national IMMIGRATION project of the National Lawyers Guild

14 Beacon Street Suite 602 • Boston, MA • 02108 • Tel. (617) 227-9727 • Fax (617) 227-5495

PRACTICE ADVISORY[1]

10 Tips for Writing Better Immigration Briefs

October 30, 2013

By Trina Realmuto

A Well-Written Brief May Make or Break A Case

Every year, immigration lawyers and accredited representatives file thousands of briefs with the nation's 59 immigration courts, the Board of Immigration Appeals (BIA or Board), and the federal courts. In many instances, these briefs represent the noncitizen's best or only chance of convincing the decision maker to rule in their favor. The Board and circuit courts adjudicating a petition for review allow oral argument only in select cases. Although immigration courts and some federal courts entertain oral advocacy more regularly, oral arguments generally are more useful and successful if the court already understands the basis for the noncitizen's position because of counsel's briefing.

The stakes in immigration cases are incredibly high. In bond matters, judges regularly decide between liberty and detention. In merits cases, they decide between allowing a person to remain in the United States with her family and deportation to a potentially unsafe or unknown country. Federal courts review these life-altering decisions. Accordingly, immigration litigators must make the most of any and all opportunities to advocate on behalf of their client through a well-written brief. This article sets forth ten suggestions to keep in mind when writing immigration briefs.

10 Tips

1. Take the Active Voice Challenge!

Write an entire brief in the active voice, compare it to any other previously written brief, and then select the better brief. Without a doubt, the active voice brief is the better brief. The active voice makes statements and arguments stronger by identifying the actor, assigning responsibility for the action and eliminating excess verbiage (which is helpful when there is a word limit for the brief).

2. Record Citations.

When writing an appeal brief, start by reading the record, and then outline it or create a timeline with citations to the record. Tab important documents in the record.

Anything and everything written in the statement of the facts or the statement of the case requires a citation to the record. If there is nothing to cite and record development is ongoing, attach an exhibit and cite to the exhibit, even if that exhibit is a declaration. If there is nothing to cite and record development is closed, either file a motion to supplement the record or do not make the statement.

3. Name Calling.

Why conjure up images of space creatures or the surgical removal of a foreign object by writing briefs that refer to the client as an "alien"? Sure, it is a term of art, but it also is a word often associated with space invaders or attacking UFOs. So, while the term *always* is appropriate to use when quoting language from the Immigration and Nationality Act or a regulation, it *never* is appropriate (in this author's opinion) when referring to one's client. Instead, consider using more *humanizing words* like person, individual, noncitizen, Petitioner/ Respondent, litigant, U.S. citizen claimant, or simply by the person's actual name.

Conversely, it is not an attorney's job to tout the authority of immigration entities or actors, yet some naming choices potentially have this effect. Is the entire U.S. Government (with a capital "G") *really* trying to deport or detain the client? No, it is not. The actual entity seeking to deport or detain the client is U.S. Immigration and Customs Enforcement (well-described by the cold and frozen associations conveyed by use of the acronym "ICE"). ICE is *not* the entire government; it is *but one* of several subcomponent agencies within the Department of Homeland Security (DHS), which itself is *but one* of several executive agencies. Similarly, members of the Board of Immigration Appeals issue decisions, not the entire U.S. government. Individuals making unfavorable and life-altering immigration determinations are human beings just like the immigrants they judge. References to these decision makers as "the Government" incorrectly suggest that the *entire* U.S. government somehow supports their decisions and actions.

4. Statement of the Case v. Statement of Facts.

The statement of the case is the *procedural history* of the case; i.e., the events leading to the client's current situation in court, including actions and determinations of an agency or court. In immigration court cases, the statement of the case might start with the affirmative filing of an immigration application or ICE's issuance of a Notice to Appear. In circuit court cases, the statement of the case generally ends with a brief recitation of the Board's decision or DHS' issuance of a reinstatement order.

The statement of facts obviously should include only what is *admitted, documented and/or indisputably true*. Common facts in immigration cases include the person's age, number of U.S. citizen or lawful permanent relatives, place of residence, employment history, and documented medical conditions. If the person is contesting alienage, then where he or she was born is not a fact. (Rather, one might include DHS' *allegation* of the person's birth country in the statement of the case.) If the person is contesting ICE's evidence of a criminal conviction, the existence of a conviction is not a fact. Relatedly, however, if the person admits the existence of the conviction, but argues it does not render her removable, then only the existence of the conviction is a fact.

Sometimes procedural and factual information may overlap. In this situation, consider combining the contents into one section entitled "Statement of the Case and Statement of Facts" *provided the governing court rules do not require briefs to contain separate statements.*

5. Maps, Apps, GPS and Alternative Routes.

Maps, apps and Global Positioning Systems (GPS) help drivers know where they are going before, or while, they are on the road. Many also suggest alternative routes when traffic conditions warrant it. Headings and headings that set forth arguments in the alternative are the maps, apps and GPS's of brief writing. They provide judges with a way to reach a desired conclusion. Moreover, headings help keep the brief organized. In short, a brief's table of contents is basically the court's driving directions to vacating or remanding a removal or detention order. If a brief has well-written headings, its table of contents alone conveys the issue, analysis, and relief sought.

