HOW TO LITIGATE SUCCESSFULLY IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

THE HONORABLE JOEL F. DUBINA*

The principal purpose of this article is to offer some practical advice on how to be successful when prosecuting an appeal in the Eleventh Circuit. At the same time, I hope that some of the advice offered will be helpful to law students who are constantly trying to improve their speech and writing skills.

Since my appointment to the United States Court of Appeals for the Eleventh Circuit on October 1, 1990, many changes have occurred in the manner in which the court conducts its business. These changes have frequently caused problems for the practitioner who litigates in the Eleventh Circuit. Most of the changes that the court has adopted are a direct result of the court's increased caseload. Court filings escalated in the last few years from 4,371 in 1990 to 6,110 in 1997.[1] Yet, the number of active judges on the court remained constant at twelve.

Assume that you represent a party in a lawsuit pending in federal district court. Ultimately, the case is resolved adversely to your client. You discuss with your client the option of whether to appeal to the Eleventh Circuit Court of Appeals. Appeals are time-consuming and costly, and no certain guarantee of getting a favorable decision for your client from the appellate court exists. Nonetheless, you and your client make the decision to take the case to the Eleventh Circuit Court of Appeals. How do you proceed? What is required? What can you expect?

When I was a young lawyer attending a CLE seminar in Montgomery, which I like to think was not too many years ago, I heard my mentor and colleague, Judge John C. Godbold, lecture on appellate advocacy. One of the statements that he made left a profound impression on me. Advising his listeners on how to proceed when they had a question about what to do in perfecting an appeal, he said, "READ THE RULES!" The foremost

---

* Judge, United States Court of Appeals for the Eleventh Circuit. Judge Dubina originally presented this article as a lecture at a Civil Rights and Government Employment Claims Seminar in Montgomery, Alabama, on June 9, 1998. The article then appeared in Volume 29 of the *Cumberland Law Review*. Other than minor changes and statistical updates, the article below is re-printed in its original form.

[1] For the twelve-month period ending March 31, 2017, 8,050 cases were initiated in the Eleventh Circuit.

advice that I can offer is be sure you read Federal Rules of Appellate Procedure 28,[2] 29,[3] and 32,[4] and Eleventh Circuit Rules 28-1[5] and 28-2[6] before you begin writing an appellate brief for submission to the Eleventh Circuit Court of Appeals. Having said that, let us consider what I think is the single most important factor in appealing your client's case: the writing of the appellate brief.

In 1998, the Eleventh Circuit disposed of approximately 72.9% of all appeals without oral argument.[7] According to the latest statistics, that figure has now increased to approximately 89%.[8] These percentages are significant. They demonstrate that appealing a case to the Eleventh Circuit does not mean that the lawyer will automatically be able to argue his or her case orally before the court. Therefore, in my view, the brief is the *single* most important aspect of appellate advocacy.

Before discussing brief writing in some detail, I think that a quick explanation of how cases in the Eleventh Circuit are screened and disposed of without oral argument is important.[9] Non-argument cases, which we

---

[2] FED. R. APP. P. 28. Federal Rule of Appellate Procedure 28 sets forth the requirements for a federal appellate brief. *Id.* Sections (a), (b), and (c) list the requirements for the content of the appellant's brief, the appellee's brief, and any reply brief. *See id.* Sections (d) through (f) discuss the appropriate procedures for various references contained in briefs. *See id.* Although Rule 28 does provide some limitations and guidelines for appellate briefs, a prudent attorney should also consult Eleventh Circuit Rules 28-1 and 28-2, as well as pertinent Eleventh Circuit Internal Operating Procedures for additional requirements and restraints on brief content and length. Violation of any of the format rules will result in the rejection of the brief. *See* 11TH CIR. R. 28 I.O.P. (1) (authorizing and instructing the clerk to "reject [any] such documents which do not comply with FRAP and circuit rules").

[3] FED. R. APP. P. 29. Federal Rule of Appellate Procedure 29 enunciates the requirements for an amicus curiae brief. *Id.* An attorney who files an amicus curiae brief in the Eleventh Circuit should also refer to Eleventh Circuit Rules 29-1 and 29-2 for local rules regarding amicus curiae briefs. Failure to comply with the relevant rules may result in the rejection of the brief submitted. *See* 11TH CIR. R. 29 I.O.P. (stating that "[t]he clerk has authority to refuse the submission of any amicus brief which does not comply with FRAP or circuit rules").

