

**TEN TIPS FOR EFFECTIVE BRIEF WRITING
(AT LEAST WITH RESPECT TO BRIEFS SUBMITTED TO JUDGE MICHAEL)**

I was once asked (OK, I once wished that I had been asked) what judges look for in written submissions. After considerable thought, and with some trepidation, I have tried to set some general principles down in writing. What follows is a list of ten ideas/suggestions for your consideration. I do not purport to speak for any of my colleagues; this list, for better or worse, is my own.

1. Remember, your goal is to persuade, not to argue. We all have had people come up to us at cocktail parties or family reunions and say, “You know, I would make a good lawyer because I just love to argue.” Those statements could not be further from the truth. Guests on the Jerry Springer show argue. Lawyers persuade. The idea behind an effective brief is to have the audience (the judge and/or the law clerk) read the brief and say to themselves, “why are these parties fighting over such an obvious issue?”
2. Know thy audience. Most bankruptcy judges write and publish opinions. The first thing anyone should do when they begin writing a brief is find out whether the judge that will decide their case has already written on the issue. The bankruptcy judges in the Northern District make it easy for you; we both have indexes of our published opinions on the Court’s website. We publish those opinions in order to give you some idea of what we have done and why. We try to be consistent. It is extremely frustrating (and remember, a frustrated judge is not easily persuaded) to have counsel in either written or oral argument raise an issue and be completely ignorant of the fact that we decided that issue in a published opinion last week, last month or last year. It is also embarrassing, both for you and for us. In addition, if your judge also serves in an appellate capacity (i.e. as a member of the Bankruptcy Appellate Panel), you might want to take a look at those opinions as well.
3. Know thy circuit. We are bound by published decisions of the United States Court of Appeals for the Tenth Circuit. If they have disposed of an issue, we must follow their lead. I know this sounds obvious; however, on more than one occasion, I have had an attorney ask me to follow a decision from another circuit which is directly contrary to controlling Tenth Circuit authority. I can’t do that, even if I wanted to.
4. Know the facts of the cases you cite. At the writing of this little ditty, there are almost 300 volumes of West’s Bankruptcy Reporter. Suffice it to say that some judge, somewhere, sometime has written and published an opinion which contains the magic words which support your position. It is extremely tempting to insert that quotation (I call them “sound bites”) into your brief and say, “see, judge, other courts agree with me so I must be right.” This is a dangerous practice. Courts decide real disputes. Real disputes are fact driven. For me, the facts of a case are at least as important as the legal analysis. Be wary of the case which is factually dissimilar to yours, but has a great sound bite. Be sure (either in your brief or at oral argument) to explain why the factually

dissimilar case is applicable to your situation. Also, be cognizant of the difference between the holding of a case and the dicta contained therein. Most judges (this one included) find little value in dicta unless we already agree with it.

5. Shorter is better. Thurgood Marshall once said that in all his years on the Supreme Court, every case came down to a single issue. If that is true, why do most briefs contain arguments covering virtually every conceivable issue (good, bad or indifferent) which could arise in the case. Weak arguments detract from the entire presentation. If you feel compelled in a particular case to include everything including the kitchen sink, maybe you ought to take another look at settling the case.
6. Quality is Job One. Check your cites. Make sure they are accurate and that each case you are relying on is still good law. We do. There is nothing more frustrating than being unable to find a case because the citation contained in the brief is wrong. There is nothing less persuasive than finding out that a case you have cited to us has been overruled or misquoted. These flaws weaken your entire presentation.
7. Present the facts of your case accurately. In most (if not all) bankruptcy cases, the judge is the finder of fact. If you are submitting a pre-trial brief, don't allege facts that you cannot prove. As a corollary, don't forget at trial to prove up the facts you promised to prove up in your brief. If you are submitting a post-trial brief, make sure the facts are in the record. (I know this sounds too basic to merit discussion. This advice is based upon experience. There have been several occasions where an attorney has forgotten to prove up an element of his or her claim. If you don't believe me, just take a look at the list of published opinions on the web site.)
8. Tell me exactly what you want. It seems simple, but it isn't. Every brief (and motion, for that matter) should conclude with a statement telling the judge exactly what you want done in the particular case. We need to know.
9. Leave the venom at home. I have yet to meet a judge who enjoys reading a brief filled with hostility toward and/or personal attacks upon the other side. Whether you like (or get along well with) your opposition has little to do with the merits of a particular case. The most effective attack you can make is to persuade (there's that word again) me that the other side is wrong. Remember, if you win, they lose. Isn't that enough? Words like these:

ridiculous

scurrilous

ludicrous

preposterous

blatant

self-serving (come on, all evidence and argument is self-serving)

nonsensical

do not help you. Don't use them.

10. Seek reconsideration sparingly. I have been surprised by the number of motions to reconsider which counsel file. For a while, they seemed to be almost automatic after every adverse decision, although they have slowed somewhat. If we spend 50 or more hours researching and writing an opinion (which is not uncommon), why would one expect us to change our mind unless there is an obvious and egregious error. Most motions to reconsider are a waste of everyone's time. If you don't like the decision, appeal. It is your right. We don't take offense if you exercise it.

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