6. Analyze It.

Thinking analytically, aka "like a lawyer," comes easier for some than to others. Yet, it is a crucial skill for effective lawyering, especially brief writing. Here is one approach to analytical thinking and writing an immigration appeal brief. Start by asking two basic questions: (1) what is/are the main agency/court holding/s?; and (2) on what reasons did the agency/court rely to reach this conclusion? Then, take the identified holding and turn it into an argument heading that describes the erroneous conclusion. Next, take the main reasons for the identified holding and turn those into subheadings that describe the flaws in those rationales. Continue to identify and then address the key reasons for the Board's decision. If the flaw in the rationale of the decision is not apparent, do not assume the decision is correct. Show the decision to a colleague and brainstorm ways to challenge it.

In addition, think through the logical order of presentation of arguments, which will vary depending on the issues in the case. Many immigration appeals raise both statutory and constitutional issues. However, courts try to avoid ruling on constitutional issues if there is a statutory or regulatory basis for deciding the case. Thus, as a general rule, statutory and regulatory arguments should precede constitutional arguments. Similarly, arguments adopted by other circuits often should precede untested arguments. Finally, arguments seeking to vacate or reverse a decision usually should precede alternative arguments seeking remand.

8. Block the Block Quotes!

Relying on lengthy or numerous block quotes in a brief is a bad idea. In addition to portraying the attorney as lazy, undermining the purpose behind page limits (if the quote is single spaced), and looking ugly, block quotes are not an effective tool for making an argument. If a language from a case is particularly helpful, provide some background information about the case or paraphrase the court's rationale and quote only the language that makes the key point.

//

//

//

7. Signal Words. Use them. Here are a few of the most common ones:

No signal (just the case cite)	Use after a direct quotation; or if the sentence references the case.
Accord	Use if the case supports the same proposition as the particular case or cases referenced in the sentence; or to show that circuit's law is in agreement.
See	Use where the sentence contains a proposition and the case directly states or stands for that proposition.
See also	Use if the cited case is *additional to* another case(s) warranting a "*see*" cite; it constitutes further authority for the proposition. A "*see also*" signal always follows a "*see*" signal. The blue book recommends parenthetical explanations.
Cf.	Use if the cited case supports a proposition that is different, but analogous, to the main proposition. The blue book recommends parenthetical explanations.
Compare [X] *with* [Y] or *compare* [A] and [B] *with* [C] and [D]	Use to illustrate a useful comparison. For example, to illustrate a circuit split, how the BIA's view differs from other circuit decisions, or inconsistent litigation positions of the opposing party.
But see	Use whenever there is a case that directly states or clearly supports a proposition contrary to the main proposition; i.e., case law that hurts the main argument.
See generally	Use when citing a case or authority that provides helpful background related to the main proposition.
E.g., *See*, *e.g.*, *But see*, *e.g.*, etc.	*E.g.* is short for the Latin phrase exempli gratia, meaning for example. This signal requires placement of a comma after "*e.g.*" and also after any additional signal word.

9. Have Some R-E-S-P-E-C-T.

Do most lawyers show up in court in jeans, a T-shirt, and wearing different shoes? No! Filing a brief with more than a few grammatical errors, typos, run-on sentences, incomplete sentences, missing record citations, and incorrect or omitted legal cites is no different than showing up in inappropriate clothing. Have some respect for the court, court staff, the client, opposing counsel, and, perhaps most importantly, have some self-respect, and edit and proof the brief. And then edit and proof it again. And then have someone else edit and proof it. And then edit and proof it again. Then consider how much is at stake for the client, and then edit and proof the brief yet again.

10. Reply Briefs are NOT Optional in Immigration Cases!

Unless the court order or rule expressly prohibits a reply brief (most do not), never, ever, ever let opposing counsel have the last word! Foregoing a reply brief because of other commitments or the client's inability to pay leaves the court's questions unanswered with no guarantee the court will schedule oral argument; dramatically decreases the client's chances of success; and hinges on malpractice. Moreover, failure to file a reply brief may violate the attorney's ethical duty to zealously represent the client. The failure to notify the court of appeals about "pertinent and significant" authority after the close of briefing is equally indefensible. *See* Federal Rule of Appellate Procedure 28(j).

Briefs Often Are the Best or Only Chance to Win the Case

Researching and writing a brief take a lot of time. Lawyers and accredited representatives are busy and often do not allot enough time to brief writing and the product suffers as a result. Underestimating or dismissing the value of a well-written brief can have dire consequences on the client's life and the lives of his or her parents, siblings, spouse and children.

A lot of lawyers know the law, but far fewer lawyers know how to write a compelling legal brief. There are organizational resources, courses, and colleagues available to help lawyers improve their brief writing skills. Since briefs often are the client's best or only chance to win the case, immigrants will fare better in the courts if immigration lawyers and accredited representatives take advantage of these resources and start writing better briefs.