

Appealing to Judicial Snap Judgment

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Why do intuitive, gut reactions to limited information so frequently turn out to be correct? That is the subject of a new book, *Blink: The Power of Thinking Without Thinking*, authored by *New Yorker* staff writer Malcolm Gladwell. In it, Gladwell explores the subconscious mind's gift for reaching correct conclusions without having all of the relevant information or time for analysis. More anecdotal than analytical, the book is replete with examples, including a tennis coach who can tell before a tennis racket strikes the ball whether the server is going to commit a double-fault, and a psychologist who can watch a 15-minute video of a married couple, with no other information, and predict with 90 percent accuracy whether the couple will still be married 15 years later.

While lawyers and legal scholars could have a healthy debate about the accuracy of snap judgments made in the heat of legal battle, there is no debating that judges are frequently forced to make such judgments out of necessity. With growing caseloads and small staff size, overburdened courts across the country struggle to stay on top of their dockets. It is not uncommon for an intermediate state court appellate judge to author as many as three opinions per week, in some instances without the benefit of a personal, full-time law clerk. Unlike an

advocate, who has basically lived and breathed the facts and legal issues in a particular matter for years, the judge may have had only 30 minutes with the briefs and a short time at oral argument (if there is oral argument at all) to reach a correct conclusion.

There is simply not enough time to read the entire lower court record and to research from scratch the legal issues presented by the parties.

Given this stark reality, appellate advocates must acknowledge that successful outcomes depend less on an attorney's ability to turn a clever phrase on page 26 of a 43-page appellate brief than on the ability to capture a panel's sense of gut equity or off-the-cuff impression of what the law is (or should be). In other words, the most logical, well-written brief may not carry the day unless it can also survive a judicial snap judgment.

So what persuasive techniques can you use to enhance the odds that a judicial snap judgment will vindicate your client's appellate position? There are several, beginning with the table of contents. The table of contents should be a road map, a stand-alone summary of argument that logically and ineluctably draws the court to reach the conclusion your client desires, with no additional reading required. It is not uncommon for judges to begin reading an appellate brief by reviewing the table of contents, looking for some insight into the argument that is to come. In addition to explaining a brief's legal reasoning in bullet-point fashion, a thoughtful

table of contents has the additional benefit of forcing you to think through an appeal and organize your thoughts before setting pen to paper (or fingers to keyboard), an exercise that will invariably improve a brief's clarity, persuasiveness, and flow.

An effective table of contents requires concise and descriptive headings. "I. The trial court erred when it refused to grant summary judgment in defendant's favor" offers the court some limited information as to the ruling being appealed, but does nothing to explain why the ruling should be reversed. Go further and explain why the ruling was incorrect, *e.g.*, "I. The trial court's refusal to grant summary judgment in defendant's favor was in error, because plaintiff's fraud claim is barred by the statute of limitations." Then, follow with several subheadings that summarize exactly why your client is entitled to relief:

- A. The statute of limitations for a fraud claim is two years.
- B. Plaintiff filed suit in this matter three years after the alleged fraud.
- C. The discovery rule is inapplicable to Plaintiff's claim as a matter of law.
- D. The trial court erred, therefore, when it failed to dismiss Plaintiff's claim on limitations grounds.

This format allows the court to quickly understand the gist of the appellate argument, and it simultaneously forces the text of the argument into digestible sub-topics that

can be understood quickly and with a minimum expenditure of time and effort.

The next opportunity to appeal to the court's snap judgment is the question presented. Framing the question presented is a difficult exercise, and the thoughtful advocate devotes substantial time to getting it right. Complicating the matter is the fact that the question's most persuasive format may vary depending on the circumstances. For example, a Bryan Garner "deep issue" question presented may be the most persuasive format for an intermediate appellate court, because it gives the background necessary to understand the legal issue and simultaneously suggests what the answer should be. But a slightly broader, more open-ended question (e.g., "Should this court create a cause of action for medical monitoring?") may be more appropriate in an application or petition seeking discretionary leave at the highest level of an appellate system, where the importance and breadth of the issue framed may be as or more important than its resolution.

With the issues properly framed, it is time to turn to the introduction. This is yet another point of entry that a court may choose to get to know a case and its intricacies, and it is the best place to start introducing non-legal concepts and themes that will influence a court's snap judgment. Do not waste excessive space identifying the parties and blandly cataloguing the issues presented. Grab the court's attention, instead. One way to accomplish that goal is to start with a theme of injustice as the introduction to a compelling story:

- This dispute arises out of a terminated employee's attempt to extract

hundreds of thousands of dollars from his former employer based on a fictitious oral "agreement" to pay him annually a share of company profits as a bonus.

