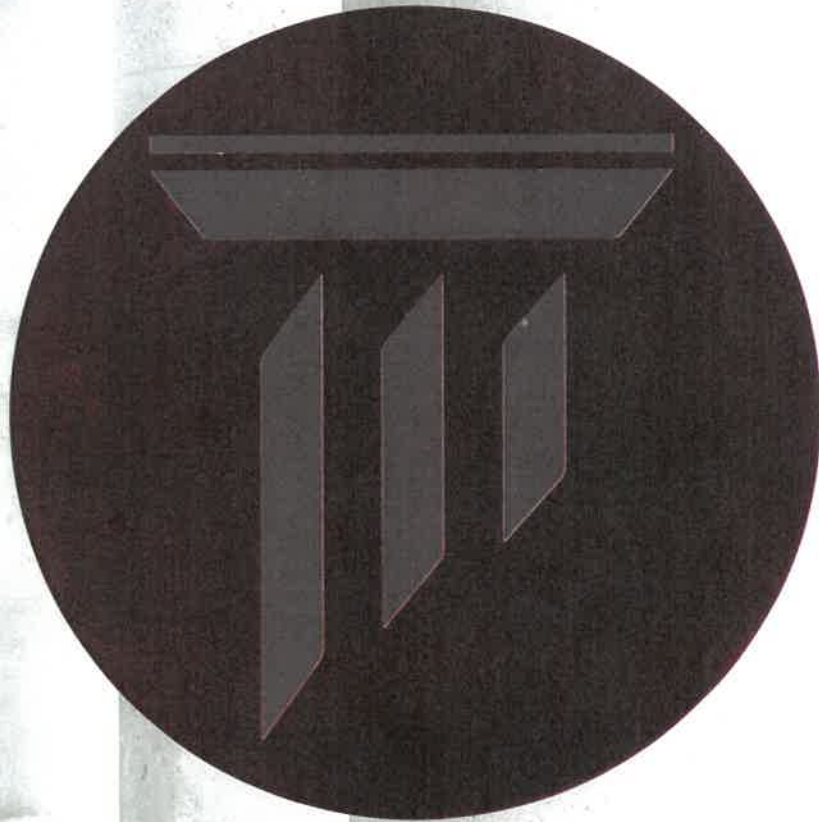


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TIPS FROM THE TRENCHES

Effective Appellate Brief Writing Whatever Does Not Help, Hurts

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Understand Your Audience

Before we delve into practical advice, first consider the workloads of Alabama's appellate jurists. Understanding the sheer volume of each judge's required reading helps illuminate why clarity, conciseness, and thoroughness of research are so very critical to their perceptions of your appellate brief and of you as an appellate advocate.

For the fiscal year ending September 30, 2024, the Supreme Court of Alabama reported 916 filings, 978 dispositions, and 330 cases pending. The workloads of each justice is staggering:

Table V

DECISIONS RELEASED

	FY 2019-2020	FY 2020-2021	FY 2021-2022	FY 2022-2023	FY 2023-2024
Palmer, C.J.					
Certiorari petitions	19	20	10	11	16
Original decisions	13	11	9	20	22
Howe, J.					
Certiorari petitions	34	31	24	39	35
Original decisions	23	26	29	32	26
Wise, J.					
Certiorari petitions	31	34	29	39	31
Original decisions	20	22	27	21	20
Grayson, J.					
Certiorari petitions	26	30	21	27	39
Original decisions	20	26	20	24	22
McClure, J.					
Certiorari petitions	34	32	22	24	29
Original decisions	23	29	24	21	26
Blackmon, J.					
Certiorari petitions	23	21	16	28	27
Original decisions	20	20	24	11	27
Stewart, J.					
Certiorari petitions	30	28	20	27	29
Original decisions	21	22	22	20	21
Simmons, J.					
Certiorari petitions	22	11	20	21	26
Original decisions	27	20	22	20	20
Cook, J.					
Certiorari petitions	26/4	26/3	26/4	28	21
Original decisions	20/3	20/3	20/3	22	24

These statistics do not reflect the following activities:

(1) cases and matters in which the Court renders decisions that are disposed of by the Court without assignment to a Justice;

(2) Justices' separate opinions in cases assigned to another Justice;

(3) Alabama State Bar disciplinary matters;

(4) administrative matters of the Court;

(5) Justices' work with various standing rules committees, commissions, and task forces;

(6) advisory opinions; and

(7) other responsibilities beyond Justices' core judicial duties.

