

## A brief-writing checklist

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My 18-year-old daughter's departure last month for her first year in college is the inspiration for the next few articles to appear in this column, but her leaving was also inspiring in at least one other way. As sad as I was to see her go, she left in her wake a spiritual reawakening and renewed faith in the existence of a higher being, which was responsible for not just exorcising our household, but for enabling my wife, me, and our son to survive living with a person who, in an obvious attempt to prepare us for her leaving, mutated in her senior year from a delightful child into a beast the likes of which has not been seen since Linda Blair did that freaky thing with her head and threw up on Max von Sydow.

This column is about appellate advocacy, of course, not an account of what it was like spending a year in hell with Damien's sister, but I thought it was important to lay the groundwork for today's subject. The seed was planted when, on the ride back to Baltimore from the college where we had dropped off our student less than an hour before, she called my wife to inform us that the washer and dryer in her dorm operated on quarters.

I was obviously shocked that we were such incompetent parents that we had omitted from the going-away-to-college checklist something as basic as a roll of quarters for our hapless freshman. But my shock turned into incredulity when I realized, moments later, that we didn't even have a checklist, just a piecemeal assortment of random thoughts, occasionally reduced to writing, that collectively amounted to what we thought was everything our child could possibly need to survive on her own in her dorm room.

Well, I might have screwed up once, but I made a vow to myself then and there not to do so again, which is why you are going to read over the next few months a list of items that every lawyer needs to think about before you part with your beloved brief, say your goodbyes, and send it far away to its new home. Some of these items have been discussed in this column over the past three years, while others have not, but all are worth considering as you finalize your brief.

The checklist will track the same manner in which a Maryland appellate court brief is organized and will lay out points to consider for each section of the brief, starting with the statement of the case, followed by the questions presented, then the statement of facts, and so on. Three items on the checklist, however, apply throughout the brief to each of these sections and deserve mentioning before any of the others. What's the top of the checklist, you may ask?

### **Checklist item #1:**

*Always advocate*

The very first question you should ask yourself once your brief is written is whether you have advocated in every section of the brief.

Advocacy means different things depending on the portion of the brief you're writing, but the one thing it always means is that you are writing to persuade. That is your life mission as an appellate advocate, and something you should never forget. Your

objective is always to persuade, whether it's the statement of the case where you're introducing the reader to your version of what your case is about, or the question presented where you're trying to provide a succinct version of what the central issue is, or the statement of facts where you're telling the story in a way that gets the reader to believe in your case before you even begin the formal argument, or the argument itself where you're pounding the theme "we win because." No sentence should ever be written without remembering that the words you have just put on that page are there for the purpose of convincing the reader that you're right, the other side's not, so please affirm or reverse.

Advocacy does not mean, however, that you should be arguing throughout the brief. The only place where argument is appropriate is, well, the argument (and the summary of argument). But you can still be an effective advocate in the other sections of the brief by selecting information and packaging it in a way that is most advantageous to your position.

**Checklist item #2: Make sure**

*that your brief has a theme*

A brief without a theme is like a dormitory washer without quarters. You may think that it's doing the job after you load it up, but it's really not.

The theme should manifest itself in every part of the brief, beginning with the statement of the case where you give a crisp explanation of the case. Use that explanation as the vehicle for developing the theme by, first, focusing on the core ruling you are asking the appellate court to overturn or uphold and, second, describing it in a way to enable the judges to begin developing an understanding of what you are asking them to do.

The next section of the brief builds on the theme by setting forth the questions to be decided in a way that crystallizes for the reader what your view of the case is. This establishes the groundwork for the statement of facts, which tells a thematic story that is designed to set up the argument where you use the theme to drive home the central point that the appellate court should reverse or affirm because \_\_\_\_\_.

Stated differently but more concisely, the theme is what ties together your entire brief. If you can't figure out your theme when you think you're ready to file the brief, then that means you're not. Think like the temporarily stymied student in the laundromat and dig deep into your pockets to get the change you need to make it work.

**Checklist item #3:**

*Remember who your audience is*

Some of you who have read this column before may remember John Davis' first commandment of oral advocacy, which is to change places with the court. That commandment is equally applicable to written advocacy and ought to be considered when reviewing your brief prior to sending it to the printer.

If you're like me, by the time you think you're finished writing, you are so persuaded by the brilliance of your advocacy that you can barely see straight. This is when you need to take a step back and to ask yourself how someone who is completely unfamiliar with your case will react to your brief. And not just to the brief as a whole, but to every sentence that you have written. Our zealotry tends to color our view of the world, sometimes in ways that others may not be so willing to embrace.

Try to envision how a judge will respond to your brief in the neutral quiet of his or her chambers, den, or wherever judges read briefs, and then make the necessary changes.

Because the last thing you want is to write something that will make the judge's head do a 360. Or worse. Not even the Exorcist can help you at that point.

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