

# THE ART OF APPELLATE ADVOCACY

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## Writing a memorable question

Most people would likely be unable to find anything about attending a high school reunion, as I did when I recently went to mine, that could inspire them to write an article on points to consider when drafting and editing the section of an appellate brief that sets forth the questions to be decided on appeal. Of course, most people would likely be unable to find anything, period, that could inspire them to write such an article, but let's move on.

Just so I'm clear, there are other things I could write about after seeing people I hadn't laid eyes on in years. Such as Susie, for example, who it was great to see even though we really didn't have too much time to talk because, after saying hi, she just kept walking. In fairness to Susie, we did just see each other at the last high school reunion ten years ago, so there probably wasn't that much more we had to say to each other.

I would have a lot more to say if I were to write about that guy with the big smile on his face who was so glad to see me that I was so glad to see him, too, even though I had absolutely no idea who he was because he didn't wear a name tag or remotely resemble anyone I had ever met in my entire life, much less somebody I knew in high school.

I could also write about how glad I was once I finally figured out who this guy was, because when I did I realized that he had obviously forgiven me for overreacting with that Exacto knife in the sixth grade after he knocked me down during recess. But that's enough about that trip down memory lane.

Unlike this classmate, most people had name tags, which was a good thing because I found it impossible to match the name to the face for more than half of the encounters I had with these links to my increasingly distant past. Sure, a few folks looked almost exactly the same as they did when I last saw them in the seventies, but 30 years of living did a lot to dramatically change the appearance of most people, which made the name tags a critical part of identifying the majority of individuals from the Class of '76 who showed up at the reunion.

### Removing the mystery

I am sure that, like many of you, my editor is wondering at this point what any of this has to do with appellate advocacy, much less with the title of today's article about writing a memorable question, so here's the connection: the name tags. At least three that I read were indecipherable and did nothing to assist me in figuring out who their bearers were. But a legible name tag, like a well-written question, changes everything, removes the mystery, and provides crucial context for the reader. Continuing the numbering sequence from my last installment on the brief-writing checklist, here are today's items for writing an effective question.

Checklist item #7: Identify for the reader the essence of what your argument is all about. Writing an effective question is one of the biggest challenges brief-writers face because, to do it well, the writer must reduce to one sentence a succinct description of the issue that the appellate court is being asked to decide.

This is no easy task when you consider that the argument written to persuade the judge to decide that issue in your favor can be 5, 10, or 15 pages, or even more. Being able to compress the argument in such a manner requires a concrete understanding of your argument, which, for me, continuously evolves through the editing process and is never fully developed until the brief is about to be filed. For this reason, although I write each section of the brief in sequence, the question presented is one of the last sections that I edit.

Make sure that the question is tailored to your case as much as possible and loaded up, within reason, with core, undisputed and factual information that works together to provide a complete explanation of the issue on appeal. A question that asks only "whether the trial court erred in granting summary judgment" does not give the reader any explanation or understanding of the question that needs to be decided.

You can force yourself to include this information by using words such as "when," "where," and "because," which would convert the question above into "whether the trial court erred in granting summary judgment when the parties submitted conflicting affidavits about the truthfulness of the statements that the plaintiff claims are defamatory."

Checklist item #8: The focus of the question should be the dispute to be decided on appeal. Although the question needs to advocate your position (that's checklist item #1 — "always advocate"), it should do so fairly and in a non-argumentative manner.

For example, if you are appealing an adverse summary judgment ruling, you would not present the question as "whether the trial court erroneously granted summary judgment when material facts are in dispute." You would not write such a question for the reasons I just stated in discussing checklist item #7, but you also would not write the question this way because the central issue on appeal is obviously whether there is a material factual dispute. That should be the focus of the question, i.e., "whether the trial court erroneously granted summary judgment on the ground that no material facts are in dispute when the parties submitted conflicting affidavits about the truthfulness of the statements that the plaintiff claims are defamatory." Make sure you ask the right question by directing the reader's attention to the core point of disagreement between the parties.

Checklist item #9: Keep the number of questions to a minimum. There are a lot of things about private practice that I like, but the one part I do not enjoy at all that I somehow was spared when I worked for the government are demanding clients who insist that every trial court error be raised on appeal. If you don't have one of these clients, then your job is easy. No case is error-free, but not every error materially affects its outcome and requires reversal. Be selective and limit the number of questions that you ask the appellate court to decide. The judges will thank you for it.

And who knows? They may even remember you the next time, even if you're not wearing a name tag. Or you're not supercool. Like Susie.

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