Elements of a Successful Appellate Brief

by Aaron N. Einhorn and Theresa L. Sidebotham

As law clerks for the Colorado Court of Appeals, we read briefs each week and analyze them with our judge. In addition, our job regularly involves appellate writing that conforms to the standards discussed in this article. These experiences provide us insight into writing persuasive and effective briefs that can strengthen your appellate advocacy. This article will discuss the elements of successful appellate briefs.

Process of an Appellate Opinion

Writing an effective appellate brief requires a sound understanding of how the Court of Appeals creates an appellate opinion. The process begins with litigants filing appeals with the Clerk's Office, which processes and distributes them to a three-judge panel.[1] The senior judge of each panel then randomly assigns cases among the judges to author.

The authoring judge, with the assistance of his or her staff, drafts a memorandum proposing a disposition of the case. The panel uses that draft and the briefs to prepare for oral arguments, if they are scheduled. After oral arguments and discussion with the panel, the authoring judge writes the final majority opinion, unless his or her opinion becomes the dissent, in which case another judge on the panel authors the majority opinion.

By the end of this process, an attorney's brief will have undergone significant scrutiny, not only from the authoring judge, but also from the entire panel of judges, as well as law clerks or staff attorneys. A well-crafted brief will have a much better chance of withstanding this scrutiny.

The Attorney's Goal on Appeal

To write an effective appellate brief, attorneys must understand the goal of an appeal. The goal generally is to convince a three-judge panel that it should affirm or reverse a specific trial court or administrative judgment, order, or ruling. Keep in mind the following three key points to help achieve this goal.

First, the Court of Appeals is a decisional court. Judges affirm or reverse based on existing law if possible, rather than creating new precedent. Attorneys should tailor briefs to this preference. Also, an intermediate appellate court does not find facts and generally does not set policy. Thus, attorneys usually should direct arguments involving the credibility of witnesses or fact-finding to the trial court, and usually should direct arguments addressing public policy or seeking a change in the law to the Colorado Supreme Court.

Second, judges meticulously analyze their cases. Because the Court of Appeals hears cases as a matter of right, not on *certiorari*, judges receive a high volume of cases. Therefore, attorneys should make their arguments short and concise, as the title "brief" suggests. Brief arguments often are more convincing than long ones because they generally are clearer, easier to digest, and focused on the key issues rather than tangential ones.

Third, a brief's strength will contribute to its success on appeal. The attorney should craft a brief that will remain strong and persuasive under scrutiny.

Practical Suggestions

Judges, staff attorneys, and law clerks notice common weaknesses that limit the effectiveness of many appellate briefs. Some suggestions follow on writing appellate briefs. Attorneys who heed them will avoid some of the most common problems that may result from poorly crafted briefs. (*See* the accompanying sidebar for additional brief-writing suggestions.)

Standard of Review

For each issue raised on appeal, the standard of review should be provided in a separate section. Include a record citation showing where the issue was ruled on or otherwise preserved below, following C.A.R. 28(k). The standard of review drives the appellate analysis; whether the trial court erred is less important than whether the error is reviewable and, if so, under what standard. Use

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a specific, applicable standard of review and frame the argument within that standard.

Contentions

State each contention clearly; the contentions direct the analysis and inform the Court's reading of the brief. Address the most important contentions first, and only address significant issues. Contentions should not force judges to wade through irrelevant allegations of error. In particular, issues not raised below usually will not be considered for the first time on appeal, with the exception of plain error in certain criminal cases.[2]

Legal Analysis

Strong legal analysis is the cornerstone of every persuasive appellate brief. Concentrate on five elements of effective legal analysis to create a more convincing brief.

➢ First, the analysis should be framed within the standard of review. Arguing that the trial court erred is not helpful if the Court

Brief-Writing Suggestions From Judges, Staff Attorneys, and Law Clerks

To help readers improve their brief-writing skills, the authors asked Colorado Court of Appeals judges, staff attorneys, and law clerks to offer suggestions for writing effective appellate briefs. Their comments are listed below.