[4] FED. R. APP. P. 32. Federal Rule of Appellate Procedure 32 discusses the appropriate form of briefs, appendices, and other papers filed in the appellate courts. *Id.* A careful attorney will consult not only Rule 32, but also the Eleventh Circuit Rules and corresponding I.O.P.s. *See, e.g.*, 11TH CIR. R. 32-1 (form of papers); 11TH CIR. R. 32-2 (pro se papers); 11TH CIR. R. 32-3 (brief covers); 11TH CIR. R. 32-4 (form of briefs).

[5] 11TH CIR. R. 28-1 (listing the limitations on length of briefs).

[6] 11TH CIR. R. 28-2 (setting forth brief content requirements).

[7] *See* Eleventh Circuit Monthly Statistical Report, July 1998.

[8] *E.g.*, Kevin Golembiewski & Jessica A. Ettinger, *Advocacy Before the Eleventh Circuit: A Clerk's Perspective*, 73 U. MIAMI L. REV. 1221, 1227 (2019).

[9] Federal Rule of Appellate Procedure 34 allows the circuits to limit oral arguments pursuant to a local rule if a unanimous three-judge panel opines that oral argument is not needed. FED. R. APP. P. 34; *see also* 11TH CIR. R. 34-3 (authorizing the three-judge panel to send a case to the non-argument calendar if: "(1) the appeal is frivolous, or (2) the dispositive issue or set of issues has been recently authoritatively determined, or (3) the facts and legal

judges refer to as "screeners," are cases that three judges decide without hearing oral argument from the parties' lawyers.[10] Screeners are the bread and butter of the Eleventh Circuit Court of Appeals. Both active and senior circuit judges sit on screening panels.[11]

Once an appeal has been perfected and all briefs and the record have been filed,[12] the case is sent to an initiating judge of a three-judge panel.[13] The initiating judge's responsibility is to review the case and either draft an opinion or classify the case for oral argument.[14] In order for a case to be disposed of without oral argument, all of the judges on the screening panel must agree to the proposed opinion that the initiating judge drafted, unless the parties expressed a desire not to have oral argument.[15] Any judge on the panel possesses the power to reject the proposed opinion and classify the case for oral argument.[16] After the classification of a case for oral argument, the initial judge's proposed opinion goes with the screening

---

arguments are adequately presented in the briefs and record and the decisional process will not be significantly aided by oral argument").

[10] *See* 11TH CIR. R. 34-3(e) (authorizing a three-judge panel to serve as a screening panel). Eleventh Circuit Rule 34-3(a) indicates that the screening process was established to increase efficiency in the disposition of cases and to increase cost efficiency. 11TH CIR. R. 34-3(a). The I.O.P. to Eleventh Circuit Rule 34 explains the screening process as follows: Screening and Non-Argument Calendar. When the last brief is filed a case is sent to the office of staff attorney for prescreening classification. If the staff attorney is of the opinion that the appeal of a party does not warrant oral argument, a brief memorandum is prepared and the case is returned to the clerk for routing to one of the court's active judges, selected in rotation. In cases involving multiple parties, the staff attorney may recommend that appeals of fewer than all parties be decided without oral argument but that the appeals of the remaining parties be scheduled for oral argument. If the judge to whom an appeal is directed for such consideration agrees that the appeal of a party does not warrant oral argument, that judge forwards the briefs, together with a proposed opinion, to the two other judges on the screening panel. If a party requests oral argument, all panel judges must concur not only that the appeal of that party does not warrant oral argument, but also in the panel opinion as a proper disposition without any special concurrence or dissent. If a party does not request oral argument, all panel judges must concur that the appeal of that party does not warrant oral argument. 11TH CIR. R. 34 I.O.P. (1).

[11] *See* 11TH CIR. R. 34-3(f).

[12] See Federal Rules of Appellate Procedure 10 and 11 for the requirements of the content and modifications of the record on appeal, the transcript of the proceedings, and the duties of all parties involved in the preparation and distribution of the record. *See also* 11TH CIR. R. 10-1 (setting forth additional duties of the appellant and appellee in ordering the transcript); 11TH CIR. R. 11-2 to-3 (discussing the duties of the clerk in the certification, preparation, and transmission of the record and accompanying exhibits).

