

The CAVC judges were asked to provide their brief-writing advice to the Court's practitioners. Seven of the nine judges provided their commentary. This is advice directly from those who will read your brief and adjudicate the appeal accordingly. These are matters that are important to them and affect how they review your case. If it is important to them, it should be important to you.

Takeaway: The judges' comments generally had the same themes, although they addressed different aspects of the brief –

- **Be honest with the Court.** Variations on this theme included: not mischaracterizing the evidence or the law; directly acknowledging the lack of precedent, unfavorable caselaw, or that you are seeking an expansion of existing precedent; and stating and applying the correct standard of review. Do not cross the line from creative lawyering to dishonesty.
- **Be clear, concise, and precise.** Clearly state the issue before the Court, the Board's error, the remedy requested, etc. Be specific. Do not include extraneous facts in the statement of facts, extensive boilerplate, or unnecessary string cites.
- **Make the judge's job easier.** This relates to being clear, but make your brief as user-friendly as possible for the judge as the reader. The majority of the judges requested that the parties use subheadings and include them in the table of contents. They also asked that the parties not separate procedural history from the other factual history.
- **Connect the dots.** Many of the judges commented in some way or another that the parties must *explain why and how* the law and facts connect in the case so that you win. It is not enough to state the law then state some facts and say that the Board did or did not err. Explain how you get from point A to point B.

The following tips from the judges are broken down generally by the brief section. The "common points" reflect the advice given by the majority of the judges. The "additional comments" indicate additional pointers provided by individual judges that may not necessarily reflect the opinions of the majority.

General Advice

Common points:

- Be respectful toward the parties and the Court.
 - Don't use purple prose. For example, don't characterize VA action as gross malfeasance (unless, of course, that characterization is warranted).
 - Don't call the other party's argument ridiculous, absurd, laughable, and so forth. If the other party makes a baseless argument, the judge will see that from the analysis. This is unprofessional and a prop to hold up an otherwise weak argument.
 - Don't be disrespectful to the other party or the Court. Remember that proceedings here are aimed at ensuring veterans and their families receive justice. Every filing should reflect the respect that they are owed.
- Be clear, concise, and precise.
 - Have a plan, let the reader know the plan, and follow through with the plan.
 - Sentence structure should be simple and straightforward. Most sentences should not exceed two to three lines. No sentence should exceed five lines. All paragraphs should be less than a page.
 - Be precise with your record citations, particularly with assertions of error. See Rule 28(a)(4)(ii).
- Be truthful when characterizing the evidence and case holdings.
- Edit for typographical, grammatical, and citation errors.

- Judges notice when a brief is sloppy, and it sends a message that the author has not taken the time to focus on the matter at hand.
- Typos/missing words/incorrect cites might not impact the outcome but looks unprofessional and could be embarrassing if the Court points out your errors.

Additional comments:

- A brief should stand on its own without requiring the reader to read the Board decision or another brief.
- Do not use the maximum number of pages for a brief unless you absolutely need those pages to make your argument(s).

Table of Contents

Common point: The judges do actually read and use the table of contents. Therefore, use subheadings and include them in the table of contents.

- Subheadings should be substantive, full sentences so that even just skimming the table of contents gives the reader an idea of the issues.
- Be specific and clearly identify each argument.
 - For example: The examiner (or Board) failed to address the veteran's in-service symptoms; the Board did not need to address the veteran's statements because it found him/her not credible.
 - If the diagnostic code includes a symptom the Board failed to address, that should be evident from your table of contents. On the flip side, if the Board did the thing appellant claims they didn't or the Board didn't need to do it, that should also be in your table of contents. This way, the reader has an idea of what they need to pay attention to when they start reading your brief.
 - General assertions, such as "the VA medical examination was inadequate," are unhelpful.

Issue Statement/Question Presented

Common point: Be specific.

- Simply having a generic statement saying that the Board failed to provide adequate reasons or bases is not that helpful. Similarly, a statement of the issues that says "whether the Board errs when it relies on an inadequate exam" is not really helpful. The more focused on your case, the better.

Additional comment:

- This should be stated positively, simply, and as favorably as possible to your position.

Statement of Facts

Common points:

- Present the facts in chronological order.
- Do not separate the procedural history from the other factual history.
- Do not make arguments in the fact section.
- Do not include extraneous facts or citations. The judge should never be left wondering why they are reading something.
- Do not mischaracterize the record.

