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Article

***417** HOW TO WRITE, EDIT, AND REVIEW PERSUASIVE BRIEFS: SEVEN GUIDELINES FROM ONE JUDGE AND TWO LAWYERS

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I. INTRODUCTION

The ability to write a clear and persuasive brief is one of the most important weapons in a lawyer's armory; this is especially true for appellate practitioners. Although oral advocacy skills are important, a litigant's briefs are reviewed long before oral argument, when judicial law clerks are drafting their bench memoranda and judges are deciding how to approach oral argument and decide a case. Briefs are often reviewed a second (or third, fourth, or fifth) time after oral argument-when judges and their clerks are crafting the court's decision and revisiting the issues that the court must decide. For these reasons, a clear and persuasive brief often has a greater impact than even the most inspired oral argument. Moreover, it is becoming increasingly common for courts to decide cases without oral argument. In those instances, a compelling brief is critical to a litigant's success, and the only way to make an impact on the court.

The ability to write and recognize a persuasive brief is important to lawyers throughout their careers. Junior attorneys are often responsible for initially writing a brief. Senior attorneys often review those briefs ***418** and either rewrite or edit them (as circumstances require). In-house counsel may then review the briefs once more, providing additional edits and comments and addressing concerns. Wherever you happen to be in your career, it is important to know how to write, rewrite, edit, recognize, and review an effective brief. This Article offers a number of guidelines for crafting such briefs and provides a number of practical pointers to help lawyers along the way from writing through final review.

More specifically, this Article offers seven general guidelines for writing persuasive briefs. Those guidelines, each of which is discussed in Part II, are as follows: (1) begin your brief with a compelling recitation of the relevant facts; (2) acknowledge the applicable legal standard and use it to your benefit; (3) carefully pick your strongest arguments; (4) present your arguments logically; (5) present your arguments simply and concisely; (6) be accurate, fair, and even-handed; and (7) follow the court's rules and sweat the details. Finally, although the discussion of these guidelines is focused primarily on appellate briefs, it is important to note that almost everything we write here applies equally to trial court briefing. After all, a good brief is a good brief.

II. SEVEN GUIDELINES FOR PERSUASIVE BRIEF-WRITING

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

One of the most important guidelines for writing a persuasive brief is to start by telling your story. Do not wait until you reach the argument section of your brief to begin arguing your case. A persuasive brief begins with a compelling recitation of the relevant facts; that is true even if the case is to be decided on purely legal grounds. The trick here, of course, is to present all the relevant facts while, at the same time, highlighting the facts (or absence of facts) that support your theme of the case and your legal arguments. Subtlety and accuracy are critical. If your presentation of the facts is too argumentative, unbalanced, or misleading, your credibility will suffer and your otherwise valid legal arguments may be discounted.

The following three examples illustrate the difference between a statement of facts that lacks persuasion or credibility and one that subtly conveys your theory. In the first example, the author sets the stage with a hum-drum presentation of facts that has all the relevant information, but lacks persuasion:

> 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.

This is pretty boring; in fact, after reading this, one cannot figure out which side the author represents.

In contrast, in the next example the author put an overly aggressive spin on these facts, one that is far too argumentative for a credible fact section:

> 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.

The problems with this version are almost too many to count (although at least you can tell who the author represents): it uses loaded, legally significant terms (offer, counteroffer, cover); it omits key facts (such as the price and when DEF sent ABC the widgets); and, worst of all, it is purposely misleading (implying that ABC had no choice but to contract with XYZ because DEF's widgets or terms were unacceptable).

The following example avoids these pitfalls. Here, the author carefully shapes the facts without distorting them:

> 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 ***420** DEF on January 9th, it had no need for them given its contract with XYZ, and they were immediately returned to DEF.

All of the facts are here. More importantly, after reading this version, not only will the reader know who the author represents, he or she will know ABC's theme of the case. Crafting a facts section in this manner takes time, but it is time well-spent. In short, when you approach the facts section, view yourself as a careful story-teller, not just a neutral historian, and certainly not a fiction writer either.