[13] *See* 11TH CIR. R. 34-3(f).

[14] *See id.*

[15] *See* 11TH CIR. R. 34-3(3) (stating that a decision without oral argument "must be unanimous, and no dissenting or special concurring opinion may be filed").

[16] *See id.* ("If at any time before decision a judge on the non-argument panel concludes that oral argument is desired, that appeal will be transferred to the oral argument calendar.").

package to an oral argument panel.[17] Most screener opinions are unpublished despite the ability of the authoring judge to require publication if he or she chooses to do so.

Screening is important, not only because it is the method by which the vast majority of appeals in the Eleventh Circuit are disposed, but also because screening is the way in which the oral argument calendars are filled during the year.[18] As screeners are classified for oral argument and returned to the clerk, those cases are placed on oral argument calendars.[19] Because the Eleventh Circuit disposes of more than two out of three cases without oral argument, one can easily see why the brief becomes so critical.

Before you begin to write a brief, I offer several suggestions. First, organize your thoughts and think about what you want to say to the court. Define the issues in your mind, and as you think about what the issues are, reduce your ideas to writing. A definition of the issues is important because the formulation of issues determines which facts are material and what legal principles govern. If you represent the appellant, you must review the record for possible grounds of error. If there is a transcript of an evidentiary hearing or trial, you need to read it in its entirety.

No one right way of writing a brief exists. Anyone undertaking to announce authoritative rules of good writing invites debate and comparison. In a leading text on good writing, the authors acknowledged that "[s]tyle rules . . . are, of course, somewhat a matter of individual preference, and even the established rules of grammar are open to challenge."[20] An exclusive style of writing does not exist. However, good writing can be distinguished from poor writing, and I can assure you that appellate judges appreciate the former. A few characteristics of bad writing are worth discussing.

Most lawyers write too much. More often than not, they try to convey too much information and cover too many issues.[21] Lawyers fail to separate the material from the immaterial. When writing a brief, a lawyer should say no more and no less than he or she needs to say. A brief should express ideas accurately, briefly, and as clearly as possible, leaving little room for inappropriate interpretation. Precision is the main concern of

---

[17] *See generally* 11TH CIR. R. 34-3.

[18] *See* 11TH CIR. R. 34-4 (describing the oral argument calendar).

[19] *See id.*; *see also* 11TH CIR. R. 34 I.O.P. (1) ("If a determination is made that oral argument should be heard, the appeal is placed on the next appropriate calendar, consistent with the court's calendaring priorities.").

[20] E.B. White, Introduction to William Strunk, Jr., THE ELEMENTS OF STYLE xi, xv (3d ed. 1979).

[21] *See* John C. Godbold, *Twenty Pages and Twenty Minutes—Effective Advocacy on Appeal*, 30 SW. L.J. 801, 807–810 (1976).

good writing. Many legal writers lack the ability to write simple, straightforward prose. In order to write with clarity and precision, the writer must know precisely what he or she wants to say and must say that and nothing else. Frequently, lawyers have a tendency to overgeneralize. When lawyers are not sure of a legal principle or how to state it precisely, they decide to cover up by using vague expressions.

Of course, painstaking and thoughtful editing is essential for precise writing. This means going over the brief, sentence by sentence, and eliminating the surplusage. A sound brief is the reflection of a logical process of reasoning from premises through principles to conclusions. Good organization will be like a road map to the judges, enabling them to follow from the beginning to the end without getting lost. Unfortunately, many lawyers engage in poor organization before beginning to write.
I, along with many other appellate judges in the United States, often refer to the ABC's of legal writing.[22]

A. Is the Writing Accurate? In other words, is the writing correct and free from error? Lawyers should never disagree with what the record states. The record either says something or not. Lawyers should be familiar with the record and should never misrepresent it to the court. The brief should be straightforward and honest. Amazingly, many lawyers make jury arguments in their briefs, in an effort to try their case before the appellate court, rather than legal arguments. A lawyer should not embellish and exaggerate in the Eleventh Circuit.

