

“HELPFUL HINTS” ON APPELLATE PRACTICE

Judge Stanley F. Birch, Jr.

United States Court of Appeals Eleventh Circuit

Atlanta, Georgia

1. Preserve Your Record by making a Proffer, Objection or Motion at Trial.

2. Keep it Short: The Length of a Brief Does Not Determine its Quality.

The brief should be written in a straightforward manner. Relevant case law should be cited, preferably case law binding in this circuit. Cases not binding in this circuit need not be cited unless there is no applicable precedent in this circuit, or unless the nonbinding case is more analogous factually and analytically. Do not use five words where two will suffice; do not use a “two-dollar word” where a “ten-cent word” is adequate and more understandable; and avoid string cites. Get to the point, make your argument, and draw your conclusion. Remember that weak arguments may detract from stronger ones, so be wary of including every conceivable argument. Using the “shotgun” approach could cause you to “shoot yourself in the foot” (or worse).

3. In the Table of Authorities, place an asterisk (*) in the left margin next to those cases upon which principal reliance is placed and so note at bottom of the page.

Although not dictated by any format, you may wish to place parenthetically after each citation the issue number, corresponding to the issue in your Statement Of Issues, to which that case is applicable.

4. Realize the importance of the Summary of Argument section of your brief.

Many judges turn initially to this section of the brief. This section should be written after your argument sections are composed. Synopses each of your arguments, preferably under brief subheadings, in simple, straightforward sentences explaining the result that you desire and the reason therefor. Do not cite cases unless you do so by footnote so as not to break the flow of your presentation.

5. Emphasize the standard of review in arguments when it works to your advantage.

If the court of appeals can reverse for abuse of discretion, or plain error only, that fact is as important as the burden of proof in the district court. In your briefs and at oral argument, remind the panel when the presumption to uphold the district court favors you.

6. Refer to parties by name.

Throughout briefs, do not refer to the parties as “appellant”, “plaintiff,” “respondent” or any combination thereof. In the first paragraph, it is helpful to identify the appellant in relation to that party’s position in the district court (plaintiff or defendant). Thereafter, it is confusing to refer to the parties generically.

7. Record excerpts and accurate record cites are essential.

Many of the cases on appeal have voluminous records, and judges will read the record. Misstatements of the record are not appreciated and detrimental to the misstating attorney’s case. Every material factual statement in a brief should be followed by a documenting cite to the record.

8. Avoid rambling and unclear factual recitations.

Many cases involve complicated factual situations, such as interlocking companies or the functioning of industries unfamiliar to the court. Judges are not experts in every field, although they must decide technical cases. Attorneys assist the court in explaining factual circumstances in a coherent, understandable manner. Generally, a chronological recounting of the facts is the most logical method of presentation. It is imperative that the facts in any case be recited to the court accurately. You may argue the facts as you desire, by explaining motivation for certain actions, for example. An accurate recitation of the facts is necessary for a correct application of the law. Unexposed facts, particularly ones that may be determinative as to the law, can be as damaging to your case with the court as improper legal arguments.

9. Never cite a case for a particular proposition unless that case actually supports your argument.

If an argument is taken out of context, or an irrelevant case is used merely to bolster an

argument with some authority, a serious risk is run of destroying an attorney's credibility with the court. When an argument is novel or otherwise unsubstantiated, it is better to present that argument without authority. Use analogous cases with parenthetical explanation where appropriate. A questionable analogy may be a creative argument, while misrepresenting the holding of a case is indefensible and counterproductive. While you may use inferences, please tell the court that you are so doing. Do not take a quotation or argument out of context, use dicta*, or rely on an inference which could jeopardize the court's view of a case. Judges look to counsel to provide accurate quotations as bases for their arguments. Do not be memorable to the judges for misleading the court on the governing law.