Comparatively, the Alabama Court of Civil Appeals reported a total caseload of 1,591 cases divvied up among that Court's five judges for the fiscal year ending September 30, 2023.

Professor Joi Montiel Christoff, formerly a law clerk and then staff attorney for former Alabama Supreme Court Associate Justice Harold See, noted that each justice of our Supreme Court is tasked with the equivalent of reading and analyzing *The Bible* and *War and Peace* twenty times each year.³

It follows that when appellate judges handle hundreds of cases each year, any brief that is disorganized, too verbose, or fails to provide a clear legal roadmap imposes a substantial burden on overworked judges (and their staff attorneys and law clerks). One of the overarching themes in appellate brief writing is that counsel should strive to "spare the judge the necessity of engaging in any work, mental or physical."⁴ This does not mean you should omit the rigorous research and analysis; it means you should do the heavy lifting so the appellate judges and their staffers will not have to.

When Preparation for an Appeal Should Begin

Appellate advocacy is often perceived as an afterthought, something not to be considered until after the trial lawyer is fortunate to win a favorable verdict. This is a fundamental mistake. Successful appellate advocacy requires planning, strategic thinking and careful preservation of issues from the very inception of the case. Failure to do so leaves you vulnerable to missed opportunities, waived arguments and frustrated appellate judges. Often, the seeds of an appellate victory or defeat are sown in the earliest phases of a case.

Before filing the complaint, work with the trial team to evaluate whether the case is worth taking or defending.

Discuss how each element of your causes of action will be explored in discovery and then proven at trial. Anticipate potential discovery squabbles, evidentiary obstacles and procedural hurdles and plan how you will handle them if they arise. Seasoned appellate advocates insist upon participating at every phase of litigation.⁵

Outline legal theories that position your case for an ultimate win, not merely short-term victories in pretrial motions. Share that research with the trial lawyers and let them work on creating the appropriate record to prevail in the event of mandamus or an appeal. If you believe a certain statutory or constitutional argument will be pivotal, begin researching that argument immediately and develop a record that will support your position in the event of mandamus or an appeal.

During trial, the appellate advocate focuses on preserving issues and creating a complete record while trial counsel concentrates on fact presentation and persuasion. Properly preserving issues is not a mere academic exercise, it is a fundamental requirement. Far too often, appellate issues are lost because a party never presented the argument to the trial court or did not obtain a clear adverse ruling to appeal from. Remember, as the Alabama appellate courts repeatedly emphasize, an issue not properly preserved is typically deemed waived or not preserved for appellate review.⁶ To put it bluntly, if you fail to timely raise arguments in the trial court and obtain rulings on those issues, you can expect the appellate courts to decline to consider them.

After a verdict or judgment, appellate lawyers' insight and familiarity with appellate standards and procedures become essential for post-trial motions and defending or attacking the judgement.

Your mission is to assist the appellate court in reaching the correct result required by application of the law to the facts.

This mission-driven perspective is championed by numerous judges and legal scholars, including, for example, late Chief Judge John C. Godbold of the former Fifth Circuit Court of Appeals, who wrote in *Twenty Pages and Twenty Minutes – Effective Advocacy on Appeal*:

Judges need all the help they can get in identifying and understanding the issues, legal and factual, and reaching the right answer. They are neither all-wise nor all-seeing. Whether in his library or on the bench, the judge is trying with every ounce of his capacity to traverse the path from issue to answer. Every intellectual pore is open to receive health and guidance from what the law-

yers say and write. That guidance is most telling when there is a minimum of artificial obstacles and irrelevant diversions that impede communication. Unfortunately, lawyers erect obstacles in their own paths that impede the processes of informing and persuading the court and obstruct the judge's progress from issue to answer.⁷

The path to providing that guidance is to remove "obstacles" from your brief. The obstacles Judge Godbold mention include disorganized arguments, sloppy language, incomplete authority, and needless forays into matters irrelevant to the disposition of the issues.

