



10 Appellate Tips From A Former Chief Justice

Originally published on the *Law360* newswire
Reproduced with permission

Written By:
Chief Justice Leah Ward Sears (Ret.)

During my 17 years on the Supreme Court of Georgia, I read hundreds of petitions for appeal, thousands of briefs, and heard countless arguments. It is no exaggeration to say that I had a great deal of time while on the court to reflect on what does work and, more importantly, what does not work in appellate litigation.

I retired from the Supreme Court in 2009 and returned to private practice as a partner at Schiff Hardin LLP/Atlanta and the leader of our national appellate practice team. During my journey to becoming Chief Justice, I made a few stops beforehand, serving once as a general jurisdiction trial judge, a traffic court judge and a young associate at a large Atlanta-based law firm. When I returned to the other side of the bench — 27 years later — I felt that my time on the court had given me a bird's eye view of the practice of law.

From my vantage point, with all of the experience and knowledge with which I am now equipped, the first thing I have noticed is that, despite the advancements in technology over the past two decades, keeping track of billable hours is still a pain!

As the months of my new private practice have flown by, I remember how much I enjoyed engaging other lawyers about the law. As it turns out, both the lawyers in my office and those from other law firms across the country often call on me for advice on their litigation strategies and ask for insight on the appellate process. And I am happy to always take their calls.

But it was soon after I began working with some of them on their cases when I realized that the brightest lawyers aren't always the best writers or even the best speakers — not initially, at least. What I mean by this is that lawyers — even the sharpest and most experienced ones — often make mistakes that ultimately hinder their chances of winning on appeal.

I have also noticed that people harbor a lot of misconceptions about what takes place behind the closed chambers of judges and justices. Some speculate that there is a magic formula to getting a petition for certiorari granted while others think that decisions are made by a game of "rock, paper, scissors." Thankfully, neither one is true.

Out of all the vast attempts in the profession to demystify the appellate process, there are really no universal truths about what a lawyer can do to ensure that her case has a winning chance on appeal. I suspect that's why judges and professors often start with the laundry list of things not to do when sharing their pointers on successful appellate litigation practices.

But no matter the strategy, the issue, the jurisdiction, or even the political climate, I believe there are some answers to the many questions lawyers have about the appellate process and, more specifically, how to present a case with the best chance to win.

1) Know that Your Petition Was Not Overlooked by the Court.

Every appeal filed in court is carefully reviewed, not just some of them. And if the issue raised by an appeal meets the court's standard for granting review, then it will in all likelihood be granted. But this standard is often very high. And it is high for a very good reason.

Appellate judges understand that every case is of great importance to the parties involved. However, the court most likely will grant review only in cases when they are required by operation of law, issues of public policy are at stake, the case presents an issue that hasn't previously been resolved, or they want to address some change in the law.

That is why, in appellate courts, it is a universal statistic that the majority of petitions for certiorari are not granted. In Georgia alone, the grant rate for petitions for certiorari is a fairly consistent 6 to 7 percent. Still, some lawyers believe that the court denies their petition because something was wrong with it.

When considering that, historically, the majority of all petitions for certiorari filed are denied, it should be obvious that when your petition is denied, you are not alone, and absent the court's decision indicating otherwise, your fears are usually displaced.

However, even if a petition for certiorari is not granted or if the outcome is favorable to the other party, you can be sure that, at the very least, the court reviewed it thoroughly before it made a decision granting or denying the appeal.

2) You, Your Firm or Your Client Will Get No Special Treatment by the Court.

Not only do appellate courts review every case, but the judges and justices have no preference for large law firms over solo practitioners. They show no bias in rendering a decision toward prominent lawyers over lesser-known lawyers. They do not look down on newly admitted lawyers in favor of seasoned attorneys. Nor do they give special treatment to lawyers who are campaign contributors in the jurisdictions where judges are elected by citizens.

Simply put, the only thing that matters to the appellate court is the issue of law and how skillfully it has been presented ... 99 percent of the time. In the rare other 1 percent of cases, there may be a problem with the court.

3) Read the Rules. Then Follow Them.

The rules of every appellate court outline the standard the court must use to determine whether it will grant review of a case and further outline what types of cases will be granted, such as appeals based on review of the sufficiency of evidence or when a lower court affirmed or denied a motion for summary judgment.

The rules also set forth requirements of how the brief should be written, filed and served on opposing counsel, as well as include instructions on motion practice and oral argument. A rule of thumb should always be to check the rules first, and if you have any questions, call the office of the clerk of court.

Failing to abide by the court's rules can sometimes cost you and your client a waiver of certain rights or even entirely the case.

4) Make Your Arguments Crystal Clear.

You must present your arguments to the court (both orally and in writing) clearly and concisely. Do this by avoiding lengthy paragraphs and including division, subdivision, sections and headlines throughout the brief. The goal is to frame each issue, utilizing the facts of your case and the proposition of law you wish to see the court adopt.

It is not helpful to use excessive jargon and "shoptalk." Some lawyers seem to want to outwit their opponent by using dense, unintelligible language in an effort to make him quiver as he witnesses their use of mind-boggling arguments that they think display their thorough knowledge of the law and fierce rhetorical skills.

It is true that such a tactic can delay an opponent's ability to respond as he or she attempts to untangle a knotty web of legalese and obtuse arguments. But it can also do the same to the judges and their law clerks, and this isn't a good thing. Appellate practice, and advocacy in general, involves getting the decision-maker to agree with you. They cannot do so if they do not understand what you are writing.

The same is true regarding lofty and colorful arguments that are not grounded in relevant law. In the unlikely chance the court finally unravels the weave of complicated arguments, the last thing a lawyer wants is for the judge to realize that the lawyer wasn't saying anything in the first place.