10. Focus on the strongest argument(s).

Frivolous arguments should not be made because they weaken the attorney's position. The argument should be discussed clearly, concisely and persuasively without stretching the argument or the applicable law.

11. An attorney should not ignore an argument raised by the other party.

The brief should address the other party's arguments and supporting cases cited therein. An attorney should demonstrate the reasons that an opposing argument is frivolous. If counsel finds an argument convincing, counsel should concede that point and focus on counsel's strongest arguments(s). This will cause the review court to respect that attorney's credibility.

12. Proofread briefs carefully.

Typographical, grammatical, compilation (i.e.. pages out of order, repeated, or not legible) and spelling errors detract from your legal arguments, If an attorney is careless in the presentation of arguments, then he to she might also not be logical and thorough in legal reasoning and analysis. For example, one judge mentioned at oral argument that counsel had discussed federal and state "comedy" in his brief rather than "comity." All cases must be cite checked. Incorrect citations are annoying, particularly if volume and page numbers have been transposed, and the case name also is misspelled.

13. Strictly adhere to the footnote and page length requirements.

See 11th Cir. R. 32-1, 32-3. All footnotes in briefs should be double-spaced, excepts for lengthy quotations. See 11th Cir. R. 32-3(c). (“Quoted material in the text and footnotes consisting primarily of quoted material and citations may be single-spaced.”).

14. Know the trial record.

In cases involving appeals from trials, it is likely that the judges will question counsel regarding proceeding at trial, such as whether a particular objection was made. It is unhelpful and frustrating to the court when the response to such a question is: “I am sorry, your Honor, I do not know. I was not the trial attorney.” If someone other than the trial counsel is arguing the case, then he or she should be completely familiar with the trial transcript so that such questions may be answered. If a judge asks a question concerning the trial that is not apparent from the brief, then that question is likely to be important in deciding the case. Therefore, it is important that it be answered for the court, at oral argument, or subsequently, with permission of the panel.

15. Be prepared to answer questions.

An attorney arguing a case before a panel should be aware that most of counsel’s allotted fifteen minutes generally will be spent responding to questions. When addressing a question, an attorney should answer the question directly and, thereafter, explain the response. Counsel should expect questions posed by the judges based on hypothetical situations. In response, explain the reasons for finding the hypothetical applicable or inapplicable. Panel questions usually are straightforward because the judge has a particular problem with the facts or your legal argument. An evasive response gives the impression that you are being less than candid. The astute attorney should realize that the judge asking the question actually is helping the counsel by directing him to the aspect of his or her case that is troubling for the judge. By clarifying that point for the inquiring judge, counsel benefits his or her case appreciably by addressing a fact or applied point of law that may be decisive.

16. Sarcasm and indignation are not substitutes for hard and cold logic.

17. Discourage your clients from attending oral arguments.

I have seen clients die the proverbial “thousand deaths” as the panel challenges and interrogates each party’s counsel on the legal theories of the case. Why put your clients through such a proceeding where legal issues predominate?

18. The appellee should be aware of all grounds supporting the district court’s favorable ruling on summary judgment.

Because an appellate court can affirm the grant of summary judgment on any ground argued before the trial court, an appellee should always address the presented, but unruled-upon grounds as well as the grounds relied upon by the trial court. See generally, Wright, Miller & Kane, Federal Practice and Procedure Civil 2d, § 2716 at p. 658 (1983).

19. Do not waste valuable space on well known legal standards and concepts.

Given the length restrictions on briefs, do not waste the court’s time or your time in exhaustively reciting the well-known legal standards applicable to the issues in your case (i.e., summary judgment standards, the employment discrimination shifting burdens, etc.). A couple of lines followed by citations to explanatory cases are enough. Use the limited space you have to talk about your case — we all know the other.

*See *New Port Largo, Inc. v. Monroe County*, 985 F.2d 1488, 1450 (11th Cir. 1993) (Edmondson, J., concurring) for a discussion contrasting “dicta” and “holding.”