

THE ART OF THE LASTING IMPRESSION:

**SURE-FIRE TIPS AND TRICKS FOR THE
ASPIRING APPELLATE BRIEF WRITER
WHO YEARNs TO BE NOTICED**

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(as edited by Kenneth J. Witzel)

1.

**YOU ALREADY KNOW WHAT
YOU'RE DOING, WHY WASTE
TIME READING THE RULES?**

BUT THEN AGAIN ...

- Did you know:
 - in appellate briefs in Pennsylvania state courts, counsel are “expected to keep to a minimum references” to parties as “appellant” and “appellee”?
 - principal appellate briefs in Pennsylvania state courts are not to exceed 14,000 words, and that if the brief is longer than 30 pages, the party must file a certificate of compliance along with the brief?
 - in most appeals before a Pennsylvania state court, the appellant is required to serve and file a designation of the parts of the record that the appellant intends to include in the reproduced record no later than 30 days before the appellant’s brief is due?
- You would if you had read the Pennsylvania Rules of Appellate Procedures.
 - See Pa.R.A.P. 2031; 20135(a)(1); 2154(b).

2.

**DANCE LIKE NO ONE'S WATCHING,
WRITE LIKE NO ONE'S READING.**

BUT THEN AGAIN ...

- “[U]nderstand the following things about appellate judges: that we won’t spend nearly as much time on the case as you will; that we are likely to know far less about the parties and about the commercial field in which the cases arises, or other real-world context of the case, than you; and that unless you are arguing a criminal appeal, we’re unlikely ... to have a deep or comprehensive knowledge of the law applicable to your case.... It will also help you as an advocate if you understand ... that we judges are for the most part practical people (even the former academics among us). We are conscious that our decisions make a difference in people’s lives, which is a different feeling or sensation or awareness from being handed a case and told to make as persuasive an argument for it as you can within legal and ethical limits. ... When you’re writing your brief, think of the questions that a layperson would ask about the case; a judge is likely to have the same or similar questions.”
 - Hon. Richard A. Posner, “Effective Appellate Brief Writing,” American Bar Association, Litigation News.

3.

**NEVER LET THE STANDARD
OF REVIEW GET IN THE
WAY OF A GOOD ARGUMENT.**

BUT THEN AGAIN ...

Your entire brief should be built around the standard of review.

- “An appellate court will apply specific standards of review based on the nature of the question or questions presented. It is absolutely essential that the attorney demonstrate how these standards apply to the case ... and why they require that the case be reversed or affirmed.”
 - Edward D. Re, *Brief Writing and Oral Argument* xxii (6th ed. 1987)

4.

**THE STREAM OF
CONSCIOUSNESS BRIEF –
TAKING THE ART
TO THE NEXT LEVEL.**

BUT THEN AGAIN ...

- “A brief must be carefully and thoroughly organized before it is written. There is nothing worse than a rambling document that sounds as if it has been dictated off the cuff and filed virtually without change. That kind of brief is difficult to follow, frequently repetitious, often internally inconsistent, and always unpersuasive.”
 - Daniel M. Friedman, “Winning on Appeal,” in *Appellate Practice Manual* 129, 131 (Priscilla A. Schwab ed., 1992).
- “If you know something you can state it clearly. If you have not mastered the thought you are not in a position to pass it on to others”
 - George J. Miller, *On Legal Style*, 43 Ky. L.J. 235, 241 (1955).
- “The secret ambition of every brief should be to spare the judge the necessity of engaging in any work, mental or physical.”
 - Mortimer Levitan, *Confidential Chat on the Craft of Briefing*, 1957 Wis. L. Rev. 59, 63.

5.

BREVITY IS FOR THE WEAK.

BUT THEN AGAIN ...

