APPELLATE BRIEFWRITING: SOME "GOLDEN" RULES

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Reading the parties' briefs in preparation for oral argument constitutes a major part of a federal appellate judge's work. In the sixteen years since I was appointed to the Eighth Circuit, the caseload of the court has increased fourfold, with the result that my colleagues and I will each read in the neighborhood of 25,000 pages of briefs each year. My experience with thousands of briefs, amounting to tens of thousands of pages, leads me to offer a few suggestions to the briefwriter as to what judges, as briefreaders, may look for in a brief. I have formulated eight simple suggestions for the briefwriter. I deem these rules of substantial importance and choose to call them "Golden Rules."

At the outset, I emphasize the several different purposes that briefs serve during the course of a typical appeal. As a preliminary matter, the briefs give the court some idea of the complexity, difficulty, and importance of the case. This initial perception influences the court's decision as to how much time to allow for the oral argument of the case. (In those cases where it appears from the brief that no oral argument is necessary, the briefs take on added importance as the parties' sole means of appearance before the court). Both in preparation for oral argument, and afterward as an aid in writing the opinion, good briefs constitute an invaluable resource for the court. A persuasive argument in a brief may well find its way into the court's opinion as part of the rationale of a decision. Better briefs can therefore improve not only the prospects of the litigants, but also the work of the court. Let us now examine these "Golden Rules."

RULE 1. APPEAL ONLY AN APPEALABLE ORDER

Surprisingly often, lawyers' arguments on the merits of a case, the court's time, and the client's money, are wasted because an

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The author of this article acknowledges with thanks the valuable editorial assistance of Assistant Dean Barbara Gaskins of the Creighton University School of Law and John M. Loder, law clerk for Judge Bright.
appeal has been taken from a non-appealable order. With some exceptions, the jurisdiction of the federal courts of appeals extends only to final decisions of district courts. Similar limits on appealability apply to direct appeals from the decisions of administrative agencies.

Verifying the appealability of an order and the timeliness of an appeal is, of course, primarily the responsibility of the appellant, but appellees owe it to the court to point out any jurisdictional defects they may perceive. Remember that the court remains free on its own motion to dismiss any appeal over which it lacks jurisdiction.

RULE 2. EXAMINE THE RULES

The submission of briefs in the federal appeals courts is governed by the Federal Rules of Appellate Procedure (in particular Rule 28) and by the local rules of each circuit. State appellate courts have their own rules for the submission of briefs. Lawyers owe it to their clients and to the court to study the applicable rules before they file a brief in any court of appeals.

Typically, the rules will set forth the court's expectations as to the order of contents, length, style, and appearance of briefs. One of the requirements in the Eighth Circuit, for example, is that the appellant append to her brief "a clearly legible copy of the district court opinion or administrative order from which the appeal is taken."

The rules of court pertaining to the submission of briefs tell litigants in fairly specific terms just what kind of written submissions the court will find most helpful. Courts find it inconvenient, to say the least, when litigants submit briefs that fail to conform to the standards set out in the rules. I especially warn counsel against violating the letter of the restrictions on length of briefs by exceeding the page limit, or the spirit of the rule by using smaller type or closely-spaced footnotes to cram into the permissible number of pages more than would otherwise fit there. (Indeed, the

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3. See 8th Cir. R. 12(b) (appellee may file motion to dismiss docketed appeal on the ground that the appeal is not within the jurisdiction of the court).

4. See, e.g., Lawrence County, South Dakota v. South Dakota, 669 F.2d 27, 32 (8th Cir. 1982).

5. 8th Cir. R. 8(g) (7).
use of small type and closely-spaced footnotes containing textual material is often counterproductive because it makes the brief difficult to read. The length limitations exist not to encourage the conservation of paper but to induce lawyers to keep their presentation concise. In appropriate cases, counsel may obtain leave of the court to submit an overlong brief, but without such leave, counsel would do well to observe the specified limits.

RULE 3. LIMIT THE ISSUES ON APPEAL AND STATE THOSE ISSUES WITH CARE

Within my experience, most appeals turn on one or two or three substantial issues. I believe the advocate in a civil appeal usually disserves his client by raising more than a very few issues. If an appellant can't win on the strength of the strongest claim or claims, he stands little chance of winning a reversal on the basis of weaker claims. The need to concentrate on a very few strong claims is partly a matter of directing the court's attention, during the increasingly limited time available for the consideration of the typical case, to the truly crucial issues. But it is also partly a matter of not obscuring the crucial issues by concealing them amid a thicket of minor or subsidiary claims. The court needs to know just where the heart of the matter lies; distracting attention from the most important issues can hardly help an appellant's cause.

Once the appellant's lawyer has identified the strongest issues, counsel should take care to state them clearly and forcefully. Again, it pays to heed the rules of the particular appeals court, which usually have something to say about the form in which the issues should be stated. Though the rules of some courts require a very general statement of the issue (e.g., "Did the trial court err in failing to grant summary judgment?") others, including the federal courts of appeals, require or prefer a more specific statement (e.g., "Was there a material issue of fact as to whether the contract had been revoked, which precluded summary judgment?"). In the Eighth Circuit, the rules also require the citation, with the statement of each issue, of the most apposite cases and constitutional and statutory provisions. In general, I believe that the more specifically informative the statement of issues, the more helpful it will be to the court, though, of course, the statement of issues should be kept concise. At its best, the statement of issues will focus the court's attention on the precise points of controversy, giving the

6. In a criminal case, by contrast, the lawyer's obligation extends to raising every arguably meritorious issue for the client.
briefreader a clear introduction to the legal issues at stake before he ever begins to read the body of the brief.