Standard of Review

- Ensure you comply with C.A.R. 28(k), which discusses the standard of review and preservation of appeals.

Legal Analysis

- In appealing an order, do not just reiterate the original motion, but state why the district court's ruling was in error or was an abuse of discretion.
- Argument sections should match (if appellant says the issues are A, B, and C, appellee should not respond with D, E, and F without also addressing A, B, and C).
- Avoid incomprehensible contentions, such as: "Why did the Court Inexplicably, Plainly, and Dispositively Err in Granting *X*'s Unfounded and Baseless Requested Removal as a Party, Thereby Voiding the Sole Available, Ascertainable, Objective, Fair, Proper, Consistent, Uniform, and Binding Method and Procedure. . . ."
- A brief with poor analysis, such as one with several pages of law and only one paragraph of analysis, is not persuasive; nor is a brief with only argument and no law.

Handling the Law

- All issues an attorney raises should draw support from legal authority.
- Simply stating that an appeal is controlled by four cases without analyzing those cases suggests ignorance of the law and poorly serves the client.
- Ignoring contrary authority makes the reader question the brief-writer's credibility. The Court of Appeals will find the contrary authority.
- The rules of procedure at the appellate level are the Colorado Appellate Rules (C.A.R.), not the Colorado Rules of Appellate Procedure (C.R.A.P.).
- *The Bluebook** exists for a reason—use it. Also, do not put citations in footnotes.

Presenting the Facts

- Excessive facts are a waste of space; use it for legal argument. The judges review the record.
- The attorney's assertion and characterization of the facts are not enough without record cites. Record cites should accurately characterize the facts.
- Be relevant. If the facts are that a woman was injured in a car accident, it is irrelevant that her husband was "fighting for freedom" in Iraq.

Procedure is Important

- Failure to comply with Colorado Rules of Civil Procedure 54(b), 58, 59, and 60 often creates problems for litigants (for example, with jurisdiction and finality of judgment). Before beginning to write the brief, examine, understand, and comply with these rules.
- Frame the brief in terms of the procedural posture of the case. For instance, if the Court is reviewing an order granting summary judgment for a genuine issue of material fact, record cites and analysis should concern evidence submitted in the exhibits attached to the motion for summary judgment and to the response to the motion.

Other Practical Suggestions

- Do not appeal issues the Court cannot possibly reverse, such as issues not preserved below for review.
- Rehashing an argument on reply without addressing the appellee's answer brief is confusing, wastes client money, and effectively concedes the appellee's argument.
- Redundant arguments are not helpful. Avoid them.
- Proofread the brief. Common examples of not proofreading include writing "trail court," "the pubic interest," and "the constitutional right to ineffective assistance of council," or misspelling the client's name. Proofreading errors create inferences about the attorney's legal analysis.
- Do not duplicate numbers (for example: "There are three (3) reasons . . ."). It is unnecessary and interrupts the reader's concentration, even if only momentarily.
- Do not request an oversized brief and make the same point ten times. The point was taken the first time.
- Excessive underlining or italicizing loses its intended effect.
- Inflammatory, disparaging language is not persuasive and raises questions as to the attorney's credibility.

*Columbia Law Review Ass'n *et al.*, eds., *The Bluebook, A Uniform System of Citation* (18th ed., Harvard Law Review Association, 2005).

reviews for abuse of discretion; contending an agency's factual findings are erroneous is not helpful if the Court reviews for no competent evidence in the record.

➢ Second, analysis should be complete. A complete analysis includes all necessary facts and law and minimal unnecessary facts and law, provides sufficient background information, and requests specific relief. Additionally, if the issue on appeal is one of first impression, an attorney should provide minority and majority views, and advocate for adoption of one view.

➢ Third, analysis should flow logically from one limited inference to another. An analysis that takes one or two large logical steps rather than several small ones is more difficult to follow and easier to refute, because there is potential for elements of the analysis to be missing.

