Some Obvious and Not-So-Obvious Tips

Writing a More Persuasive Brief

By Jeffrey J. White

Lawyers tend to like complexity—complexity in their case loads, in fact patterns, and, perhaps most of all, in their legal arguments. There is something compelling about saying that you engage in "complex" litigation, implying you are far too good a practitioner for mere "simple" litigation. For purposes of brief writing, though, one of the cardinal sins of any advocate is to complicate an issue. Your job is to simplify a complex legal issue so that one or more judges deciding a case can easily understand your arguments.

Scores of articles describe how to simplify a legal brief, including tips about removing excess language, hyperbole, poor analogies, and the so-called "A-rate" words that force a reader to have a dictionary by the ready. Yet, little has been written about "stating the obvious." An effective brief should expressly state the parties' agreements and disagreements.

Consider the opening paragraphs of an argument section of a brief. Almost all briefs immediately dive into the legal argument without first explicitly setting forth what is in dispute, and even more importantly, what is *not* in dispute. Although many lawyers do not like to give the other side more "airtime," it can be effective to spend a paragraph or two summarizing what the parties agree about: "The plaintiff and defendant both agree that…," or "No one contests that the central facts are undisputed." From there, it is easy to make a transition to the core disagreement: "Where the parties diverge, however,…," or "What this Court must resolve, however, is how the law applies to these undisputed facts."

Some may say that stating "obvious" areas of agreement or disagreement is not necessary because judges are smart enough to figure it out. But why run the risk of drawing a question at oral argument along the lines of this: "Maybe I am missing something, but what exactly are you arguing as to Issue 1?" Moreover, by framing the issues for a court, you control the message. It is not uncommon to read an adversary's brief and spend a great deal of time figuring out the scope and context of the argument presented. This exercise invariably leads to a statement such as the following: "Although it is not clear, it appears that the appellee is arguing that…." Generally, it is not helpful to have opposing counsel characterize, or, in some cases, mischaracterize your argument to a court. A short paragraph or two at the opening of an argument section prevents that from happening.

Furthermore, this simple explanatory technique can also allow you to "smoke out" the other side. When you make an affirmative statement in your brief that the parties agree about "X," you have in essence laid down the gauntlet to your opponent. If that statement goes unanswered, not only will a court assume that your statement is correct, but also you have laid the groundwork to later challenge any opponent who attempts to raise an argument that contradicts your earlier statement.

For example, I was recently involved in an appeal during which opposing counsel argued that the court should reverse the underlying jury verdict because no cause of action was available for a litigant alleging a certain type of constitutional violation. As part of that argument the other side referenced the trial jury instructions but, importantly, did not expressly challenge the actual substance of those instructions. Accordingly, in our response, we emphasized that the appellant had not challenged the jury instructions but rather focused solely on whether a cause of action existed. After losing the case, however, the appellant sought reargument on the basis that the court had not ruled upon whether the jury instructions were proper. Needless to say, when objecting to reargument, we pointed to the statement in our appellee's brief, which went unchallenged, that the appellant had not raised that issue on appeal. If we had not "stated the obvious" but simply "briefed" the issue that we believed was at the center of the controversy, we would have had a difficult time arguing that the appellee had waived that issue.

By "stating the obvious" you help a court better understand what it needs to decide in a particular appeal. Judges rightly see their roles as only deciding the issues in dispute. Therefore, courts employ procedural devices such as the "statement of issues" to clarify what is at issue. But, as we all know, that statement of issues may lead to more confusion than clarification. The best advocates can sum up the critical areas of agreement and disagreement in clear, concise points at the beginning of a brief and later, if the opportunity presents itself, during oral argument. Do not overlook the power of "stating the obvious." It is never a bad idea to signal that you wish to simplify things and to make judges' lives easier. FD

■ Jeffrey J. White is an attorney in the Hartford, Connecticut, office of Robinson & Cole LLP. He is a member of the firm's Appellate Group and has successfully handled numerous appeals in several federal and state appellate courts. Mr. White is a member of DRI's Appellate Advocacy and Product Liability Committees.