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

Once you get past the facts, you can and should remove the cloak of even-handedness and get straight into serious advocacy. Yet most lawyers blow right through what is typically the very first argument section of the brief-the applicable legal standard-without employing any advocacy whatsoever. Do not miss this opportunity. The controlling legal standard not only tells the court how your arguments must be evaluated, it is also the first step in convincing the court why you should win. That is especially important on appeal, where the rules typically require attorneys to include a section describing the applicable standard of review. As Judge Harry Pregerson notes in his article, *The Seven Sins of Appellate Brief Writing and Other Transgressions*, [FN1] "[t]he standard of review is the keystone of appellate decision making." [FN2] It is not enough to show that your client is right through persuasive argument; you need to show the court that it can rule in your favor because you have satisfied the applicable legal standard (or that your opponent has failed to do so).

The first step in that process is to acknowledge and accurately state the applicable legal standard. In the trial court, the correct standard turns on the relief sought and the procedural posture of the case. On appeal, the correct standard (usually called the standard of review) depends on the type of lower court decision or judgment that has been appealed. In many cases, there will be different standards of review applied to different aspects of the appeal, and you should carefully identify for the court all that apply. In most cases, this can be accomplished by using an online research tool and a simple query such as "standard of review" in the same paragraph as "summary judgment."

***421** Most lawyers have no problem identifying the correct standard of review and setting it out for the court, but that is where they stop. In some cases, the standard of review is copied from a recent case. In other cases, it is copied from a previous brief. There is a good reason why the standard of review section of a brief often looks as if it has been cut-and-pasted from another source; it probably was. But to be persuasive, a brief should also explain how the standard works to your client's advantage. If the standard is de novo, emphasize to the court that it is not bound by the trial court's adverse findings and conclusions. If the standard is abuse of discretion, on the other hand, emphasize that the court should not substitute its judgment for that of the trial court. You may even want to provide a few citations to appellate decisions where the court reached the conclusion you want your court to reach. For example, a brief challenging the sufficiency of the evidence would state: "The court of appeals has, on numerous occasions, overturned a jury's verdict where, as here, there was insufficient evidence to support the verdict." In the end, the standard of review section of the brief should not appear in a vacuum; treat it as part and parcel of your argument.

After you have stated the proper standard of review and explained why it matters in your case, you should reiterate it and tie it to the substantive arguments you make throughout the substantive sections of your brief. For example, if you represent the respondent who successfully won a jury verdict in the trial court, do not just explain why the jury's verdict was correct; emphasize that the verdict was supported by substantial evidence. Do not conclude by simply stating that the court should affirm the judgment below; remind the court of the heavy burden the standard of review places on the appellant. In responding to the appellant's sufficiency of the evidence argument, you might state: "Appellant has not demonstrated that there was insufficient evidence for a rational, fair-minded person to come to the conclusion that the jury did in this case." Again, whether you are writing or reviewing a brief,

make sure that you not only correctly state the applicable legal standard, but also remember to use it to your advantage whenever possible.

C. Carefully Pick Your Strongest Arguments

A persuasive brief should include persuasive arguments and *only* persuasive arguments. More is definitely not better in written advocacy, especially when crafting persuasive legal briefs. Judges (and their clerks) have a very limited amount of time in which to read and evaluate your brief. If you force them to trudge through a host of unpersuasive arguments, you lose credibility and they lose interest. Perhaps more importantly, strong arguments lose their edge and persuasive force when ***422** surrounded by less persuasive arguments. Judge Alex Kozinski of the Ninth Circuit notes in his article that an extremely effective way to lose on appeal is to "bury your winning argument among nine or ten losers." [FN3] The key to effective written advocacy, therefore, is selectivity, not fertility. A lesser brief includes every conceivable argument. A good brief is focused, concise, and persuasive. In practical terms, this may mean abandoning or deemphasizing arguments that you may have made to the trial court. If you tend to fall in love with your own arguments and ideas, that kind of decision can be excruciating, but it is essential.

D. Present Your Arguments Logically

After you have identified the most persuasive arguments and dropped the rest, it is equally important to present your arguments in a logical manner. If this is done correctly, one point flows from another, arguments build on facts, and the arguments (hopefully) compel the result you want. This sense of flow should be evident within each paragraph, within each section of the brief, and within the brief as a whole. One easy way to begin this process is to structure your brief so that the issues and your main points are contained in discrete sections and subsections. You can test whether you have done this effectively by reading the table of contents as if it is the only thing the court will consider. Ask yourself "does the table of contents tell the court what kind of relief I am seeking, accurately describe my main (or alternative) arguments, and tell (or at least outline) my story?" In the end, your table of contents should look something like a summary of the argument. Here is a simple example:

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 ***423** 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.