When you prepare your appellate brief with the goal of making each appellate judge's job easier, you elevate your chances of prevailing on appeal.

Rule 28 and the Structure of an Appellate Brief

Rule 28 of the Alabama Rules of Appellate Procedure provides the essentials for an appellate brief. Think of each subsection as a rung on a ladder, each rung essential to get you and the court to the next step. The rule is comprehensive, covering everything from a statement regarding oral argument to the arrangement of the argument itself. Remember, conformance with these rules isn't optional, it's mandatory. The consequences of non-compliance can be severe.⁸ Ned Miltenberg, Managing Partner of the National Legal Scholars Law Firm, P.C., emphasizes the importance of strictly following the Rules of Appellate Procedure:

In order to reduce their workload, appellate judges frequently take every opportunity – and often command their clerks to research every device – to dismiss appeals without reaching the merits. For example, judges and their staffs comb briefs and appellate records to find a basis ... to decline decision due to procedural default or to shunt the case onto a summary track to a decision rendered without oral argument.⁹

Below is a practical breakdown of the rule's key elements:

1. Rule 28(a)(1) – Statement Regarding Oral Argument

This should be a short statement indicating whether oral argument is desired. More than mere boilerplate, it is an opportunity for advocacy at the outset. Some practitioners use it to give the appellate court a taste of the merits, demonstrating why oral argument is helpful—thus subtly previewing the strengths of their case. It also

does *not* count against your word limitations, so it can be used to plant seeds in the judges' minds without cost against the required sections your brief must contain.

2. Rule 28(a)(2) – Table of Contents

A disorganized brief is a burden. Your table of contents (with page references to each section, heading, or subheading) not only guides the reader but also reveals the structure and clarity of your legal analysis. If a judge can glean your entire argument's flow from the table of contents, you have done your job well.¹⁰

Professor Christoff provides guidance for drafting a productive table of contents:

First, use concise, persuasive headings. In an organized brief, the headings and sub-headings reflect a logical structure of the argument. If the judge read only your headings and sub-headings, he should be able to see what you are asking for, as well as the logical structure of your argument. Headings and sub-headings should state legal positions in sentence form, instead of merely labeling the topic of the section. Good headings 'explain where the brief is going and provide signposts along the way.' Each heading should 'bring you closer to the finish line.' For the headings to be effective, they should be clear and concise. Take time to revise them after completing the body of the argument.¹¹

3. Rule 28(a)(3) – Statement of Jurisdiction

This section is straightforward but important. Cite the statutory basis for the appellate court's jurisdiction, most often in civil litigation such as Ala. Code §§ 12-2-7, 12-3-9, or 12-3-10. Also demonstrate that your appeal was timely filed. Demonstrating early that the appellate court has proper jurisdiction is a matter of credibility.

4. Rule 28(a)(4) – Table of Authorities

This table lists each case, statute, and rule you cite, including the specific pages in your brief where the authorities appear. A thorough table of authorities signals careful research and mastery of the issues. When judges see an organized, well-cited table, they are more inclined to trust that the arguments are well-researched and thor-

ough.

5. Rule 28(a)(5) – Statement of the Case

Summarize what happened at the trial court level accurately, referencing the record. Identify the adverse rulings that are the subject of your appeal and cite their location in the record. This is not a place for argumentation. It is a concise narrative of the procedural history and how the appeal arrived at its present posture.

6. Rule 28(a)(6) – Statement of the Issues

List the specific issues presented for review. Less is often more. When you are the appellant or petitioner, argue the fewest number of issues possible. As Judge Godbold observed, multiplying issues "dilute[s] and weaken[s] a good case and will not save a bad one."¹² If you have three strong issues, do not bury them under seven weaker ones. Be selective, disciplined and strategic.

