Ohio State Bar Association
Appellate Practice

Brief Writing

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Topics

- Identifying the Issues
- Standard of Review
- Writing to Persuade
- Writing a Clear and Concise Brief
- Organizing the Brief
- Using Authorities Effectively
- Format Issues
Preliminary Matters

- Who is your audience?
  - state court
  - federal court
  - administrative agency

- What are the rules?
  - Administrative Agency Rules
  - Ohio Rules of Civil Procedure
  - Ohio Rules of Appellate Procedure
  - Local Appellate Court Rules
  - Rules of Practice of the Supreme Court of Ohio
  - Federal Rules of Appellate Procedure
  - Sixth Circuit Internal Operating Procedures

- What do I need to draft the brief that I do not have?

Contents of Brief

App. R. 16
1. Table of contents
2. Table of authorities
3. Statement of assignments of error, with reference to place in record where each error reflected
4. Statement of the issues, with reference to the assignments of error
Contents of Brief

App. R. 16
5. Statement of the case
6. Statement of the facts, with appropriate reference to the record
7. Argument
8. Conclusion

Identifying the Issues

Don’t
- Start to write until you have thought the case through
- Make the court grope for the question that needs to be answered
- Attempt to address too many issues
Identifying/Stating the Issues

**Do**
- Prepare an outline, but it need not be linear
- Determine all potential issues and prioritize them
- Select only most important issues for inclusion
- Weave in facts so reader understands the problem

**Identifying the Issues**

**Don’t**
Whether the trial court erred in dismissing the complaint.

**Do**
A party cannot be required to arbitrate claims in the absence of an agreement to do so. The trial court erred in dismissing the complaint because there was no agreement to arbitrate the discrimination claim.
Identifying/Stating the Issues

- Framing the issue is critical
  - Put it up front, preferably in opening paragraph
  - Be succinct
  - What is the question you want the court to answer?
  - What do you want the court to decide?

DEBUNKING THE MYTH

- No need to start issues with “whether” or another interrogative word.
- A one-sentence version of an issue is not required.

(Bryan Garner, *The Winning Brief*, Tip 9)
Standard of Review

- In an appellate brief, always state the standard of review (Bryan Garner, The Winning Brief, Tip 95)
- Check rules - under federal appellate rules, the SOR is required for each issue presented
- Don’t just state -- essential to demonstrate how the standard applies to the case

Standard of Review

- The standard of review is the substance of appeals
- Focuses on the deference due a prior decision maker
- Often has a great impact on the outcome of the appeal
- Usually the second question the court must answer
Standard of Review

- Use in determining whether to appeal

- Appellants – raise standard to a more rigorous review

- Appellees – frame the issue in a manner more deferential to the initial decision maker

Standard of Review

- Example: Discovery of privileged medical records under *Roe v. Planned Parenthood*
  - Otherwise privileged medical information may be disclosed if “disclosure is necessary to protect or further a countervailing interest that outweighs the patient’s interest in confidentiality” (*Biddle v. Warren General Hosp.*)

- Discovery issues usually reviewed under abuse of discretion standard

- But, propriety of disclosure is a question of law reviewed *de novo*
Standard of Review

- *De novo* review – plenary review – no deference

- Weight of the evidence or “clearly erroneous” – highly deferential standard

- Abuse of discretion – allows trial court to be “wrong” but not reversed

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Standard of Review

- Abuse of discretion
  
  - “An abuse of discretion involves far more than a difference in opinion or an error of judgment; it connotes an attitude that is unreasonable, unconscionable or arbitrary.” (Seasons Coal v. Cleveland (1984), 10 Ohio St.3d 97)

  - Chosen option need not be the best – need only be legally permissible

  - Appellants - focus court on what was not permissible
    - failure to consider appropriate factors
    - consideration of improper factors
    - failure to recognize and exercise discretion
Writing to Persuade

- The Statement of Facts
- Show, Don't Tell
- Eliminate Clutter and Weasel Words
- If You Are Credible, You will be More Persuasive

Statement of Facts

"While there are lots of ways to write a statement of facts, a good one passes two essential tests:

First, it stands alone. Anyone reading your statement of facts should understand what the case is about without having to look at anything else.

Second the statement of facts should make the reader take your side. It should be persuasive without being argumentative.