Bottom line, if the table of contents does not make sense or is hard to follow, chances are that the brief is disorganized as well.

Another very useful way to present your arguments logically is to first tell the court how to get to the *right* answer, and only then tell the court why the other side (or the trial court) is *wrong*. All too often, lawyers devote too much of their argument to explaining why someone else is wrong. In an opening brief, the appellant may feel compelled to provide a litany of reasons why the trial court erred. In a responsive brief, the respondent may provide an equally comprehensive list of why the appellant's arguments are flawed. While that kind of analysis is important, court opinions typically start by explaining the *right* answer, and persuasive briefs should as well. Having provided that analysis, you can ***424** then turn to the other side's arguments (or the trial court's analysis) and explain why that approach is incorrect.

Obviously, determining the amount of space to devote to each portion of the brief can be a difficult judgment call and will necessarily vary from brief to brief. It often requires a good deal of text to properly develop a legal argument-to explain the *right* answer-and you should devote appropriate attention to that analysis. That, after all, is the strength of your case. Once you have done so, there will likely be a number of arguments that you have not yet addressed. But if you have properly developed your affirmative argument, it should be much easier to address those remaining issues. Moreover, the court will be much more likely to agree with you that the other side (or trial court judge) is wrong if you have already convinced the court that you are right.

The above advice applies to any brief, but it is especially important if you are the respondent or the appellee on appeal. Available statistics show that most respondents win on appeal. [FN4] When you can, use that subtle, cultural prejudice to your advantage. As the respondent, do not simply accept your adversary's phrasing of the issues or order of presentation. Do not hesitate to rephrase issues if it can be done fairly and to your advantage. Most of all, do not be afraid to address the issues presented in a different order than the order in which they appear in your adversary's brief. Reordering the presentation of the issues can work to your advantage, especially in a case presenting multiple issues of approximately the same importance.

Another effective way to determine the most logical manner in which to present your arguments is to spend some time thinking about how the opinion would look if you were to prevail on every issue. In other words, ask yourself: “If I were tasked with writing an opinion on this matter, how would I do it?” After you determine the answer to that question, you should make sure that the brief you are writing (or reviewing) includes everything the court needs to know, in the order it needs to know it. Often, this lends itself to a chronological presentation of the issues based on how the issues arose during the trial, not as the underlying facts actually unfolded. This presents an easy approach to brief-writing and may have the dual benefit of (1) persuading the judge's law ***425** clerk to “work from” your brief instead of the appellant's brief in drafting internal memoranda to the judges, while (2) de-emphasizing a possibly vexing issue that arose late in the trial. By restructuring the issue statements and the order in which the issues are addressed in the briefing, a skilled writer can send the implicit message that the case is really just a routine affirmance. When used in conjunction with sound arguments regarding the standard of review, such a presentation builds a silent momentum toward affirmance.

E. Present Your Arguments Simply and Concisely

A persuasive brief also expresses arguments in a simple and concise manner. Addressing this issue, Judge Kozinski notes that "simple arguments are winning arguments; convoluted arguments are sleeping pills on paper." [FN5] Obviously, this is not an easy task where the legal issues on appeal are complex or the subject matter is highly technical or specialized. But, in general, use plain language if possible, avoid jargon and legalese, and look for ways to eliminate any text that is not essential to your discussion of the facts or argument. There are dozens of books and articles on style, usage, and effective legal writing to help you accomplish this, [FN6] so we pause only long enough to give you three tips that we feel are particularly useful. One, ask one of your colleagues (or even a non-lawyer) to read your brief; if they cannot understand it, a judge may not be able to either. Two, once you finish your first full draft, strive to cut your brief down by at least one-third; you might not be able to do it, but the exercise is extremely useful. And three, as you near completion of your final draft, take a break from the brief for a day or two (time permitting) before you give it one last fresh and objective read.