7. Rule 28(a)(7) – Statement of the Facts

Provide a "full statement of the facts relevant to the issues presented," referencing the record as required. Persuasively tell the story but do so with absolute accuracy and honesty. Do not ignore unfavorable facts, address them. Keep your factual narrative short. Overloading the court with unnecessary details only distracts from your key points.

Judge Godbold states:

"Every appellate advocate must state facts and law candidly and accurately. This is an uncompromising absolute. 'The mark of really able advocacy is the ability to set forth the facts most favorably within the limits of utter and unswerving accuracy.' Every sentence must shine with the whole truth. Even when it has been misled the court may find the correct path, but the attorney who is inaccurate or less than candid interferes with the objective of persuasion. He comes to the court saying 'please believe me and be persuaded.' If it is revealed that what he says or writes cannot be believed, he forfeits the confidence which he seeks to create. The court's distrust of him may taint his next appeal as well."¹³

8. Rule 28(a)(8) – Statement of the Standard of Review

The standard of review is crucial because it frames how the appellate court must evaluate your legal contentions. Is it *de novo*, an "abuse of discretion," or "clearly erroneous findings of fact"? Provide a concise statement here, reserving extended discussion for your Argument section if necessary. Summarizing the standard of review signals to the court the lens through which your issues must be viewed.

Former Chief Judge Emeritus of the United States Court of Appeals from the Third Circuit, Ruggero J. Aldisert, wrote about the standard of review this way:

Standards of review are critically important in effective advocacy. In large part, they determine the power of the lens through which the appellate court may examine a particular issue in a case. The error that may be a ground for reversal under one standard of review may be insignificant under another. It does not matter what you ask the court to do on appeal if the court cannot jump the hurdle imposed by the standard of review. You must craft your brief on appeal to reflect the proper standard and to show why, under that standard, your client deserves to win. If your appeal raises more than one issue, then you should state the standard of review for each point.¹⁴

9. Rule 28(a)(9) – Summary of the Argument

Typically no more than two to five pages, it should present a succinct condensation of your argument. Some judges read the summary first, so clarity here is paramount. Present your key points plainly, anticipating that the reader has not yet reviewed the record or your argument in detail. We often wait until the entire brief is nearly finished before then attempting to craft a succinct but forceful summary of the argument.

Professor Christoff writes:

As the brief writer, you probably will write the summary of the argument last, but a judge may read it first – before he reads the argument. Thus, the challenge for you as the writer is to write the summary so that it is clear and understandable to a judge who has not yet read your argument section. One trick is to set aside your brief for a few days, and write your summary after you have not looked at your argument for a while. You are less

likely to write it in a way that assumes familiarity with the argument section.¹⁵

10. Rule 28(a)(10) – Argument

"The heart of any appellate brief is the argument, the requirements of which are governed by Rule 28(a)(10). It is well settled that this court will not consider issues for which no legal arguments are developed and for which no authority is offered to support the appellant's contentions."¹⁶ Put differently, an argument without authoritative support is no argument at all.

It is not the court's role to perform legal research for an appellant. When an appellant fails to support his arguments with any legal authority, this Court will not address those arguments. Therefore, a well-crafted brief should focus on thoughtful legal arguments, thoroughly researched, and presented in a civil tone.¹⁷

Provide pinpoint citations, follow The Bluebook or ALWD standards, and do not rely on appellate judges and their staff to do your research for you.