- “To be persuasive, a brief must be read. Its chances of being read and assimilated are in inverse proportion to its length. Briefs should be edited and ‘boiled down’ to eliminate repetition and surplusage.”
 - Jim R. Carrigan, “Some Nuts and Bolts of Appellate Advocacy,” in *Appellate Practice Manual* 102, 104 (Priscilla A. Schwab ed. 1992).
- “Be brief. Judges do a lot of reading. ... We get tired or bored, and some of us tend to start skimming when we encounter a tedious, repetitious brief.”
 - Hon. Richard A. Posner, “Effective Appellate Brief Writing,” American Bar Association, *Litigation News*.
- “Courtesy to the court demands that ... information should be conveyed in the clearest, most concise manner possible. Self-interest, or the interest of the client, emphasizes and reinforces this demand.”
 - William M. Lile et al., *Brief-Making and the Use of Law Books* 366 (3d e. 1914).

6.

**WHY PROOFREAD AND EDIT
IF YOU KNOW YOU
NAILED IT THE FIRST TIME?**

BUT THEN AGAIN ...

- “Too often briefs ... are filed without having been proofread and corrected. We attorneys have no right to criticize physicians who leave sponges in the bellies of patients if lawyers are equally cavalier of the rights of their clients.”
 - Jean Appleman, *The Written Argument on Appeal*, 41 Notre Dame Law. 40, 41 (1965).

7.

**NOTHING CAN KILL
THE FLOW OF A GREAT
BRIEF LIKE A HEADING.**

BUT THEN AGAIN ...

- “Picture yourself as a passenger in a car, going somewhere but not knowing where because the driver won’t tell you. If you’re like most people, you’d probably feel uneasy—even if you know the driver; but more so if you don’t. You’d probably like to know something about where you’re going and how you’re going to get there. In that way, a written argument is analogous to a car journey. This means, of course, that the effective writer must orient the reader at the outset and place signposts along the way, as the analytical journey proceeds. Even as you approach little bends in the road, it’s helpful to know that they’re coming up. Hence, you need to supple signposts both for the brief as a whole and for individual paragraphs as well.”
 - Bryan A. Garner, “The Winning Brief” 106 (2d ed. 1999).

8.

**NEVER LET THE TRUTH STAND IN
THE WAY OF A GOOD STORY.**

BUT THEN AGAIN ...

Your integrity and credibility with the court are absolutely essential.

- “When you overstate, the reader will be instantly on guard, and everything that has preceded your overstatement as well as everything that follows it will be suspect in his mind because he has lost confidence in your judgment or your poise.”
 - William Strunk, Jr. & E.B. White, *The Elements of Style* 72-73 (3d. Ed. 1979).
- “Conscientiously avoid overstatements of any kind, lest you undermine not only your immediate client’s cause, but also your own credibility and therefore the chances for future clients.”
 - Bryan A. Garner, “The Language of Appellate Advocacy,” in *Appellate Practice Manual* 188, 190 (Priscilla A. Schwab ed., 1992).

9.

**THE JOY OF JARGON—
MAKE THEM KNOW YOU CAN
“TALK THE TALK.”**

BUT THEN AGAIN ...

- “Avoid jargon: business jargon, industry jargon, computerese and other technical jargon (and yes, economic jargon, too), and legal jargon. Avoid legal clichés, such as “plain meaning” (typically, and futilely, argued by both sides in the same case!).”
 - Hon. Richard A. Posner, “Effective Appellate Brief Writing,” American Bar Association, *Litigation News*.
- “It will take an emotional, almost psychological, pitch to teach many attorneys that there is nothing wrong with sounding like a citizen of the second half of the 20th century. You are no less a lawyer for being understandable.”
 - “Christopher T. Lutz, “Why Can’t Lawyers Write?” in *Appellate Practice Manual* 167, 177 (Priscilla A. Schwab ed., 1992).

10.

**WHY USE A PICTURE
WHEN YOU CAN USE
A THOUSAND WORDS?**

BUT THEN AGAIN ...

- “Wherever possible, use pictures, maps, diagrams, and other visual aids in your briefs. Some lawyers seem to think a word is worth a thousand pictures. The reverse, of course, is true. *Seeing* a case makes it come alive to judges.”
 - Hon. Richard A. Posner, “Effective Appellate Brief Writing,” American Bar Association, *Litigation News*.
- “Charts or tables may inform the judge at a glance of what he or she could similarly understand only with minutes of reading and of puzzling out words and figures.”
 - Albert Tate, Jr., “The Art of Brief Writing: What a Judge Wants to Read,” in *Appellate Practice Manual* 197, 206 (Priscilla A. Schwab ed., 1992).