F. Be Accurate, Fair, and Even-Handed

A persuasive brief is also even-handed in its presentation of relevant facts and controlling legal principles. A caustic tone or needlessly antagonistic rhetoric, on the other hand, detracts from a brief's persuasiveness. If you have a truly compelling argument, there is no need to disparage your opponent or your opponents' arguments in order to prevail. Those arguments may be "without merit" or "unprecedented"; if so, you should not be shy about using these kinds of phrases. But very little is added by using terms like "preposterous," "absurd," or "silly." In fact, ***426** when litigants use such terms, judges may start to wonder whether the attack is an attempt to hide a weakness in the party's position. Eliminate those words from your briefs, both in the drafting process and in the review process. Remember, a good brief leads the court to conclude that the opponent's arguments are absurd without actually saying so.

The same sense of even-handedness and restraint should inform your factual and legal presentation. As noted above, a good brief presents the facts in a favorable light, but does not overstate those facts or wholly ignore countervailing considerations. A good brief is equally fair in characterizing case law, without mischaracterizing the holding of a case or ignoring controlling authority. If you are confronted with bad, but not controlling, case law, you can choose to deal with it fairly and head-on. Or, in appropriate circumstances (such as where the adverse case law is not directly on point), you might decided to ignore an adverse decision. But one of the worst things you can do is to put a misleading spin on a case. The judge (or your opponent) will certainly call you on it, and the result could be far worse than the case law itself would require. As Judge Pregerson notes: "[i]f, under the guise of aggressive advocacy, you misuse a case or fail to discuss an unfavorable holding, you lose credibility." [FN7] In other words, if part of your brief is misleading or evasive, the court may conclude that the rest is equally suspect.

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

When courts issue rules relating to the submission of briefs, they expect those rules to be followed. A court's insistence on a particular format, font size, page limitation, or word limitation may appear arbitrary, but it is not. The rules exist because judges have concluded that they can more effectively decide cases if briefs are in the correct format and include the required analysis. Failure to follow the rules will, at best, leave a judge annoyed and irritated. At worst, your brief could be stricken or your credibility destroyed. Imagine what your client would think if the court refused to consider a particularly important argument, such as entitlement to attorney fees, simply because your brief exceeds the court's page limits or otherwise fails to follow the court's rules.

This is not a theoretical concern. On November 29, 2007, the Ninth Circuit issued an opinion striking a brief in its entirety and dismissing the appeal because the brief was seriously deficient. [FN8] The court noted that ***427** the brief failed to provide the applicable standard of review, made almost no legal arguments, and lacked a table of

contents, table of authorities, citations to authority, and accurate citations to the record. [FN9] Addressing the significance of its rules, the court explained:

> Federal Rule of Appellate Procedure 28 and our corresponding Circuit Rules 28-1 to -4 clearly outline the mandatory components of a brief on appeal. These rules exist for good reason. In order to give fair consideration to those who call upon us for justice, we must insist that parties not clog the system by presenting us with a slubby mass of words rather than a true brief. [FN10]

Judge Kozinski takes an equally harsh stance with lawyers who play games (smaller fonts, smaller margins, and the like) to circumvent the court's rules, stating: "It tells the judges that the lawyer is the type of sleaze ball who is willing to cheat on a small procedural rule and therefore probably will lie about the record or forget to cite controlling authority." [FN11]

It is equally important to consider other relevant sources of advice regarding effective briefs. In Washington, for example, appellate practitioners can find a very useful document, *Brief Writing-Best Practices*, on the website for Division One of the Court of Appeals. [FN12] A number of federal judges have published similar advice, some of which we have cited in this Article, including Judge Pregerson's *The Seven Sins of Appellate Brief Writing and Other Transgressions*, [FN13] Judge Kozinski's *The Wrong Stuff*, [FN14] and Third Circuit Judge Ruggero J. Aldisert's book, *Winning on Appeal: Better Briefs and Oral Argument*. [FN15] These "guidelines" also stress the importance of avoiding spelling, grammatical, and citation errors. These kinds of mistakes, while not necessarily germane to the argument, demonstrate a lack of attention to detail and can distract the judge from the merits of your argument.