RULE 4. STATE THE FACTS OF THE CASE FAIRLY AND ACCURATELY

No part of the brief is more important than the statement of facts, for however much the court may know about the applicable principles of law, it knows nothing of the facts of the case before the lawyers submit their briefs. The statement of facts should, in addition to giving the relevant procedural background of the case, relate the legally relevant facts in a logical order. (Chronological order is often the best). The statement of facts should be supported by precise references to the record. Briefwriters should avoid giving a mere summary of the various witnesses' testimony in the order in which they appeared at trial. The purpose of the statement of facts is not to rehash indiscriminately the trial testimony, but rather to organize the facts of the case in such a way as to focus on the issues on appeal. The statement should give enough information so that the court understands generally what the lawsuit is about, but should omit anything that is unnecessary either for a general understanding of the suit or for the development of the precise issues on appeal. Detailed evidence on the issues in the case is often better saved for the argument section of the brief than set forth in the statement of facts, where it tends to distract from the flow of the narrative. Keep in mind that, on appeal from a fully tried case, the court accepts the version of disputed facts that supports the judgment.

Above all, keep the statement of facts concise. Avoid rambling. Appeals courts these days rarely have time to search the record for error, nor are they obligated to do so. Instead, the court relies on the briefs to make the parties' cases. A statement of facts that fails to focus on the issues on appeal, or that fails to make the nature of the case clear to the court, disserves both the court and the client.

Finally, don't misrepresent the facts. The other party will rarely hesitate to set the record straight. A lawyer never advances the client's case by attempting to mislead the court.

RULE 5. EVERY PART OF THE BRIEF IS IMPORTANT

Eighth Circuit Rule 8(f) requires a brief to contain, in addition to a statement of issues, a statement of facts, and the argument,

7. See Rebuck v. Vogel, 713 F.2d 484, 487 (8th Cir. 1983).
the following: a summary and request for oral argument, a table of contents, a table of authorities cited, a summary of the argument (if the brief runs over twenty-five pages), and a conclusion. Each of these portions of the brief serves an important purpose.

The summary and request for oral argument should give the court, in very brief form, an indication of the nature, complexity, and importance of the case, to help the court determine how much oral argument time the case requires. In my view, the appellant should virtually always request oral argument; an appellant's waiver of oral argument practically invites the court to affirm summarily the result below.

The tables of contents and of authorities cited can give the court great practical help in writing the opinion by permitting the court an easy reference point to the place or places in the brief where a particular case, statute, or constitutional provision is discussed. The better tables of contents summarize the argument portion of the brief in outline form, giving the numbers of the pages on which each topic in the outline is discussed.

The conclusion of the brief is so important that I make it the subject of a separate rule:

RULE 6. TELL THE COURT WHAT TO DO WITH THE CASE

The conclusion should tell the court exactly what the litigant wants done with the case. Ordinarily, the appellee simply wants the court to affirm the result below. But the appellant may request any of a number of different results—reversal, remand, vacation, modification, a new trial, dismissal. It often takes the mystery out of a case if the appellant will only tell the court just what relief he wants.

RULE 7. WRITE CLEARLY AND UNDERSTANDABLY

Though I cannot here offer a complete course in effective legal writing, I do have a few suggestions:

After you write a paragraph or a sentence, try to put yourself in the position of someone who knows nothing about your case. Would what you have written make sense to such a person?

Ask someone who doesn't know your case to read what you have written. Does he or she understand what you wrote?

Keep things clear. Use short, uncomplicated sentences where possible. Favor the active over the passive voice.

Explain the law to the court. Don't merely cite cases and ask the judge to search out the law. The judge preparing for oral argu-
ment rarely has time to read all the cases cited. The judge wants a clear statement of the legal principle for which a cited case stands, not a minute dissection of the facts of each case cited. Brief quotations from leading cases often do the best job of getting the precedential point across.

Write in English, not legalese. Avoid foreign words and phrases, including those timeworn Latin maxims.

And as a matter of substance, as much as style, put your client's best foot forward. Stress the most appealing elements in the client's case, remembering that a human factor is at work in the decisional process. If your client is a widow with six children and the adverse party is a large corporation, it doesn't hurt to bring those facts to the court's attention.

RULE 8. EDIT, EDIT, EDIT

Good legal writing is mostly rewriting. Edit your work for clarity. Excise the redundant. Check the accuracy of your statements and citations. Proofread your brief before you submit it. And, to save yourself embarrassment and the court frustration, make sure the pages are all there, in order, right side up, without duplications or blanks.

In conclusion, I emphasize the importance of the brief in any appeal. Generally, the brief that best helps the court understand the case is the brief that best serves the client's cause. Following the eight Golden Rules can lead, I believe, to better briefs. And better briefs can lead to better appellate decisions.8