APPELLATE PRACTICE
SECTION OF LITIGATION

Summer 2019, Vol. 38 No. 4

August 26, 2019

Tips on Tone: Finding the Right Voice in Briefs

It's not just about the law and the facts—striking the right tone with the court can make all the difference.

By Jeffrey Y. Wu

One of the more perplexing comments that young lawyers can get after turning in a draft brief to senior colleagues—often after having spent countless hours and perhaps even sleepless nights putting together a polished draft—is something along the lines of this: "Your draft makes the right arguments and cites the right cases, but the tone needs some work." Diligent young lawyers, eager to grow in their craft, would be justified in wondering, "Tone? What does that mean? What am I supposed to do with that?"

There are few concepts more amorphous in legal practice than "tone." *Merriam-Webster's Dictionary* has 10 definitions for the term. "[T]he style or manner of expression in speaking or writing" is on point but vague; others, such as "vocal or musical sound of a specific quality," are evocative but fall short of useful guidance for practicing lawyers. *Tone*, Merriam-Webster's Collegiate Dictionary (11th ed. 2003). And there is little official guidance as courts rarely comment on the tone of legal briefs. When courts do comment, it is often because something has gone awry with a brief. *Cf. e.g.*, *Toeller v. Wis. Dep't of Corr.*, 461 F.3d 871, 875 n.1 (7th Cir. 2006) (stating brief's rhetoric was "out of line" and urging "a more appropriate tone in future briefs filed with this court"). There is usually no acknowledgment when a brief *does* present arguments effectively in an appropriate tone.

There is, of course, no one-size-fits-all formula for finding the right tone for legal briefs. The appropriate tone will depend on the nature of the case; the posture of the proceedings; the particular issues involved; the jurisdiction; the specific forum, the parties; and, of course, the goals of both client and lawyer. Below are a few suggestions that young lawyers might consider.

APPELLATE PRACTICE
SECTION OF LITIGATION

Summer 2019, Vol. 38 No. 4

Show, Don't Tell

When young lawyers make the transition from objective writing (such as legal memoranda during summer clerkships) to persuasive writing, a common pitfall is to equate advocacy with contentious rhetoric. This is exacerbated by the adversarial nature of litigation—it's easy to convince yourself that the other side's position is preposterous hogwash.

But overuse of rhetoric can distract from your presentation of the law and the facts—and those are, of course, the basis on which the court will ultimately decide the issue. So, tell your story through the law and the facts; as a more senior colleague once suggested to me, "show, don't tell." Rhetoric is an important tool for emphasis and framing, but use it selectively. Make sure that it actually helps the reader understand (and hopefully agree with) the authorities and the evidence that you have marshaled.

Fact sections can be a good vehicles for learning how to "show" in persuasive writing. The fact section should not be explicitly argumentative, but a strong facts section is one of the most critical components of an effective brief. It should focus the reader on the most relevant and material facts; and, ideally, by the time readers get to the argument section, they should already see substantial reasons to agree with the brief on the merits.

Be Helpful to the Audience

When crafting a brief and honing its tone, consider what would be helpful if you were in the court's shoes. How would your brief help the court, in weighing the two sides' competing presentations, to determine the right result based on the law and the facts? If the court were to prepare an order or opinion in favor of your client's position, how would the brief assist the court's own drafting?

A brief is not, and should not read like, a judicial opinion, but thinking about how the brief would be used by the court in its work is a perspective that can help you find the right tone. A brief that feels as though it is yelling and screaming its points can grate, regardless of its substantive merits. A dismissive tone toward significant issues in the case could also be unhelpful. *Michigan v. U.S. Army Corps of Eng'rs*, 667 F.3d 765, 794 (7th Cir. 2011) ("[S]coffing at the defendants' concerns about the costs of relief does not aid our assessment of the expense of the relief that the states want."). A brief that unnecessarily

APPELLATE PRACTICE
SECTION OF LITIGATION

Summer 2019, Vol. 38 No. 4

impugns opposing counsel can be distracting and unhelpful as courts ordinarily do not wade into such waters in judicial decisions. *Cf. Gibbs v. Nate-N-Al's Deli*, 79 F.3d 1153, 1996 WL 119478, at *3 n.2 (9th Cir. 1996) (table case) ("Although we affirm the dismissal, we note with displeasure the consistently unprofessional tone of appellee's pleadings," and stressing that opposing counsel should be treated with "courtesy and respect").

Strive for a Succinct Presentation

In an era of crowded dockets and ever-growing caseloads, courts appreciate succinct briefing so that they can efficiently determine the right results and move cases forward. Although the length of a brief and the tenor of its tone may not seem obviously related, a serious effort at brevity imposes discipline on drafters. It forces them to be selective in the words that they use and to focus the presentation on the most important issues at hand. It is harder for extraneous words to steer the tone astray when there are few extraneous words to begin with.

Know the Client's Positioning and Objectives

The tone of a brief should also be consistent with the client's overall goals. For example, government lawyers may adhere to a more objective, dispassionate style in accordance with government agencies' responsibility to deliver impartial justice and serve the public interest. A public interest advocacy organization may find it useful to advocate for its cause with a less detached style. Lawyers for private parties must be sensitive also to how their clients may be perceived, including by the broader public as well as by the courts, based on the tone of their advocacy.

The client's role in the case also matters. While specific circumstances will vary, it usually makes sense for an amicus brief on behalf of a client that has no direct stake in the outcome of the particular case to take on a different tone from that of an interested party. In a multiparty case where different parties may have varying and adverse interests, the tone of a party's brief should also be pitched to match its particular positioning in the case.

Learn from Others

Tone is quintessentially a matter of judgment. Getting it right is a skill that has to honed through practice and experience. But much can be learned from examples set by others,

APPELLATE PRACTICE
SECTION OF LITIGATION

Summer 2019, Vol. 38 No. 4

both by getting feedback on drafts from colleagues (face-to-face discussion can be especially valuable) and by reading the briefs prepared by more experienced lawyers, including both colleagues and practitioners at other firms. Sometimes another brief may illustrate an approach to avoid rather than one to learn from. Either way, reading widely and analyzing a variety of styles and approaches should help young lawyers develop their own judgment about the appropriate tone to strike.

Jeffrey Y. Wu is a partner in the Los Angeles office of Munger, Tolles & Olson LLP.