Additional comments:

- Include a statement about the veteran's branch and dates of service, including combat service.
- Identify parties by name (i.e., Ms. Smith or VA/Secretary) not status (i.e., appellant or appellee)

- Include a footnote or above the line text clarifying whether the appeal was under the legacy system or is an AMA appeal.
- Do not cite to 100s of pages of medical records in the fact section and not return to them in the analysis.
- Do not cite to duplicate records, just select the cleanest copy. And, parties should strive to cite the same document to avoid duplication.
- Double check record citations.

Analysis

Common points:

- Standard of Review: Address it, be honest and clear about whether you are asking the Court to review a factual finding by the Board or a legal question, and then apply the standard of review correctly.
- Be honest regarding facts and precedent.
 - Be clear and up front if no clear precedent exists, or if you are seeking an expansion of existing precedents.
 - Acknowledge and distinguish caselaw that's not in your favor.
 - Acknowledge if your argument is barred by current caselaw and you are raising it solely for purposes of preserving the issue for appeal.
 - Address unfavorable facts up front and distinguish or explain why those facts do not compel an opposite result.
- Each argument should be self-contained.
 - Follow the IRAC method for *each* issue in the case, so that it is a "one-stop shop": (1) state the issue you are addressing; (2) identify the applicable rule of law; (3) apply the law to the facts of the case—make your argument; and (4) conclude the point.
 - Do not weave multiple arguments together; keep each argument separate and address it fully before moving onto the next.
- Connect the dots between the facts and caselaw.
 - String cites to the record with no accompanying explanation are generally unhelpful.
 - Explain *why and how* the law as applied to the facts does or does not show Board error. It is required by the Court's rules (Rule 28(a)(5)) and may avoid an argument being deemed undeveloped or unpersuasive.
 - If you cite to law in your boilerplate, apply it in the analysis.

Additional Comments:

- Avoid string cites.
 - Unless you are relying on the specifics of a case or you are disputing what rule applies, you probably don't need a lot of cites or quotes to back up your rule of law.
- Discuss specific Board findings and conclusions.
 - If there are multiple key Board findings, explain how each is erroneous/plausible. Showing error/non-error in some Board findings may not matter if you leave unchallenged/undefended other pivotal findings.
 - Acknowledge when the Board did not make findings of fact and tell the Court why that does or does not require remand.
- Do not use *supra* to refer to record evidence from the statement of facts.
- Be selective in your arguments. The kitchen sink approach almost never works.
- Address issues for which you have the burden (jurisdiction, prejudice, rebuttal of a presumption).

- Be proactive – anticipate what factual or legal questions the Court may have after reviewing the law/evidence and answer them. Failing to do so could lead to delays (Court ordering additional briefing) or even impact the outcome on issues for which you have the burden.
- Do not assume the Court will do the legal research for you.
 - Especially if a legal issue is complicated or unclear, lay out the array of caselaw and how you came to your conclusion as to what caselaw requires.
- Divide the issues into "positive" and "negative" issues.
 - The positive issues are your affirmative issues about why your-client should win the case and should come first (i.e., the issue here is x; several cases decide x in our favor, we win).
 - The negative issues respond to your opponent's view about why they should win the case and should come last (i.e., (1) contrary to appellee's argument, these cases do not decide x in their favor, we still win, or (2) contrary to appellee's argument these facts do not change the application of the case law, we still win).
- Lead with your strongest argument.
- Ensure specificity in the analysis. When using the indefinite "this" or "that," ensure that the referent is clear or obvious.
- Many briefs could include less boilerplate (especially about standard of review). Use those pages instead to really explain your argument/analysis.

Remedy

Common point: Ask for what you want clearly and directly.

- If there is a specific approach that you want the Court to take (i.e., remand on Ground #1 even though you'd get the same relief under Ground #2), ask for it.
- Be clear if you are asking for any alternate relief.

Reply Brief

Common point: Always file a reply brief.

- Caveat: Do not merely rehash your opening brief. If you truly have nothing new to add, don't reply (but remember that silence could be viewed as concession of your opponent's argument).

Additional comment:

- If you are making a new argument or it's a close call, be up front about it and explain why the Court should address it anyway.

Miscellaneous

- *Solze* notices
 - Extensive boilerplate regarding the legal standard for a *Solze* notice is unnecessary.
 - Do not use *Solze* notices to raise an old case or existing statute/regulation that you forgot in your brief(s).
 - Do not use *Solze* as a second attempt to argue your case.
 - If necessary, seek leave to file a supplemental brief to address how new precedent impacts arguments made in your brief.
- Consider the possibility that your pleading may be read at least once on a tablet or phone. A short document with a good summary and substantive subheadings will be much easier to understand, especially if your opponent makes the judge hunt through pages of boilerplate for substance.
- The summary of the argument is important and should incorporate your best points.