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5 Things To Leave Out Of Your Next Brief

By **Jeff Zalesin**

Law360, New York (November 10, 2015, 2:00 PM ET) -- Lawyers may pride themselves on knowing what to put into a court filing, but knowing what to leave out can be just as crucial to a winning strategy, experts say.

To be sure, there's nothing wrong with making a thorough and forceful argument. But judges are too busy to put up with wasted words, so it's important not to cross the line into excessive detail or even melodrama.

"In my experience, judges who have hundreds of cases on their dockets don't always pay as close attention to what's on page 53 as they do to what's on page two," said John Goldman, a partner at Herrick Feinstein LLP. "Generally, I think litigation submissions are too long and can be a lot tighter."

Here, attorneys tell Law360 what you should cut from your next brief if you don't want to put the judge to sleep, or worse.

Information Overload

Evan Tager, a Mayer Brown LLP partner who frequently argues in federal appeals courts, said he has seen appellate briefs that retell the case's procedural backstory in minute detail, including developments with no relevance to the question facing the court.

Tager recalled reading one brief that told the appellate panel about pretrial status conferences, scheduling stipulations and jury selection.

"This was a particularly absurd and obscene illustration, but even when it's not that extreme, a lot of times people don't think carefully about what's necessary to be in there and what's just going to lengthen the brief and burden the court," he said.

The procedural background section isn't the only part of a brief that lawyers tend to overstuff, Tager said. It's also common for attorneys to say too much about the facts of the case.

Goldman echoed that point, adding that he tries to cover the essential points in the first three pages of a brief.

"Oftentimes, lawyers spend far too much time expanding upon the facts rather than focusing in on

what's really important," he said.

Why You Hate the Opposing Counsel

In the midst of a hard-fought case, it can be tempting to throw some insults. But Steven Zager, a partner at Akin Gump Strauss Hauer & Feld LLP, said it's better to steer clear of describing your adversary's lawyer as "economical with the truth" or some other snide label.

"In oral argument, addressing opposing counsel directly is not permitted, and the same rule ought to apply to briefing," Zager said in an email. "Most importantly, judges do not like it."

Goldman said that complaining at length about the other side's behavior can damage an attorney's credibility, especially when those gripes have nothing to do with the issue before the court.

"Calling your adversary a jerk has no place in a brief or an affidavit," he said. "A client affidavit that calls the other guy a jerk doesn't make too much sense, either. I see a lot of that, especially in state court practice."

Of course, sometimes you do get stuck across the aisle from an unsavory character whose actions could harm your client unfairly. In that case, there are ways to fight back in court, including motions for sanctions.

But even when you are asking the judge to fix a problem caused by the other side, it's important to avoid ad hominem attacks or language that could be seen as name-calling, said Rachel Krevans, a partner at Morrison & Foerster LLP. A better approach, she said, is to stick to the facts.

"If you are right that the conduct was outrageous, by the time the judge finishes reading your account of the facts, s/he will have come to that conclusion themselves — way more effective," Krevans said in an email.

A similar principle applies when your client is appealing a judgment and you need to explain why the trial court judge got it wrong, Tager said. Just like trash-talking opposing counsel, explicitly calling a judge incompetent or biased is a losing tactic, he said.

"Maybe you have to show it through illustrations, but you have to be so careful with the words you choose, because appellate judges generally don't like to see fellow members of the bench have their integrity impugned in writing," Tager said.

Long Lectures on Legal Standards

If you're briefing a motion to dismiss or for summary judgment, the judge may expect you to discuss the governing standards for that type of motion. But judges will get bored if a brief goes on for pages about rudimentary legal principles, attorneys said.

"Reciting the standards can be done a lot more quickly than a lot of lawyers do," Goldman said. "You don't need a string cite of 15 cases for the same basic proposition which has been around for a long time."

Krevans said that when deciding how much detail to provide about the controlling law, it helps to know

who the judge is.

“An experienced judge is not going to want a long section on governing law which they already know,” she said. “They want a brief recitation of the standard and then citation and discussion of any cases that are specific to the issue on point, not to all motions of that kind.”

Ross Guberman, the president of consulting company Legal Writing Pro LLC, said in an email that dismissal and summary judgment motions aren’t the only ones that get packed with “boilerplate that every judge knows by heart.” Lawyers also tend to belabor the Daubert standard, which governs the admission of expert testimony in federal court, Guberman said.

Repeated Arguments

Tager said that back in his law review editing days, he would shorten professors’ articles dramatically by eliminating redundancy. Now, he takes a similar approach to editing briefs.

“I really can’t abide seeing the same legal argument in multiple places in the brief,” he said. “The excuse is that ‘I want to make sure the court doesn’t miss the point,’ but it’s really just lazy drafting.”

According to Zager, one surefire way to make a brief repetitive is to include too much detail in the introduction. It’s preferable to leave some of the specifics for the argument section of the brief, he said.

“An introduction should be just that,” he said. “It should be concise and provide a map for your very best arguments.

Needless Words

Even if a brief is free of ill-advised arguments or redundant paragraphs, it might suffer from verbose sentences, attorneys said.

One common mistake, Guberman said, is to use the full titles of “long-winded filings and pleadings” when abbreviations would be clear enough. A filing styled “Motion for Summary Judgment as to Claim For Non-Dischargeabilty of Debt Under 11 U.S.C. § 523(a)(6)” might as well be referred to as a “summary judgment motion.”

Tager said that he often sees legal writing cluttered with unnecessary adverbs. For example, the phrase “utterly frivolous” wouldn’t lose any of its meaning if “utterly” were deleted, he said.

“How can you be more frivolous than frivolous?” he said. “We all like to put an exclamation point on stuff, but it really doesn’t add anything.”

Lawyers used to blame wordy writing on the dictation process, but now that they draft briefs on their own computers, they have only themselves to blame, Tager said.

“People write flabby, and then they don’t self-edit enough,” he said.