by Bryan A. Garner, supra note 7.

n9. *Bowman v. CSX Transp., Inc., 931 So. 2d 644, 658 (Miss. App. 2006).*

n10. See, e.g., Miss. Sup. Ct., supra note 5, at 14 (Mississippi Supreme Court and Court of Appeals disposed of 1021 cases in 2009); *United States Court of Appeals for the Fifth Federal Circuit, supra* note 6

(showing that 3639 cases were terminated on the merits, resulting in 421 published and 2728 unpublished opinions, in the twelve months ending June 30, 2009).

n11. John C. Godbold, Twenty Pages and Twenty Minutes - Effective Advocacy on Appeal, *30 S.W.L.J. 801, 809 (1976)* (quoting Justice Robert H. Jackson, Advocacy Before the Supreme Court: Suggestions for Effective Case Presentation, Advocacy & The King's English 216 (G. Rossman ed., 1960)).

n12. Godbold, supra note 11, at 809; accord Fifth Cir., supra note 4, at 58 (quoting Justice Felix Frankfurter: "[A] bad argument is like the clock striking thirteen, it puts in doubt the others.").

n13. Godbold, supra note 11, at 810.

n14. See, e.g., *Ralph Walker, Inc. v. Gallagher, 926 So. 2d 890, 893 (Miss. 2006);* see also Munford, supra note 3, at 15-1 to 15-2.

n15. See, e.g., *Cotton v. McConnell, 435 So. 2d 683, 685 (Miss. 1983)* (citing numerous cases, as well as C.J.V.A. Griffith, Miss. Ch. Practice, § 674 (2d ed. 1950)). This standard of review is also formulated as the "clear error" standard, under which the reviewing court will not set aside a finding unless, "although there is evidence to support" the finding, the reviewing court "is left with the definite and firm conviction that a mistake has been made." See, e.g., *UHS-Qualicare, Inc. v. Gulf Coast Cmty. Hosp., Inc., 525 So. 2d 746, 754 (Miss. 1987).* Compare *Fed. R. Civ. P. 52(a)(6)* (stating that findings of fact "must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility").

n16. For a summary of the various standards of review, including the abuse of discretion standard, and a collection of cases applying each, see Munford, supra note 3, at 15-1 to 15-34.

n17. See, e.g., *Greater Canton Ford Mercury, Inc. v. Lane, 997 So. 2d 198, 202 (Miss. 2008)* (emphasis added) (quoting *Burkett v. Burkett, 537 So. 2d 443, 446 (Miss. 1989)).*

n18. See, e.g., *Irby v. Estate of Irby ex rel. Marshall, 7 So. 3d 223, 228 (Miss. 2009)* (quoting *Cooper v.*

State Farm Fire & Cas. Co., 568 So. 2d 687, 692 (Miss. 1990)) (emphasis added).

n19. The appellee has a great advantage. As one source puts it, "in all but the exceptional case, the respondent sits in the driver's seat, enjoying the protective cloak of a practical (if not legal) presumption of correctness; the reviewing court does not want to reverse, and will bend over backwards to affirm the result below." Marshall Houts, J.D. & Hon. Walter Rogosheske, Appeals: Art of Advocacy § 24.01 (Matthew Bender 1995).

n20. Munford, supra note 3, at 15-2 n.4 (quoting Miss. Sup. Ct., Annual Report 23, 26 (1993)).

n21. See, e.g., Miss. R. App. P. 28(a)(3); *Fed. R. App. P. 28(a)(5)*; 5th Cir. R. 28.3(f).

n22. Anecdotally, the statement of issues or summary of the argument may be the first thing that the judge reads. Both are critical tools in framing the issues so that the judge understands your argument right away. See Bryan A. Garner, Garner on Language and Writing: Selected Essays & Speeches of Bryan A. Garner 114 (ABA 2009) (discussing the importance of properly framing the issues). The statement of issues or summary of the argument may be the only thing that the judge has time to review before oral argument, if there is to be oral argument (and the judges hearing the oral argument may take tentative votes on the disposition of the case immediately afterward). Or these sections may what the judge uses to refresh his or her recollection about your argument before sitting down to draft an opinion. Make sure, therefore, that these sections can be read as a freestanding piece, without reference to the rest of the brief, and that they are short - no more than a couple of pages.

n23. Miss. R. App. P. 28(b); *Fed. R. App. P. 28(b)(2).*

n24. Miss. R. App. P. 28.

n25. Fifth Cir., supra note 4, at 58.

n26. Likewise, the table of authorities can give the court its first view of the governing law. For a judge familiar with the area of law involved, this tells the court that the parties have done their homework and have

considered the leading authorities in the area - not only the authorities that support their positions, but perhaps also the ones on which their opponents rely. Suppose you are the appellee and the court has already seen the appellant's brief, which relies heavily on the Baker case. Your table of cases had better include Baker, because the court will want to see that you have an answer to the appellant's argument.

n27. Miss. R. App. P. 28(b); *Fed. R. App. P. 28(b)*. The statement of the case, required as part of the appellant's brief under Mississippi Rule of Appellate Procedure 28, should "indicate briefly the nature of the case, the course of the proceedings, and its disposition in the court below. There shall follow the statement of facts relevant to the issues presented for review, with appropriate references to the record." *Federal Rule of Appellate Procedure 28* separates the statement of the case (which should "briefly indicate the nature of the case, the course of proceedings, and the disposition below") from the "statement of facts relevant to the issues submitted for review with appropriate references to the record... ." *Fed. R. App. P. 28(a)(6)*, (7).