B. Is the Writing Brief? "Concise" is defined as "marked by brevity of expression or statement: free from all elaboration and superfluous detail."[23] Similarly, "precise" means "sharply defined or stated."[24] The terms "concise" and "precise" are critical to the writing of a good appellate brief. An attorney should express only what is essential in the fewest number of words. "A sentence should contain no unnecessary words, a paragraph no unnecessary sentences, for the same reason that a drawing should have no unnecessary lines and a machine no unnecessary parts."[25]

Many lawyers believe that every brief must use the entire allotment of pages; some believe this to be true even in simple one-issue cases that only require 15 to 20 pages at most. Astonishingly, a small percentage of lawyers file motions to exceed the page limitations, which are almost always denied.[26] Although not one excess word should be used, the writer

---

[22] *See* Judicial Opinion Writing Manual, A.B.A. (1991).
[23] *Concise*, WEBSTER'S NEW COLLEGIATE DICTIONARY (9th ed. 1991).
[24] *Id.* at 926.
[25] William Strunk, Jr., THE ELEMENTS OF STYLE 23 (3d ed. 1979).
[26] Eleventh Circuit Rule 28-1 requires that motions seeking to exceed the page limitations on briefs be filed at least seven days before the due date. 11TH CIR. R. 28-1. However, Rule 28-1 also explicitly states that "[t]he court looks with disfavor upon motions to exceed

should not make the brief so short as to be incomplete and inadequate. Lawyers need to explain their reasons sufficiently so that the court can follow what they are trying to say. A brief that omits steps and reasoning essential to understanding will fail to serve its purpose.

The lawyer needs to re-read and edit the brief thoroughly to determine whether the brief is repetitious. The brief needs to be pared down by reciting only essential facts, necessary cases, and significant dates. A lawyer should omit dates unless they are material and relevant to the issue in the case. One should cite only cases from the United States Supreme Court and the Eleventh Circuit, unless no authority from either of those courts exists, and then one may refer to cases in other circuits. A lawyer should not be a slave to the Bluebook[27] and should shorten citations when possible. One should also use arabic numbers for numbers greater than nine. Footnotes should be used sparingly because many times they are unnecessary, detract from the brief, and make it more difficult to read and understand. A prudent attorney can save many pages of text simply by following these rules.

C. Is the Writing Clear? Nothing is worse than reading an appellate brief and wondering what in the world the lawyer is writing about. Some appellate briefs that I have read made me wonder if the opposing lawyers were writing about the same case. Sometimes the briefs literally seem to pass in the night. Remember, the brief is to help the court, not confuse it. Writing succinctly forces the lawyer to think with precision by focusing on what he or she is trying to say.

Surprisingly, many appellate briefs that we see in the Eleventh Circuit, even from good lawyers, contain bad grammar. Obviously, incorrect spelling and punctuation destroy clarity and distort the intended meaning.

Before discussing oral argument and changes that have occurred in oral advocacy over the past eight years, I want to emphasize again that the brief is the single most important aspect of appellate advocacy. Indeed, I suspect that in the future, as the court's caseload continues to climb, more and more cases will be decided without oral argument. Consequently, the brief will be even more significant.

In the past eight years, we have seen a fundamental change in the dimensions of appellate advocacy in the Eleventh Circuit. One dimension, time for oral appellate arguments, has become increasingly shorter. In our circuit, screening panels of judges presently class oral argument cases as a class III or IV.[28] The only difference between a class III case and a class

---

the page limitation and will only grant such a motion for extraordinary and compelling reasons." *Id.*

[27] THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (20th ed. 2015).

[28] In the Eleventh Circuit, "[t]he clerk attempts to balance the calendars by dividing the appeals scheduled for oral argument among the panels by case type . . . ." 11TH CIR. R. 34 I.O.P. (3)(b).

IV case is the time allotted for oral argument. When I first joined my colleagues on the court, we allotted twenty minutes per side for a class III case. Presently, counsel for each side is allotted fifteen minutes to argue a class III case and thirty minutes to argue a class IV case. The pressures of time have also changed two other dimensions: formality and the nature of the participation by the bench. Because time for argument has been so sharply reduced, the judges on the panel cannot expect to learn everything they need to know by sitting back and listening to counsel merely narrate the case. If the judges are bothered about something, they bring up the matter before the allotted time expires. Thus, an advocate cannot safely expect to be able to complete a nicely prepared set of formal remarks.