➢ Fourth, analysis should not be conclusory; that is, the analysis should offer convincing reasons for its conclusion. For example, the following statement is conclusory: "CRS § 13-17-201 requires the court to impose attorney fees when a party brings a frivolous action. Therefore, the court was required to grant attorney fees in this case." Using the word "because" can repair a conclusory sentence. For example, "Therefore, the court was required to grant attorney fees in this case because the appellee's action was frivolous for reasons *x*, *y*, and *z*." Always consider whether the reasons supporting the conclusion have been addressed.

➢ Finally, analysis should distinguish the opposing party's brief. Ignoring issues raised by the opposing party may effectively concede them. Again, if possible, rest the distinction on precedent rather than policy or expansion of the law.

Addressing the Law

Briefs should include all pertinent law the judges will need to decide each of the contentions. If Colorado law is dispositive, use it. For an issue of first impression, other states' laws and federal law may be persuasive. The Tenth Circuit is more persuasive than other circuits; federal appellate circuits are more persuasive than federal district courts; and state supreme courts are more persuasive than state intermediate courts. String cites are helpful only occasionally, such as when providing majority and minority views of how other jurisdictions have decided an issue of first impression.

Citing cases accurately is imperative. Over-generalizing or mischaracterizing the holding of a case will cause an attorney to lose credibility. Pinpoint cites assist the judges both to review cases and cite them in turn. A brief's Table of Authorities is useful when it accurately references where in the briefs authorities are cited.

Providing law in attachments to briefs can be helpful. If a statute has changed, attach a copy of the older statute. Copies of pertinent administrative rules and regulations relied on in a brief are useful, because they can be difficult and time-consuming to find.[3]

Presenting the Facts

The Statement of Facts must be accurate, but also should be persuasive. It should give the reader background and provide facts needed to understand and analyze the issues. For clarity and ease of reading, name the parties by role (victim/defendant; buyer/seller) rather than by "appellant/appellee."

Each factual sentence should cite to the record. Judges and law clerks check record cites for accuracy. In many cases, they read the entire record, but if the record is particularly voluminous, accurate record cites are even more important. The Court has no duty to search through the record for supporting evidence; that is counsel's responsibility.[4]

Finally, well-prepared and catalogued exhibits are preferred to poorly organized and unmarked exhibits. Attorneys may attach copies of crucial exhibits to the briefs.

Prioritizing Procedure

Often a case turns on a procedural point. Include a relevant procedural history of the case in the Statement of the Case. Judges often begin by considering the procedural posture of the case, which may control the legal analysis. Be sure to address the pertinent rules of civil procedure in the brief.

Other Common Mistakes

Follow the standards of C.A.R. 32, "Form of Briefs and Appellate Documents." This rule gives directions on formatting the briefs and providing basic document information.

Typographical and grammatical errors make the reader suspicious of the legal analysis. Legal writing should be clear and succinct.[5] Read the brief aloud, and ask others to read it, including a nonattorney, such as a spouse or adolescent. If the brief sounds complicated, keep drafting and revising. Strong legal writing makes complex issues simpler.

A reply brief should address the arguments of the answer brief, not repeat material from the opening brief. Also, the Court of Appeals does not consider issues raised for the first time in the reply brief.[6]

Conclusion

The Colorado Court of Appeals serves a unique role as a decisional court handling a massive volume of appeals. Attorneys who understand this role, and who consider the suggestions this article makes for writing effective briefs, stand to build greater credibility with the Court and have a greater chance of success on appeal.

Notes

1. CRS § 13-4-106.
2. *People v. Salazar*, 964 P.2d 502, 507 (Colo. 1998); Crim.P. 52(b).
3. C.A.R. 28(f).
4. *Castillo v. Koppes-Conway*, 148 P.3d 289, 291 (Colo.App. 2006).
5. *See* Armstrong and Terrell, *Thinking Like a Writer: A Lawyer's Guide to Effective Writing and Editing* (2d ed., Practising Law Institute, 2003).
6. *People v. Medina*, 72 P.3d 405, 409 (Colo.App. 2003). ■