6 Things To Leave Out Of That Brief

By **Natalie Rodriguez**

Law360, New York (September 11, 2014, 7:59 PM ET) -- A crisply written brief can ultimately help win an argument, but it's easy to drive up word counts with unnecessary case law or bombastic language when laying out an impassioned case.

When writing a brief, the goal is to give the judge a succinct and persuasive summary of everything he or she needs to know to decide a motion in your favor. But all too often it's easy for attorneys to get in their own way by cluttering up briefs with unnecessary information.

“Attorneys just fall in love with their own words and have a hard time cutting what should be cut,” said Dave Catuogno of Forman Holt Eliades & Youngman LLC. “But nothing is worse than having a bored reader. A judge might start skimming and potentially miss important points … hidden in the verbosity.”

Here are the top elements to take an ax to, according to attorneys:

Long Introductions and Repetitive Background

One easy place to get caught up in long-winded tangents is right at the beginning of a brief.

“Introductions should generally be a page. If you make the introduction too long, the rest of the brief becomes very repetitive because you’re making the same arguments and stating the same things,” said Jeff Huron, a litigator with Dykema Gossett PLLC.

Instead, focus on creating an introduction that gets to the point and sets the stage for your upcoming arguments.

"People have a tendency to raise all the facts and that's almost always not necessary," said Dominic F. Perella of Hogan Lovells, who has briefed cases for the U.S. Supreme Court. He added that the factual background that is included should be written to help guide the court toward your ultimate argument. "It keeps it short and ... the court already knows where you're going.”

Attorneys should also be wary of including information that has already been covered in past briefings.

“When you’re several motions into a case, a lot of attorneys will add background that the court has read a thousand times already,” Dykema's Phu Nguyen said.

But that can often be a waste of writing real estate. Rather than doubling the size of the brief with information that you’ve already presented, point the court back to your previous submission in a sentence, then draw the court back to the present issue, attorneys suggest.

Or if you prefer to try to make the pleading as self-contained as possible, at least try to condense your prior points, Catuogno said.

“The caveat to that is be careful to not leave something out where someone could say you don’t have a complete record,” he noted.

Footnotes and Block Quotes

When writing a brief, try to avoid adding in footnotes or block quotes whenever possible. Instead of adding to an argument, they usually draw attention away for the main focus.

“Somebody here once said footnotes are like commercials: They’re annoying and they interrupt,” said Thomas A. Muccifori, a partner and litigator with Archer & Greiner PC.

Plus, while it can be tempting to stuff extra information into footnotes, it's better to cut things out and write a little more crisply, attorneys noted.

"When you have an important, salient point and you have them in a footnote or big block quote, it messes up the flow of how the reader reads the brief," said Carson Sullivan, an employment partner with Paul Hastings LLP.

Instead, make it a point to try to incorporate the information that would have gone into a footnote into the main text or ask yourself if it can be ditched altogether.

"I like to go through and say, 'OK, can I move this to the text or eliminate them altogether?' I try to get to a place where I have very few substantive footnotes," Perella said.

Take that same kind of persnickety attitude toward block quotes, which can use up valuable page space given the indentations and cloud the point of a brief if not used judiciously.

”More than four or five lines and you're going to lose your reader," Sullivan said. "Pick the best one and use it. And even then, highlight or bold the most operative part because it could get lost in the quote.”

Extra Arguments and Common Standards

One bad habit often formed in law school is the tendency to want to point out every issue and track down every argument that could be related to a case, just as one would for a law exam, Muccifori noted. But when appearing before a judge that is going to have a hundred other motions to wade through that day, you want to go in with your best arguments only.

And while there are some cases that require extensive explanations of facts, generally if you find yourself talking about another case for more than a paragraph or two you've done way too much, according to Sullivan.

In most cases, you don't need to cite the entire procedural posture of the cases you are discussing, Sullivan noted.

Also, avoid that other law school-ingrained habit of explaining the legal standards that might be related to your case unnecessarily. “We all know what the standard is. Why are you wasting this time?” Muccifori said, adding that it's one habit that could annoy a judge.

Muccifori would know — his father was a New Jersey state court judge who would vent at home about lawyers who regurgitated the law.

Tangential Attacks on the Opposition

Yes, litigation can be hostile.

But as a professional it's your job to rise above vitriolic attacks, so leave the venom at home, Muccifori noted.

Even when adversaries do lousy things and you feel vindicated in unloading on them, it's important to rein yourself in, Catuogno said. Not only does it take up valuable space, but it could diminish your standing before judges.

“They’re going to think you’re too emotional, too biased, and therefore you don’t have credibility,” Muccifori said.

Also try to avoid using briefs as a place to air out grievances in an attempt to let the court know that you’re having trouble with the other side.

Particularly in discovery disputes, it can be easy to fall into he said, she said back-and-forth, but it's important to avoid making personal attacks on opposing counsel, Sullivan noted.

Adjectives, Adverbs and Bombastic Language

Alongside keeping your attacks in check, avoid sprinkling your brief with adjectives or adverbs that are confrontational or derisive, attorneys note.

“If every description of your opponent's argument begins with ‘preposterously’ or ‘outrageously,’ the judge simply won't take your characterizations seriously, and those words are wasted. Don't call arguments frivolous unless they really are, and the court will pay more attention,” said William Jay, co-chair of Goodwin Procter LLP’s appellate litigation practice.

Even less barbed adjectives or adverbs should be sliced off. When you’re making a lot of exaggerated statements, you can lose credibility as the case goes on, Nguyen said.

“They are good for occasional emphasis, but for the most part they kind of clutter things up," Perella said.

Legalese and Double Negatives

Although you probably invested quite a bit in your legal education, using a ton of legalese in briefs won’t endear you to the court and will likely diminish the effectiveness of your argument, several attorneys noted.

“Don’t use 25 cent words for the sake of using 25 cent words,” Catuogno said. “You’re not going to impress the judge... [and] the last thing you want is someone having to grab a dictionary.”

That’s what happened to an associate that once worked with Muccifori and insisted on using an arcane term when “beyond dispute” would have worked just as fine — something that the judge called the younger lawyer out on.

“The goal is clarity. Don’t use legalese if you can avoid it, and don’t use double negatives,” Muccifori said. “When the reader has to stop and think about [what you’re getting at], you take away from telling your story.”