- This is a case of commercial betrayal that illustrates the wisdom of the Uniform Commercial Code's notice requirement in Section 2-207.
- This appeal arises out of the Court of Appeals' holding that private plaintiffs may challenge in perpetuity an administrative agency's authority to issue an environmental permit, regardless of how much time elapses between the permit's issuance and the subsequent judicial challenge.

(For more on the importance of telling your story on appeal, see Bursch, *Storytelling in Brief Writing*, For the Defense 42 (April 2004).)

Another, equally effective opening is to take the first 2–3 sentences to focus narrowly on the principal legal issue and tell the court why that issue must be resolved in your client's favor:

- The language of the Real Estate Settlement Procedures Act ("RESPA") section 8(b) prohibits the split of a fee for settlement services between two parties. Neither section 8(b) nor its regulations define the giving of a discount as a fee split, and no court has ever ruled that the giving of a discount can constitute a prohibited fee split. Discounts have always been evaluated under section 8(a), and the claims made in this case should be as well.
- This case cannot possibly be tried as a class action. Plaintiffs seek a classwide trial as to whether each of the four defendants entered into

agreements or understandings with hundreds of different builders throughout Michigan resulting in referrals of title insurance business by each builder to the thousands of members of the proposed class. The only evidence plaintiffs offer to support their contention that these issues could somehow be resolved without testimony from each builder and each claimant—and possibly lenders, lawyers, and closing agents—is an expert report that has been utterly repudiated by its author.

- Defendants have an expansive view of their limited statutory authority. Though Defendants disagree on a major point, they would both like to control the prices Plaintiff pays its own co-op Members for some of their crops, but they have no authority under the Agricultural Marketing and Bargaining Act (the "Act") to do that. To avoid a ruling on this issue, they would hide behind the "exhaustion of administrative remedies" doctrine, which does not apply in this situation.

Either of these two styles offers a basis on which a court can begin to make an intuitive decision regarding the merits of a position, even though precious little information has been conveyed.

A seriously neglected opportunity for informing a court's snap judgment is the summary of argument. Although many appellate jurisdictions have done away with the summary as a required element of an appeal brief, summaries are generally not prohibited, either. To maximize a summary's effectiveness, consider asking another attorney who is completely unconnected to the appeal to review your

brief and write the summary for you. This exercise will shed light on the snap judgments an objective third party is likely to make when they read the brief, and it will inevitably highlight the themes, issues, or discussions that appeared lucid from your own myopic view of the case, but that come across as confusing or unclear when viewed from 10,000 feet by someone who is completely unfamiliar with the case.

A final opportunity to influence a judicial snap judgment is the conclusion. How many times have you read (or written) a conclusion that says: “For the foregoing reasons, the decision below must be affirmed/reversed”? While this is a concise way to end a brief that is on the verge of exceeding its page limit (more on that topic shortly), it is wholly ineffective advocacy. There is a reason that the fi-

nal chapters of best selling novels do not read: “For the foregoing reasons, they all lived happily ever after.”

As a more persuasive alternative, use the conclusion as a final opportunity to emphasize your principal theme, or to summarize the one reason that requires the ruling you desire. Although the text of a conclusion may be dictated by tradition in some forums (such as the concluding sentence of a petition for certiorari to the United States Supreme Court), it generally is not. Do not waste the opportunity to say something meaningful with the last words the court is likely to read, and be sure to specify the relief requested.

Perhaps the easiest way to garner the court’s appreciation (and attention) is to keep the overall brief as short as possible. Remember, the reason appellate advocates need to worry

about judicial snap judgments is because judges simply do not have the luxury of spending unlimited time on any individual case on a massive docket. You can be sure that a judge is far more likely to read every word of a 20-page brief than even every section of a 50-page tome. Do not make the mistake of cluttering your brief with excess verbiage, citations, or anecdotes, any of which can quickly overwhelm the points that are most important to the court’s decision.

In sum, when drafting your next appeal brief, think carefully about how much time the court is actually going to be able to spend with the brief, then tailor it to cater to the snap judgment the panel will be forced to make. The court will appreciate your focus and brevity, and your client may appreciate the result.

Read over your compositions, and wherever you meet with a passage which you think is particularly fine, strike it out.
— Samuel Johnson