By way of illustration:

I. BRIEF NARRATIVE STATEMENT OF THE CASE

Plaintiffs Richard W. Schneider, Sr. and Jane L. Schneider (the "Schneiders") own the surface and certain other rights and interests in a 35.77-acre parcel of land located at 151 Agape Road, Hickory, Washington County, Pennsylvania 15340 (the "Property"). They obtained their rights and interests in the Property from Defendants Roy H. Miller and Georgann Miller (the "Millers"), by means of a Deed, dated June 22, 2006 (the "Deed").¹

The Deed contains the following exception (the "Exception"):

FURTHER EXCEPTING AND RESERVING unto the Grantors, their successors and assigns, all gas within or that may be produced from the premises described herein; Provided, however, that the grantors my [sic] not use any of the surface of the parcel of land herein conveyed outside the perimeters of the easements or terms of the rights of way hereinafter excepted and reserved.

Deed, at 1 (emphasis added).

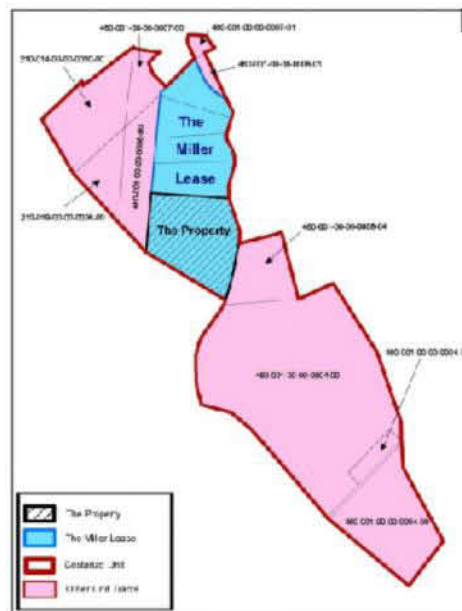
On May 29, 2009, the Millers entered into an Oil and Gas Lease with Range (the "Miller Lease"). The Miller Lease covers 76.85 acres of land, including the Property's 35.77 acres, plus the acreage of four additional parcels. The Property and the Miller Lease are depicted on Map 1, below. The Millers subsequently signed a Correction of Oil and Gas Lease clarifying that as to the Property and three of the other parcels included in the Lease, the Miller Lease excludes "oil."

¹ Plaintiffs' Pretrial Statement incorrectly indicates that the Property "contains approximately 163 acres . . . known as tax parcel 460-001-00-00-0008-00[.]" Plaintiffs' Pretrial Statement, at 1. However, as explained in the Deed, the conveyance was limited to "Lot No. 1 in the Miller Plan of Lots Revision 2 as recorded in the Recorder of Deeds Office in Washington County, Pennsylvania, at Plan Book Volume 45, page 101." The Miller Plan of Lots Revision 2 indicates that Lot No. 1 is only 35.77 acres. The Washington County property tax records confirm that tax parcel 460-001-00-00-008-00 is only 35.77 acres.



Map 1.

On February 3, 2010, Range executed a Designation of Unit – Costanzo Unit that it recorded with the Washington County Recorder of Deeds on March 12, 2010 (the “Unit Designation”). By means of the Unit Designation, Range exercised its unitization rights under various oil and gas leases, including the Miller Lease, and created a 346.639-acre production unit known as the Costanzo Unit. The Costanzo Unit, the Property, and the Miller Lease are depicted on Map 2, below.



Map 2.