Appellate courts expect professionalism, collegiality, and focus on legal issues, not personal jabs or *ad hominem* attacks. The Alabama Supreme Court has decried attorneys who used appellate filings or rehearing applications as "bully pulpit[s]" to vent personal frustrations.¹⁸

For example, in *Prudential Ballard Realty Co. v. Weatherly*, the court described how counsel's baseless accusations of impropriety reflected a "dangerous method of appellate advocacy."¹⁹ The Court stated that such "childish behavior is uncivil and beneath the members of a professional bar association."²⁰

11. Rule 28(a)(11) – Conclusion

End with a crisp, direct statement of the relief sought. If you are the Appellant, you might say, "For these reasons, Appellant respectfully requests that the judgment below be reversed and the case remanded for further proceedings consistent with this Court's opinion." If you are the Appellee, a simple "The judgment should be affirmed" may suffice. State your requested relief and then stop.

12. Rule 28(a)(12) – Certificate of Service

Provide the names and addresses of all counsel (or *pro se* parties) upon whom the brief has been served as required by Rule 31(b).

13. Rule 28(b) – Brief of the Appellee/Respondent

Importantly, Rule 28(b) clarifies that the Appellee's brief should conform to these same requirements, except the Appellee need not supply jurisdictional statements or statements of the case, issues, facts, or standards of review, unless dissatisfied with how the Appellant handled them.

Careful, thorough, purpose-driven editing is the hallmark of effective appellate writing. The process of refining each word, phrase, and sentence to ensure clarity is not merely an exercise in stylistic preference; rather, it is the linchpin of persuasive advocacy. Indeed, the difference between a muddled argument and a concise, impactful one often rests on the writer's willingness to strip away extraneous language and communicate in plain English.

Senior United States Court of Appeals Judge for the Eleventh Circuit, Joel Dubina, wrote:

"[P]lainstating and thoughtful editing is essential to 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."²¹

By embracing a disciplined approach to drafting and organization, lawyers can present courts with a streamlined path from the initial premises to the final conclusions, thereby focusing judicial attention on the merits of the case rather than on the mechanics of the brief.

Word Limits and Formatting

The Alabama Rules of Appellate Procedure impose strict formatting, word count, and pagination requirements for briefs, reflecting the appellate court's expectations of precision and compliance in legal submissions. Ala. R. App. P. 28 (j)(1) provides:

Except in cases in which the death penalty has been imposed, a principal brief may not exceed 14,000 words (70 pages for a principal brief filed *pro se*), and a reply brief may not exceed 7,000 words (35 pages for a reply brief filed *pro se*). The word or page limitation applies to all portions of the brief beginning with the statement of the case, including headings, footnotes, and quotations, but excepting the cover page, a statement regarding oral argument, a table of con-

tents, a statement of jurisdiction, a table of authorities, any certificate of compliance, the signature block, the certificate of service, and any appendices and exhibits. Pages in the brief must be numbered using Arabic numerals, with pagination beginning with the cover of the brief; however, a page number shall not appear on the cover of the brief.

Ala. R. App. P. 32(a)(7) requires that the font of all documents, including footnotes, filed in the appellate court must be set in Century Schoolbook 14.

Additionally, Ala. R. App. P. 32(c) specifically excludes certain items from length calculations, such as the cover page, statement regarding oral argument, table of contents, statement of jurisdiction, table of authorities, signature block, certificate of compliance, addendums of statutes/rules/regulations, exhibits, or appendices. Thus, if you intend to push the word limit, you must be diligent in accurately counting words and excluding only what the rule permits.

Bear in mind, if you cannot follow the rules on format, margins, and word limits, a reviewing court may question your ability to adequately analyze the law or present the facts.

Conclusion

A well-written appellate brief is the product of thoughtful planning from the moment you first consider taking a case, continuing through trial, and culminating in the final acts of drafting, editing and revisions. At each stage, you must preserve issues, think strategically, and remain ever mindful that your ultimate goal is to assist the appellate court in reaching the correct result required by application of the law to the facts.

Moreover, you must do so with professionalism and adherence to the Alabama Rules of Professional Conduct, remembering that you are an officer of the court entrusted with advancing the fair administration of justice. Civility, clarity, thoroughness and candor are your tools and weapons.

Given Alabama's appellate caseload, our justices and judges rely on the diligence and expertise of appellate practitioners to help them reach the required results. The better you can articulate your position, cite proper authorities, and demonstrate that the law supports your request for relief, the greater the likelihood that your client's position will prevail.