In general, the old saying rings true with writing: Less is often more. Always strive to be as efficient as possible when drafting.

5) A Brief Is Called a Brief for a Reason.

Imagine the amount of reading each judge must endure before she can make a decision. With the briefs, lower court record or appendix, and law combined in just one case before the court, it can literally be hundreds of pages. And each judge has hundreds of cases. All of this reading can be exhausting for judges — especially when the writing is poor or complicated. Keep this in mind when you choose to maximize or request to exceed beyond the page limit allowed for your brief.

Instead of trying to hit your opponent over the head with as many legal arguments as you can fathom, put your arguments in order of persuasiveness and exclude those that lack or have little merit relative to the issues of the case. Merely including a ton of arguments in a brief will not increase your chances of winning. In fact, it can actually decrease your chances by de-emphasizing or burying the ones that are persuasive. By placing your strongest arguments first, you can grab the court's attention up front.

6) Be a Barrister, Not a Bully.

In my opinion, the easiest way to frustrate the court is to be arrogant and insulting. Arrogance and rudeness have no place in a legal presentation, no matter what court you are in or who your opponent is. As attorneys and officers of the court, we should always conduct ourselves in a professional manner. It is not a choice, but a duty.

This is distinguishable, however, from the practice of using the other side's own words against them. If the opposing brief said things that help you, quote them. This is a great way to get the judges' attention. But this can, and indeed should, be done in a way that is both professional and respectful.

7) Bluebook? Yes. Law School Bluebook Exercise? No.

Writing an appellate brief is not an opportune moment to show to the court how well you know the Bluebook rules. Of course, the Bluebook is an invaluable resource and lawyers should always use the proper format and style in legal writing. But use good judgment when deciding what information is necessary to support your arguments in a way that assists — not obstructs — the court's research.

For instance, you need not chronicle well-established rules of law and cases. While it's always important to provide adequate support for any assertions or arguments in your brief, some points are so deeply rooted in the law that, if you do cite to any authority at all, you generally will need only one supporting citation.

What you should never do is inundate the court with long string cites — to several persuasive cases with parenthetical citations of each in the order as provided in Bluebook Rule 1.5(b) and a but cf. signal to the contrary secondary sources and also a footnote with citations to the supra internal cross references, which all fall in the order as provided in Bluebook Rule 1.3 — that go to support the same proposition.

As you can see, too much information can make for difficult reading. Unless it is absolutely necessary, such long references and citations should be omitted. The key is to keep it as simple as possible.

8) Obtain Amicus Curiae Briefs if You Can.

Admittedly, amicus briefs are typically filed by individuals, groups and organizations that ascribe to a particular point of view. However, well presented amicus arguments succeed in standing back from the fray, so to speak, because parties to a case have a much greater emotional stake in the outcome. At times, this can make it difficult for them to appreciate the potentially far-reaching impact a case may have on the law or on others.

Ideally, a good amicus brief will appraise the court of the significance of a particular ruling and, typically, do so with less heat and more reason. Whenever possible or appropriate, I encourage the filing of amicus briefs in support of your conclusion.

9) Argue — Never Read — at Oral Argument.

I have heard some lawyers say that oral argument is useless. "After all," they say, "oral argument is only your entire written brief crammed into 15 to 20 minutes of recitation, right?"

Wrong. I, and many of my former judicial colleagues, strongly disagree with this sentiment and believe that oral argument is always important in a case, critical even. In any case on appeal, I highly recommend that you invest a lot of preparation and energy into preparing for oral argument.

There are several tips for delivering an effective oral argument: Give a succinct version of the facts that support your arguments; assume that at least one judge has thoroughly done his or her homework and is intimately familiar with your case; argue only your best and strongest arguments; be courteous and honest; use eye contact; always remain professional to the opposing party; prepare to engage in dialogue with the bench, not to deliver a monologue; and use a theme to state your case and weave it throughout your arguments.

Oral argument is very important and can sometimes alter the outcome of cases and change a judge's opinion.

10) Be Honest to the Court, to Your Client and to Yourself.

Attorneys have a responsibility to their clients and to the court. Meeting this responsibility requires honesty and integrity. If, after reviewing the lower court's decision, you can find no issue that would warrant an appeal, you must inform the client.

While courts expect attorneys to be their clients' most impassioned advocate, you are also their most important adviser. If a client wants to fight until the bitter end at no matter the cost, it is up to the attorney to explain that no viable issues remain for appeal and that they may already have arrived at the bitter end.

Additionally, just because you haven't had a petition for certiorari granted in awhile, you want to accrue more attorney fees or you have a winning reputation at stake, it is unfair — and undoubtedly unethical — to drag a client and a case through each level of appellate review when there is absolutely no reason to do so. At the end of the day, this means we must be honest with not only the court and to our clients, but also with ourselves.

-- By Leah Ward Sears, Schiff Hardin LLP

The Honorable Leah Ward Sears (lsears@schiffhardin.com) served as the chief justice of the Georgia Supreme Court. She is a partner in the Atlanta office of Schiff Hardin LLP, where she is head of the firm's national appellate practice team.

The opinions expressed are those of the author and do not necessarily reflect the views of the firm, its clients or Portfolio Media, publisher of Law360.

All Content © 2003-2010, Portfolio Media, Inc.

This publication has been prepared for the general information of clients and friends of the firm. It is not intended to provide legal advice with respect to any specific matter. Under rules applicable to the professional conduct of attorneys in various jurisdictions, it may be considered advertising material.

For more information visit our Web site at www.schiffhardin.com.