In the late winter and spring of 2010, Range drilled and completed two horizontal Marcellus Shale wells on the Costanzo Unit, known as the Costanzo Unit 1H Well (the "Costanzo 1H") and the Costanzo Unit 2H Well (the "Costanzo 2H"). As depicted on Map 3, below, both wells were drilled from a well pad located on lands to the southeast of the Property. The horizontal portion of the well bore for the Costanzo 1H travels in a southwesterly direction from the well pad, leading away from the Property. No part of the Costanzo 1H enters the

Property. The horizontal portion of the well bore for the Costanzo 2H travels in a northeasterly direction from the well pad. Substantially less than one-half of the horizontal portion of the Costanzo 2H's well bore is located on the Property.



Map 3.

11.

**THE “IT IS WHAT IT IS”/
“WHY ASK WHY?” APPROACH.**

BUT THEN AGAIN ...

- “Increasingly, courts don’t want to know simply that there are cases on your side. They want to know that the legal rules announced in those cases make good sense—that the rules you’re asking them to apply are sound public policy.”
 - Bryan A. Garner, “The Winning Brief,” (2d ed. 1999).
- “Do not beat us over the head with statutory language and precedent. ... I am not saying that you should ignore relevant statutory text and precedents, but they are more likely to narrow the area of contestable disagreement than to resolve the case. You will have to extract the purpose of the statute and excavate the policies underlying the precedents to make a cogent argument that the statute and the precedents support (and if you are lucky, compel) the outcome that you are urging.”
 - Hon. Richard A. Posner, “Effective Appellate Brief Writing,” American Bar Association, *Litigation News*.

12.

**LIBERAL DOSES OF NON-BINDING
AUTHORITY—JUST WHAT THE
DOCTOR ORDERED!**

BUT THEN AGAIN ...

- “Speaking of precedent, go light on district-court citations, remembering that they are *not* precedents. This is not said in disrespect of district judges, but in recognition of the fact that if district-court decisions were given precedential effect, there would be no uniformity of federal law within a district or circuit.”
 - Hon. Richard A. Posner, “Effective Appellate Brief Writing,” American Bar Association, *Litigation News*.

13.

**LEAVE YOUR OPPONENT'S
ARGUMENTS WHERE
THEY BELONG—
IN YOUR OPPONENT'S BRIEF!**

BUT THEN AGAIN ...

- “[D]o not omit from your brief, especially if you are the appellant, mention of the strongest points that you know your opponent will make in his or her brief. Often I read the appellant’s brief and think, how could the district judge (or administrative agency) have made such a mistake, committed such an injustice! And then I read the appellee’s brief and realized that the appellant’s brief had omitted the points that showed that the lower-court opinion, whether ultimately persuasive or not, was at least reasonable. And when that happens, one loses confidence in the appellant’s position.”
 - Hon. Richard A. Posner, “Effective Appellate Brief Writing,” American Bar Association, Litigation News.

14.

ALWAYS MAKE IT PERSONAL!

BUT THEN AGAIN ...

- “Omit irrelevancies, slang, sarcasm, and personal attacks. These serve only to weaken the brief. Ad hominem attacks are particularly distasteful to appellate judges. Attacks in the brief on brothers and sisters at the bar rarely bring you anything but condemnation by an appellate court. All that scorched-earth, take-no-prisoners, give-no-quarter, hardball stuff is out. And never, *never* attack the trial judge.”
 - Roger J. Miner, *Twenty-Five “Dos” for Appellate Brief Writers*, 3 Scribes J. Legal Writing 19, 24-25 (1992).

15.

**SOME THINGS ARE BEST
LEFT UNSAID – REPLY
BRIEFS, A COMPLETE
WASTE OF TIME.**

BUT THEN AGAIN ...

- “[D]o not forgo the opportunity to file a reply brief. The appellee is bound to make *some* halfway decent points in rebuttal of your appeal. Don’t let him or her have the last word.”
 - Hon. Richard A. Posner, “Effective Appellate Brief Writing,” American Bar Association, *Litigation News*.

SELECTED RESOURCES

- Garner, Bryan A., *The Winning Brief* (Oxford University Press, 2d ed. 1999).
- *Effective Appellate Brief Writing*, Hon. Richard A. Posner, American Bar Association, Litigation News. https://apps.americanbar.org/litigation/litigationnews/trial_skills/appellate-brief-writing-posner.html

