



Fall 2007

Briefing Strategies:
The Introduction — Preparing the Court to Decide Your Case

Last time we talked about the importance of the Conclusion. This time we tackle the other end of the Brief: the Introduction.

Introductions, or “Preliminary Statements,” have been in vogue for years. Many firms use them, and some courts (including New Jersey’s) have amended their rules to allow them. See R. 2:6-2 (permitting preliminary statement not exceeding three pages).

But lawyers use the Introduction differently. Most use it as a nutshell version of their brief, summarizing the arguments contained in the main body. Others use the Introduction to emphasize their client’s version of the facts. Still others use the Introduction to list the issues discussed in their brief. And some don’t use the Introduction at all.

What’s the best approach? Well, it depends on your case.

For simple cases containing one or two straightforward issues, consider omitting the Introduction entirely. This may seem counterintuitive for lawyers taught to pursue every chance to persuade. But lawyers sometimes repeat an



argument too many times. If an Introduction would only restate the arguments in the main body, and there's nothing you can say that would help illuminate the arguments or give them context, don't use an Introduction.

But how about the appeal with numerous or complex issues? Isn't the best approach that which most lawyers use: to summarize the arguments contained in the main body? Doesn't this guard against the traditional fear that the court might not read the entire brief (so the lawyer better put everything she wants to say "up front" in the Introduction)?

I understand the fear that motivates this approach, and I can't criticize lawyers who follow it. If you suspect that the judges in your case will not read your entire brief, then summarizing the arguments in the Introduction is best.

But where the judges will read your entire brief (which hopefully is most appeals), summarizing arguments that you then repeat in even longer fashion in the main body is not, I believe, the best use of an Introduction. Stating an argument twice does not make it more persuasive (particularly in writing). It's repetitive and boring for appellate judges to read the same thing over and over again. It may



ironically lead to the very thing that lawyers fear: the court will tire and not read the rest of your brief.¹

What's a better use of the Introduction? To think of it as just that: an *introduction* — a taste of the arguments to come in the rest of your brief.

Experienced trial lawyers speak of preparing a jury to hear their case. This concept is equally valid on appeal. You must prepare the appellate judges to be open to your arguments and your view of the case. Only then can you prepare the judges to decide the case your way.

This preparation is vital in difficult appeals. In many criminal cases, for example, the State's evidence appears overwhelming. Marshalling a persuasive argument for reversal often hinges on violations of rights that don't impact directly on guilt or innocence. The Introduction is particularly important in these cases to set the stage for the legal arguments you develop in the main body. The Introduction can highlight the issues you believe the case raises and why they are important to this and other cases, encouraging the court to read the rest of your brief with an eye on these issues and the framework you have suggested. Consider the following example seeking reversal in a difficult criminal appeal, where the

¹ There are some cases, such as death penalty matters requiring counsel to raise as many grounds for relief as possible, where the brief is unavoidably long and complex. In these few cases, the "summary" introduction may be warranted. But even here I believe the better approach is not to simply regurgitate the arguments you've developed at length in the merits section but, rather, to set the stage for the arguments to come by telling the court why they are important.



Introduction express candor about the case's unsympathetic facts while attempting to focus the court on the fairness of the trial process that led to the verdict:

This is a difficult case because it involves charges of sexual abuse. We ask, however, that the Court evaluate the issues we've raised as it would in any criminal appeal: was the trial process that led to the convictions fair and calculated to lead to a reliable verdict?

The trial was a credibility contest. On one side was the victim, who claimed that defendant had sexually assaulted her. On the other side was defendant, who denied the accusations and noted that the victim had not made them until several years after they'd allegedly occurred. The jury was left to weigh the testimony of these two primary witnesses in evaluating whether the State had proven, beyond a reasonable doubt, the crimes at issue.

We now submit that this credibility contest was infected by three errors below: one, the substitution of an alternate juror and establishment of a new jury panel after the original panel had already deliberated too far; two, the prosecutor's improper cross-examination of defendant; and three, the incomplete instructions to the jury on how they should evaluate the key elements of the crimes. These errors, we submit, undermined the fairness of the trial process and resulted in a verdict too unreliable to stand.

Like a trial lawyer's *voir dire* or opening statement, the appellate lawyer's Introduction can begin preparing the minds of the judges to be open to the lawyer's view of the case. Only then, after the decisionmaker is willing to listen to your arguments, can you begin to persuade the court to rule in your client's favor. So like the Brief's Conclusion, use the Introduction wisely.



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