428Bluebook*[FN16] citation errors can also be harmful to your argument. Citation form is like the handshake of a secret society: it conveys important information while simultaneously announcing membership. A brief with correctly formatted citations not only provides information (i.e., the holding, the case, the court, the year) but also conveys a sense of completeness and thoroughness. Conversely, a brief marred by incorrectly formatted citations raises hackles and invites suspicion; it is the lawyer-author's tacit admission that "I really don't belong here." If you send the message that it is not important to you, you identify yourself as a careless outsider. That cannot possibly help your client's cause. In short, whether you are the author or reviewer, it is important to ensure that the brief not only complies with all applicable requirements, but also is accurate in substance and professional in appearance. Always:

- 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; and
- delete excessive adverbs such as "clearly," "specifically," and "simply."

Although some of these suggestions may seem self-evident, it is important to sweat the details (even the obvious ones). Otherwise, a winning brief can quickly become a losing one.

III. CONCLUSION

Whether you are writing, editing, or simply paying for a legal brief, you want that brief to be as persuasive as it can possibly be. Judges expect no less. They read hundreds of briefs each year, and they enjoy reading briefs that are easy to follow, logical, and persuasive. Knowing how to satisfy that desire is an important step on the road to success in court. This Article presented seven general guidelines-from one judge and two lawyers-regarding how to write, edit, and review persuasive briefs. Although writing a persuasive brief is more art than science, the ***429**

guidelines that are described in this Article can help lawyers craft briefs that will have a more significant impact on judges and their clerks-something that anyone reading a brief (or paying for it) will truly appreciate.

[FNd1]. Stephen Dwyer was elected to the Washington State Court of Appeals, Division One, in November 2005. Prior to that, in February 2004, Judge Dwyer was appointed to the Snohomish County Superior Court after serving for nine years as a Snohomish County District Court Judge. Leonard Feldman is an attorney at Heller Ehrman LLP, where he specializes in appeals before the Ninth Circuit and Washington appellate courts. Ryan McBride is a member of the Litigation Practice Group and the Appellate Practice Group at Lane Powell PC, where his practice focuses on complex commercial litigation and appeals.

[FN1]. Harry Pregerson, *The Seven Sins of Appellate Brief Writing and Other Transgressions*, 34 UCLA L. REV. 431, (1987).

[FN2]. *Id*. at 437.

[FN3]. Alex Kozinski, *The Wrong Stuff*, 1992 BYU L. REV. 325, 327 (1992).

[FN4]. *E.g*., Bureau of Justice Statistics, *Compendium of Federal Justice Statistics 2004* at 82 (Dec. 2006) ("In most (80%) of the appeals terminated on the merits, the district court ruling was affirmed; in another 4% it was partially affirmed"); Dale E. Console, *Understanding the Appellate Process*, 211 N.J. LAW. 8, 9 (2003) (New Jersey statistics: "Appellate Division affirms 74 percent of the civil appeals that go to the panel. The affirmance rate in criminal appeals is 84 percent."); John Derrick, *Appeals Statistics* (2006), http://www.californiaappeals.com/appeals_statistics.html (reporting reversal rates of approximately 20% in California).

[FN5]. Kozinski, *supra* note 3, at 326.

[FN6]. *E.g*., LAUREL C. OATES & ANNE ENQUIST, THE LEGAL WRITING HANDBOOK (Aspen Publishers, 4th ed. 2006); LAUREL C. OATES & ANNE ENQUIST, JUST WRITING, GRAMMAR, PUNCTUATION, AND STYLE FOR THE LEGAL WRITER (Aspen Publishers, 2d ed. 2005).

[FN7]. Pregerson, *supra* note 1, at 436.

[FN8]. Sekiya v. Gates, 508 F.3d 1198 (9th Cir. 2007).

[FN9]. *Id*. at 1200.

[FN10]. *Id*. (internal quotations omitted).

[FN11]. Kozinski, *supra* note 3, at 327.

[FN12]. Washington State Court of Appeals Division I CLE: Briefly Speaking, *Brief Writing-Best Practices*, http://www.courts.wa.gov/appellate_trial_ courts/?fa=atc.display_divs&folderID=divl&fileID=brief Writing (last visited Mar. 15, 2008).

[FN13]. Pregerson, *supra* note 1, at 436.

[FN14]. Kozinski, *supra* note 3.

[FN15]. RUGGERO J. ALDISERT, WINNING ON APPEAL: BETTER BRIEFS AND ORAL ARGUMENT (2d ed. 2002).

[FN16]. THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (Columbia Law Review Ass'n et al. eds., 18th ed. 2005).

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