LAW360

Portfolio Media. Inc. | 111 West 19th Street, 5th floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

The Key To Turning Solid Briefs Into Winning Briefs

By **Andrew Nichols** (February 25, 2022, 6:09 PM EST)


Andrew Nichols

I once heard an esteemed appellate litigator, who now sits as a federal circuit judge, make a striking confession.

Speaking to a large audience, he said that when he first began practicing, he was bothered by the new insights he gained during moot courts before oral argument. Why couldn't he get those moot-court insights when writing his briefs? But it just kept happening. And so, he concluded that briefer's remorse — my name for it — was inevitable.

Even if you're not an appellate lawyer, maybe you've experienced similar revelations — say, while doing jury research, or during your own moot courts on dispositive motions. Preparing for open court, especially with the help of outsiders, does tend to enlarge the mind.

The problem is, at least with motions and appeals, by then it's often too late. The court has the briefs filed without the benefit of your new insights.

Making matters worse, courts often rely heavily on the briefs.

Consider the vast number of motions and appeals — some 80% in the federal system — that never see argument in the first place. Surveying such statistics, the American Bar Association journal Litigation recently dubbed this phenomenon "the disappearing oral argument."

Why is this happening? U.S. Circuit Judge Joseph Greenaway Jr. has no doubt:

> It is the waning skill of wordsmithing that is most responsible for the disappearance of oral arguments. … How do you make the prospect of oral argument seem intriguing? That is the skill that is lacking.[1]

He continues, bluntly:

> We judges are not our brothers' keepers. We are asked to resolve cases correctly and with alacrity. If you want more oral arguments, make us do it! Compel us, persuade us, even cajole us. … Make your brief the tool of persuasion. If you do, maybe you will see me in court.[2]

But say you do see him — or his counterparts — in court. Even when they hold arguments, judges naturally show up leaning one way or another. And in some busy courts, judges seem to be coming to the bench with their opinions already written. Cases are literally prejudged.

Briefer's remorse, then, can be costly. Can anything be done to avoid it?

Yes. Before you file, run your draft past people who haven't been drinking the Kool-Aid. We do this as litigators all the time in other contexts. Before a big trial, we do extensive jury research. Before a big oral argument, we hold multiple moot courts.

Why wouldn't we do a variation of the same thing with our briefs, when so much rides on them?

Most judges are what U.S. Circuit Judge Frank Easterbrook calls busy generalists.[3] Both words matter.

Judges are busy, which typically means they're impatient. And they're generalists, which usually means they aren't experts in your area of law or your client's industry.[4]

So, find some busy generalists of your own and invite their honest, systematic feedback. I'm not speaking here of recruiting actual judges, but rather lawyers — and especially litigators.

Be sure that they know little to nothing about the case, so that, like the court, they're not tainted. And again, include in the mix people outside your area of law and your client's industry.

Now give them a draft of your brief.

Ask them to start with the writing. Does the argument unfold clearly in the table of contents? Are the main themes plain from Page 1? Does the prose carry the reader along, or does she have to keep backtracking to untangle hard sentences? Does the draft rely on industry jargon and obscure acronyms? Are the verbs vivid? Are the metaphors apt? Is it plain what you want the court to do? And the list goes on.

Incidentally, a useful tool for improving your drafts is software called BriefCatch, which suggests edits based on the collected wisdom of active judges.

But the goal is not merely a well-written brief. The goal is a winning brief. And there's a world of difference between a well-written brief and a winning brief.

A well-written brief can be a dead-bang loser if, for example, it omits telling facts, makes tone-deaf legal arguments, or ignores the practical implications of the result you're seeking.

So your busy-generalist readers should ask themselves:

- Was I left with any basic factual questions?
- Did the draft anticipate and answer my objections, legal or otherwise?
- Did the legal authority seem thin in any spots? Which ones?
- Was the argument too aggressive, or not aggressive enough?
- Did the result sought make good policy sense? And if not, did the draft explain why it's not the court's job to set policy?
- Was I comfortable with how that result would work in practice?
- Did I think of arguments that might strengthen the draft?
- Does the draft avoid needless concessions? And did it make all needed concessions?
- Does the draft's approach suit this particular court?

To incorporate feedback, you'll need to build a little time into the schedule. But there's no reason all this can't be done quickly, discreetly and at low expense.

It doesn't take long to read and comment on a draft brief. You need enough readers to produce reliable results.

With each battle-testing, the brief will grow more powerful. You and your client will look good. Most importantly, your case will look good.

So, avoid briefer's remorse. Take steps now to get that view of the brief you'll have later, when you're staring at those moot-court judges. But do it while there's still time to improve the draft and impress

the court. Because that impression may well be all you'll get.

Andrew Nichols is a shareholder at Charis Lex PC.

[1] Hon. Joseph A. Greenaway Jr., The Disappearing Oral Argument: A Judge Comments, Litigation, Winter 2022, at 42.

[2] Id. at 43.

[3] Hon. Frank H. Easterbrook, Friedman Lecture in Appellate Advocacy, 23 Fed. Cir. B.J. 1, 3 (2013).

[4] Andrew C. Nichols, Three Principles for Strengthening Any Brief—or Email, Certworthy, June 2018, at 1–2.