n28. John W. Davis, The Argument of an Appeal, *28 A.B.A. J. 895, 896 (1940).*

n29. Fifth Cir., supra note 4, at 58.

n30. *U.S. v. Robichaux, 995 F.2d 565, 571 (5th Cir. 1993)* (Wisdom, J.) ("The court would like to commend the government for an excellent brief. It states the facts and law clearly in simple declarative sentences.").

n31. Ernest Hemingway, A Moveable Feast 134 (Scribner 1993) (1964) (describing Pound as "the man who believed in ... the one and only correct word to use - the man who had taught me to distrust adjectives as I would later come to distrust certain people in certain given situations").

n32. Accord Fifth Cir., supra note 4, at 59 ("While the brief should be written with attention to style and interest, clarity and simplicity are the paramount considerations. Italics and footnotes should be used sparingly.").

n33. Carelessness in citation form or proofreading is also damaging to credibility. Judicial law clerks - perhaps the first readers of a brief - are recent law review staff members, and they will notice if citations are not complete, or if other proofreading errors appear. While there is no requirement in Mississippi appellate courts or in the Fifth Circuit to use the form prescribed by The Bluebook: A Uniform System of Citation (Columbia Law Review Ass'n et al., eds., 19th ed. 2010), the Fifth Circuit recommends it. Fifth Cir., supra note 4, at 57. And any

court will prefer and expect briefs to follow some uniform and comprehensible system of citation. Cite-checking and proofreading may not be substantive components of an argument, but an impression of carelessness about these may bleed over into the substantive portions of the brief. Fifth Cir., supra note 4, at 59. ("Counsel should carefully proofread briefs for errors in spelling, quotations, or citations. The neater the briefs appear, the better written, the more succinct, the more to the point they are, the better the impression the briefs make on the judges.").

n34. Persuasion should happen in every element of a brief, even in areas that one may not initially view as parts of the argument. For example, a request for oral argument, see Miss. R. App. P. 34(b), *Fed. R. App. P. 34(a)(1)*, and Fifth Cir. R. 28.2.3, can be more than simply "oral argument is requested" or "oral argument is not requested." Although this may be all that appears on the cover of a brief, the statement regarding oral argument inside the brief can be several sentences that provide context and some facts to demonstrate why oral argument would assist the court's understanding of a complex case, or why the case is an important one that deserves very careful consideration.

n35. *477 U.S. 317 (1986).*

n36. *444 So. 2d 358 (1983).*

n37. The Bluebook tells writers to single-space and indent a quotation of fifty or more words on the left and right. The Bluebook R. 5.1, supra note 33, at 76.

n38. Fifth Cir., supra note 4, at 59.

n39. See, e.g., *U.S. v. Redd, 562 F.3d 309, 314 (5th Cir. 2009)* (argument was not waived where it was raised only in a footnote; footnote presented argument together with citations of authority to support it).

n40. See, e.g., Miss. R. App. P. 28(g); *Fed. R. App. P. 28.1(e)(1)*, (2).

n41. See Miss. Sup. Ct., supra note 5.

n42. *McKenzie v. River Region Med. Corp., 96 Fed. Appx. 222, 223 (5th Cir. 2004)* (not designated for publication in Federal Supplement Second) (appellate court will not consider issue raised by appellant where it is not supported by citations to authority and to record) (quoting *U.S. v. Martinez-Mercado, 888 F.2d 1484, 1492 (5th Cir. 1989)).*

n43. If using this method, counsel should be sure to point out the availability of the video excerpts or hyperlinks (and include a CD or flash drive with the same information) with copies of the brief served by mail or by hand delivery rather than electronically.

n44. Exactly as with a normal prose paragraph, a chart or bullet points should include citations to the record where necessary.

n45. Interview by Bryan A. Garner, supra note 7.

n46. See, e.g., Miss. R. App. P. 28, 32; Fifth Cir. R. 28.1 to 28.7 & IOP; Fifth Cir. R. 32.1 - 32.5 & IOPs.

n47. See, e.g., Miss. R. App. P. 31; *Fed. R. Civ. P. 25*; Fifth Cir. R. 25.1 (clerk may accept brief sent by facsimile transmission under emergency or other compelling circumstances); Fifth Cir. R. 25.2 (establishing electronic case filing procedures).

n48. Munford, supra note 3, Checklists C and E, at C-11, C-18.

n49. The Fifth Circuit Clerk's office uses a checklist to be sure that briefs contain all required elements. The checklist is available by contacting the clerk's office or may be downloaded from the Fifth Circuit's website at http://www.ca5.uscourts.gov/, by clicking on the link titled "Practitioner's Guide" and then on "Appendix E" within that document.

n50. See, e.g., Miss. R. App. P. 28(m); Miss. R. App. P. 31.

n51. Miss. R. App. P. 25(b).

n52. Miss. R. App. P. 44(a).

n53. See, e.g., *Pickens v. Donaldson, 748 So. 2d 684, 691-92 (Miss. 1999); Hudson v. Moon, 732 So. 2d 927, 933 (Miss. 1999).* See also Miss. R. App. P. 44(c).