

HOW TO WRITE, EDIT, AND REVIEW PERSUASIVE BRIEFS: Seven Guidelines From One Judge and Two Lawyers

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1. Begin Your Brief with a Compelling Recitation of the Relevant Facts



BORING

On January 5, 2005, ABC Co. sent a written purchase order to DEF Co. for 100 widgets at an advertised price of \$1 per widget. When it received same on January 7, DEF put 50 widgets in regular mail addressed to ABC with an invoice for fifty dollars. On that same ***419** day, ABC sent a purchase order to XYZ Co. for 100 widgets at an advertised price of \$.50 per widget. On January 9, ABC received DEF's widgets and invoice. The next day, ABC returned DEF's widgets.



1. Begin Your Brief with a Compelling Recitation of the Relevant Facts *(cont.)*

ARGUMENTATIVE

On January 5, 2005, ABC Co., acting in the utmost good faith, sent a conditional purchase order to DEF Co. that required DEF to send ABC precisely 100 widgets according to the strict terms and conditions of ABC's purchase order, or not at all. DEF specifically refused to accept ABC's purchase offer. Instead, DEF made an express counteroffer. It did so in two ways: one, it varied the quantity term by sending ABC less widgets than it wanted (50 instead of 100); and two, by making acceptance of the widgets subject to a vastly different (and commercially unreasonable) set of terms and conditions pre-printed on DEF's written invoice form. Left with no choice, ABC was forced to cover itself by purchasing alternative widgets from XYZ Co. under acceptable terms.



1. Begin Your Brief with a Compelling Recitation of the Relevant Facts *(cont.)*

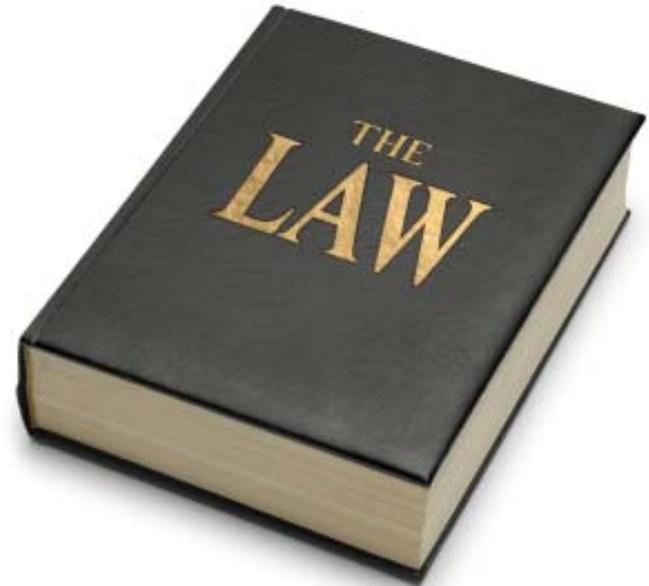
BALANCED

ABC Co. needed 100 more widgets to satisfy customer demand. At the time, the best price on the market was \$1 per widget from DEF Co. So, on January 5, 2005, ABC sent DEF a written purchase order. The PO specifically called for 100 widgets and set forth ABC's standard terms and conditions. Although there was no way for ABC to have known it at the time, DEF could not fill the order. But rather than inform ABC of that fact, on January 7th, DEF simply went ahead and put 50 widgets in the mail to ABC. More than that, DEF included an invoice with the incomplete shipment that included certain terms that were different than those on ABC's PO (although the price term was the same). Meanwhile, and not having heard from DEF regarding its order, ABC placed a separate order with XYZ Co. for 100 widgets at a better price, which XYZ promptly filled. When ABC finally received the 50 widgets from DEF on January 9th, it had no need for them given its contract with XYZ, and they were immediately returned to DEF.



2. Acknowledge the Applicable Legal Standard and Use It to Your Benefit

- Accurately state the applicable legal standard
- Explain how the legal standard works to your client's advantage
- Reiterate and tie the legal standard to the substantive arguments in your brief



3. Carefully Pick Your Strongest Arguments

- Strong arguments lose their edge when surrounded by less persuasive arguments
- Consider abandoning or deemphasizing weaker arguments
- The key to effective written advocacy is selectivity, not fertility



“An effective way to lose on appeal is to “conveniently bury your winning argument among nine or ten losers.”

Alex Kozimski, The Wrong Stuff, 1992 BYU L. REV. 325, 327 (1992).



4. Present Your Arguments Logically

- Present your facts logically, in a logical order
- Arguments should build on facts and should compel the result you seek
- Break up your “affirmative” and “defensive” arguments
- Ask yourself how the court’s opinion should look
- Read your table of contents!



A Persuasive Brief Starts with the Table of Contents

- I. THE TRIAL COURT'S GRANT OF SUMMARY JUDGMENT IS SUBJECT TO DE NOVO REVIEW.
- II. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT IN DEFENDANT'S FAVOR BECAUSE THERE IS NO GENUINE ISSUE OF MATERIAL FACT THAT PLAINTIFF'S COMPLAINT IS BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS.
 - A. Plaintiff's complaint is subject to the two-year statute of limitations for assault and battery claims set forth in RCW 4.16.100(1), not the three-year statute of limitations for ordinary negligence.
 1. In determining which statute of limitations applies, this court must evaluate the essence of plaintiff's allegations rather than the way plaintiff characterized his claims in the pleadings.
 2. The essence of plaintiff's allegations, as well as his own deposition testimony, demonstrates that plaintiff's claim is based on defendant's alleged intentional conduct.
 3. In any event, defendant owed plaintiff no legal duty and, therefore, plaintiff cannot bring a claim for negligence as a matter of law.
 - B. Defendant is not equitably estopped from asserting a statute of limitations defense because nothing defendant said or did prevented or dissuaded plaintiff from filing his complaint within the relevant limitations period.
- III. THE TRIAL COURT'S SUMMARY JUDGMENT RULING CAN BE AFFIRMED ON THE ALTERNATIVE GROUND THAT PLAINTIFF FAILED TO SET FORTH SPECIFIC FACTS IN RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON THE ISSUE OF SELF-DEFENSE.

5. Present Your Arguments Simply and Concisely

- Avoid jargon and legalese
- Look for ways to eliminate any text that is not essential to your argument
- Ask a non-lawyer to read your brief



**“Simple arguments are winning arguments;
convoluted arguments are sleeping pills on paper.”**

Alex Kozinski, *The Wrong Stuff*, 1992 BYU L. REV. 325, 326 (1992).



6. Be Accurate, Fair, and Even-Handed

- Avoid caustic and antagonistic rhetoric
- Don't attack your opponent
- Don't ignore adverse authority



7. Follow the Court's Rules and Sweat the Details

- Follow the court's rules regarding form and substance
- Proofread, proofread, proofread
- Support all factual assertions with citations to the record
- Ensure that case citations and quotations are accurate
- Keep string-cites and footnotes to a minimum
- Avoid massive block quotes
- Delete excessive adverbs such as “clearly,” “specifically,” and “simply”





QUESTIONS?