Since my appointment to the federal bench, I have had the pleasure and honor of judging many moot court competitions in various law schools in the United States. In my view, many of the law schools fall far short of addressing the contemporary conditions of presenting a case to a federal appellate court. From personal experience, the fact that law students on moot court teams are often simply expected to narrate the facts and then speak for a rather lengthy period of time on a pre-assigned and pre-announced set of issues astounds me. This emphasis on mere narration is unlike anything I have seen while deciding real disputes in the Eleventh Circuit.

I have participated on some panels where the lawyers, after introducing themselves, are questioned and never get to present any of their prepared remarks. Because of the reduction in time, the appellate bench in our circuit does not passively listen; they do actively question the lawyers. The judges do not ask questions to intimidate counsel but do so in an effort to get to the heart of the case before time expires. If a case is important enough to be scheduled for oral argument, something about that case was either troubling to the screening panel, or so complex that the screening panel believes oral argument will be helpful to the court.[29] Therefore, rather than becoming exasperated with the active questioning from the bench, attorneys should be grateful for an additional opportunity to advocate a client's position.

Before arguing a case, counsel should recognize that the judges have read the briefs and the record excerpts and are generally familiar with the issues in the case.[30] However, counsel should not anticipate that the judges know everything about the case because in most cases the judges do not have an opportunity to read the complete record.

My personal view of oral argument is that, in certain types of cases, it is a waste of time. For example, the court does an excellent job of

---

[29] *See generally* 11TH CIR. R. 34.

[30] *See* 11TH CIR. R. 34 I.O.P. (6) (mandating that judges read the briefs prior to oral argument).

screening out the easier cases, but every now and then one slips through the cracks. Oral argument can, however, make the difference in a close case. Since I have served on the court, oral argument has changed my initial view of how an appeal should be decided in no more than ten percent of the cases.

Some of my colleagues disagree with me about the importance of oral argument. I confess that I have seen cases where a good oral argument compensated for a poor brief and saved the day for that particular lawyer's position. I have also seen effective oral argument preserve a victory in a deserving case.

The following are 16 simple suggestions that should help a lawyer achieve success in orally arguing a case:

(1) Be courteous and polite.
(2) Get right to the issues.
(3) Don't dwell on the facts.
(4) Answer the judges' questions directly and precisely.
(5) Learn to overcome fear.
(6) Cite to Supreme Court authority and Eleventh Circuit authority.
(7) Check slip opinions the day before oral argument to see whether recent law impacts your case.
(8) Keep in mind that the brief is critical.
(9) Know the standards of review.
(10) If you represent the appellee, track the argument of the appellant.
(11) Know the record.[31]
(12) Don't make a jury argument.
(13) If you represent the appellee and the district judge committed error, you will do better to admit it and argue that it was harmless.
(14) When concluding your argument, tell the court what you want.
(15) Educate and teach the court.
(16) PREPARE!

In this article, I have attempted to point out several significant changes that have taken place in the Eleventh Circuit Court of Appeals in this decade. I suspect that, with the increase in caseload and the present debate raging in this country on whether a cap should be put on the number of Article III judges in the United States, courts will continue to create

[31] *See* Brookhaven Landscape & Grading Co. v. J.F. Barton Contracting Co., 676 F.2d 516, 520 (11th Cir. 1982) ("It is the responsibility of counsel representing both appellant and appellee to discuss intelligently any portion of the record which may be relevant to a disposition of the issues on appeal.").

innovative ways to deal with the myriad of problems facing federal appellate courts.[32] Indeed, as this article is being written, there is a comprehensive study in progress to consider a complete restructuring of the federal appellate courts in the United States.[33] Congress mandated this study approximately one year ago and, as of this writing, no recommendations had been made.[34] Only time will tell where all of this may lead.

The suggestions in this article are the result of my fifteen years of experience on the federal bench. I hope that they will be helpful not only to the federal practitioner, but also to law students who someday will appear before federal appellate courts.

---

[32] *See, e.g.*, Carl Tobias, *Suggestions for Studying the Federal Appellate System*, 49 FLA. L. REV. 189 (1997).

[33] *See* Commission on Structural Alternatives for the Federal Courts of Appeals, Pub. L. No. 105-119, § 305(a), 111 Stat. 2440, 2491–92 (1997) (explaining that one of the functions of the Commission is to "report to the President and the Congress its recommendations for such changes in circuit boundaries or structure as may be appropriate for the expeditious and effective disposition of the caseload of the Federal Courts of Appeals, consistent with fundamental concepts of fairness and due process.").

[34] *See id.*