



## Meeting the Reader's Needs

# Does the Quality of Appellate Advocacy Make a Difference?

By Mitchell C. Tilner

I recently came across an article reporting the results of a study designed to determine whether an appellate brief's "readability" affects the outcome on appeal. Lance N. Long & William F. Christensen, *Does the Readability of Your Brief Affect Your Chance of Winning an Appeal?* 12 J. App. Prac. & Process 145 (2011). After analyzing 882 federal and state appellate briefs and the outcomes those briefs produced, the authors concluded: "[T]he length of sentences and words, which is 'readability' for our purposes, probably does not make much difference in appellate brief writing." *Id.* at 147. Stated differently, "there was no significant relationship between readability and outcome...." *Id.* at 157.

These conclusions are consistent with the widely held view, at least among judges, if not lawyers, that appellate justice depends on the merits of a case and not on the quality of appellate advocacy. According to Justice Brennan, "[i]f the quality of justice in this country really depended on nice gradations in lawyers' rhetorical skills, we could no longer call it 'justice.' Especially at the appellate level, I believe that for the most part good claims will be vindicated and bad claims rejected, with truly skillful advocacy making a difference only in a handful of cases." *Jones v. Barnes*, 463 U.S. 745, 762 (1983) (Brennan, J., dissenting).

More recently, Chief Justice Roberts, formerly an appellate lawyer himself, has voiced similar skepticism that skillful advocacy makes a difference: "I don't understand the concept of extraordinary success or result obtained. The results that are obtained are presumably the results that are dictated or command [*sic*] or required under the law.... The results obtained under our theory should be what the law requires, and not different results because you have different lawyers." Tr. of Oral Argument at 30-31, *Perdue v. Kenny A.*, 130 S. Ct. 1662 (2010) (No. 08-970), [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/08-970.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-970.pdf).

As an appellate lawyer, I am intrigued. Is a readable brief prepared by a skilled appellate advocate no more likely to produce a favorable outcome than an awful brief? Is it true that skillful advocacy rarely makes a difference, as Justice Brennan asserted? How can I justify billing a client for the many hours spent in front of my computer screen, carefully selecting each word and massaging each sentence to produce a brief that is, if not eloquent, at least readable?

With oral arguments on the wane in many jurisdictions, appellate lawyers present themselves to courts almost exclusively through briefs. The judges who read a brief form an impression about a lawyer's skill and integrity based in part on the quality of the writing and the analysis. The judges may share with judicial colleagues their impressions of a lawyer's work, favorable or unfavorable. These impressions may inform the judges' views of a lawyer's arguments in other appeals.

And the savvy lawyer understands that while the appellate judges may constitute the principal audience for a brief, they are not the only audience. Law clerks, clients, opposing counsel, and even unknown lawyers and prospective clients who gain access to the brief through computerized research services likely will read the brief, too.

In time, brief by brief, a lawyer's reputation grows. A lawyer ultimately reaps the benefits, but so does a client. A lawyer who approaches a court with a reputation for superior appellate advocacy will afford a client the best chance of achieving at least a receptive hearing, if not a victory on an appeal.

Without question, readability and, more generally, superior appellate advocacy are important. But what makes a brief readable? What qualities distinguish it as superior?

Advice on appellate briefing is in no short supply, but most of the advice ultimately rests on one fundamental principle: write to meet the needs, expectations, and motivations of the reader. Sensitivity to the reader distinguishes the expert brief writer from the novice. The expert knows that "[t]he overarching objective of a brief is to make the court's job easier. Every other consideration is subordinate." Antonin Scalia & Bryan A. Garner, *Making Your Case: The Art of Persuading Judges* 59 (2008).

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An appellate brief is not a novel; the reader does not expect to be entertained or kept in suspense. But like a novel, a brief must engage the reader.

An appellate brief is not a law review article; the reader does not expect commentary on arcane legal principles tangentially related to the issues on appeal. But like a law review article, a brief must demonstrate a lawyer's command of the subject.

The reader of an appellate brief expects to receive all the information needed—and no information not needed—to understand the issues and the pertinent law quickly and to decide the case efficiently and fairly. The reader expects sentences without needless words, paragraphs without needless sentences, and briefs without needless, meritless, or repetitive arguments. The reader expects arguments written in plain English with proper grammar and without

outmoded legalisms and archaic expressions. And the reader expects a lawyer to adopt a civil, professional tone and to resist the inevitable temptation to impugn the trial judge or opposing counsel.

An expert brief writer strives to meet the needs of the reader by producing readable briefs of superior quality. That lawyer knows that his or her reputation, if not the success in a single appeal, depends on it. 