As you embark on your next appellate brief, heed the wisdom of Judge Dubina's "ABC's of legal writing"²², be accurate, be brief, and be clear, and remember that every

superfluous word or muddled argument is a self-inflicted wound. **Whatever does not help, hurts.** Approach each brief with the mindset that your mission is to equip the court with exactly what it needs (and nothing it does not) to reach a sound, just resolution. This is the very essence of effective appellate brief writing.

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- comply with Rule 28(a), Ala. R. App. P.).
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 - 11 Id.
 - 12 John C. Goldbold, *Twenty Pages and Twenty Minutes – Effective Advocacy on Appeal*, 30 SMU L. Rev. 801, 809 (1976).
 - 13 Id. at 816-817 (quoting F. Wiener, *Briefing and Arguing Federal Appeals*, p. 49 (1967)).
 - 14 Ruggerio J. Aldisert, *Winning on Appeal – Better Briefs and Oral Argument*, 5 5.2 pp.56-57 (2d Ed. 2003).
 - 15 Joi Montiel Christoff, *Your Appellate Brief: An Obstacle Course for the Court or a Clear Pathway to Your Conclusion*, 73 Ala. L. 344, 348 (2012) (She cites as authority former United States Supreme Court Justice Antonin Scalia and Bryan A. Garner, *MAKING YOUR CASE: THE ART OF PERSUADING JUDGES* at 97 (Thomson/West 2008), who state that some judges consider the summary of the argument to be "indispensable – indeed the most important part of the brief."
 - 16 May v. May, 292 So. 3d 385, 388 (Ala. Civ. App. 2019).
 - 17 Guthrie v. Fanning, 329 So. 3d 1, 3 (Ala. 2020) (citations omitted).
 - 18 Prudential Ballard Realty Co. v. Weatherly, 792 Ala. So. 2d 1045, 106, 2000).
 - 19 Id.
 - 20 Id.
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(Endnotes)

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- 2 With special thanks to Mr. Hunter T. Hyderally, Sophomore, Auburn University (pre-law) and aspiring future attorney.
- 3 Joi Montiel Christoff, *Your Appellate Brief: An Obstacle Course for the Court or a Clear Pathway to Your Conclusion*, 73 Ala. L. 344 (2012).
- 4 Ned Miltenberg, *I Get By With a Little Help From My Friends: Why it Makes Economic Sense to Consult With an Appellate Coach or Other Specialized Counsel in High-Stakes Cases or When Confronted With Novel or Complex Issues*, Manuscript © 2014 (reproduced with permission of the author).
- 5 (Citing Mortimer Levitan, *Confident Chat on the Craft of Briefing*, 4 App. Prac. & Process 305, 310 (2002)). Id
- 6 See J.S. v. J.C., 181 So. 3d 1067, 1069 (Ala. Civ. App. 2015).
- 7 John C. Goldbold, *Twenty Pages and Twenty Minutes – Effective Advocacy on Appeal*, 30 SMU L. Rev. 801, 808 (1976).
- 8 May v. May, 292 So. 3d 385, 389 (Ala. Civ. App. 2019) (The appellate court awarded an appellee \$1,500 to be paid by appellant's attorney for failing to



David Wirtes, Jr.

Dave works behind the scenes on strategic planning, legal issues, and appeals. Dave's efforts over the past forty years have helped protect working men and women in Alabama and throughout the country in ways most will never know: he has won many battles against unfair "tort reform" laws such as indiscriminate caps on recoverable damages, special immunity statutes, and other efforts intended to deprive people of their constitutional rights to trial by jury and an adequate remedy for their injuries and losses. Dave is admitted to practice before all state and federal courts serving Alabama and Mississippi, the Fifth and Eleventh Circuit Courts of Appeals, and the Supreme Court of the United States. He has been rated by his peers as "AV" (preeminent for ethical standards and legal abilities) as shown at martindale.com.