[James W. McElhaney, The Art of Persuasive Legal Writing, ABA J., Jan. 1990, at 76, 78]
Statement of Facts

- Confine facts to those that are relevant and essential to the issues
  - Don’t overchronicle – skip dates unless critical

- Present facts in chronological order
  - Don’t present facts by summarizing trial testimony on a witness by witness basis

Statement of Facts

- Write facts so that court will want to decide case in your favor
  - Don’t use “appellant,” “appellee,” etc.
  - Don’t flog your opponent or opposing counsel
Statement of Facts/Argument

Acceptable
1. Appellant’s reliance on XYZ case is misplaced
2. Smith ignores three crucial facts

Unacceptable
1. Appellant misrepresents the holding in XYZ case
2. Smith blatantly attempts to mislead this court by misstating the facts

Show, Don’t Tell

- Use descriptive signposts to tell the reader where you are going and to break information into digestible pieces

Example: U.S. v. Martha Stewart

From Stewart’s brief:
1. Stewart’s Stock Sale and the Federal Investigation
2. Pre-Trial Proceedings
3. Trial

From the Government’s Brief:
1. “Get Martha on the Phone”
2. “Peter Bacanovic Thinks ImClone is Going to Start Trading Downward”
3. Stewart Sells Her ImClone Stock
4. “Something is Going on with ImClone and Martha Stewart Wants to Know What”

(Rose M. Guberman, Secrets of The Great Brief Writers, p.51)
Show, Don’t Tell

- Use descriptive words and rich details to paint the picture
- Don’t tell the reader what to think about the facts; let reader reach own conclusion
  - never use “which shows” or “which demonstrates”
  - don’t tell the reader Martha Stewart’s friends are liars – give them facts to reach that conclusion

Eliminate Clutter and Weasel Words

- Eliminate tiresome repetitions
  - Example: Defendant-Appellant United States Fidelity & Guaranty Company

- Eliminate throat-clearing words
  - "It is important to remember that . . ."
  - "It is respectfully submitted that . . ."
  - "It should be noted that . . ."
Eliminate Clutter and Weasel Words

Example:

Before
It is respectfully submitted that genuine issues of material fact remain such that defendant’s motion for summary judgment must be denied.

After
Because genuine issues of material fact remain, the court should deny Taylor’s motion for summary judgment.

(Bryan Garner, The Winning Brief, Tip 38)

Eliminate Clutter and Weasel Words

- Avoid weasel words – they qualify and dilute
- Cut unnecessary words

Before
Mr. Smith wholly fails to plead ABC Life Insurance’s knowledge of any alleged falsity nor does Mr. Smith plead any intent on the part of ABC Life to defraud.

After
Smith does not plead that ABC Life knew about an alleged falsity or intended to defraud.

(Bryan Garner, The Winning Brief, Tip 39)
### Eliminate Clutter and Weasel Words

<table>
<thead>
<tr>
<th>Instead of</th>
<th>Use</th>
</tr>
</thead>
<tbody>
<tr>
<td>the means by which</td>
<td>how</td>
</tr>
<tr>
<td>filed a motion</td>
<td>moved</td>
</tr>
<tr>
<td>in light of the fact that</td>
<td>because</td>
</tr>
<tr>
<td>was in conformity with</td>
<td>conformed</td>
</tr>
</tbody>
</table>

(Judge Mark Painter, *The Legal Writer*, pp. 90-93)

### Writing a Clear and Concise Brief

- Write like you talk
- Write like a nonlawyer – no legalese!
- Use short, simple, direct sentences, primarily in the active voice
The appellant complains that the trial court erred in holding that an attorney at law representing a loan association in the distribution of the proceeds of a loan to be made by such association could refuse to answer questions concerning such distribution on the ground that to answer would disclose a confidential communication to his client; and that the trial court erred in holding that a garnishee ordered by the court to appear for examination as to his indebtedness to the judgment debtor was the witness of the judgment creditor and could not be called for cross-examination by the latter.

(Judge Mark Painter, *The Legal Writer*, p. 15)

In other words, the Court in reaching its decision (to grant Plaintiff-Appellee’s Motion for Summary Judgment and denying Defendant-Appellant’s Motion for Summary Judgment) used arguments in Defendant-Appellant’s memorandum in its Motion for Summary Judgment and Defendant-Appellant’s memorandum in its Motion to Dismiss. (The Motion to Dismiss was granted and Plaintiff-Appellee was required to file an amended complaint.)

(Judge Mark Painter, *The Legal Writer*, p. 21)
Writing a Clear and Concise Brief

- Link paragraphs
- Minimize use of the passive voice
  - usually adds unnecessary words
  - fails to make clear who did what
  - makes it harder for reader to process the information

Passive
The deadline was missed by plaintiff’s counsel.

Active
Plaintiff’s counsel missed the deadline.

Writing a Clear and Concise Brief

Before law school
Smith hit Jones.
The police searched my friend’s car.

After law school
Jones was victimized in an assault by Smith.
The police performed a search upon my friend’s car.

- Avoid nominalization
- Watch for buried verbs

(Judge Mark Painter, *The Legal Writer*, pp. 75 – 79)
Writing a Clear and Concise Brief

- Most nominalizations end with:
  - tion (determination, modification)
  - ment (agreement, improvement)
  - ence (dependence)

Before
Ohio law makes a distinction between economic and noneconomic loss.

After
Ohio law distinguishes between economic and noneconomic loss.

Writing a Clear and Concise Brief

- Edit, edit, edit
- Read your brief out loud
- Don’t rely on spell-check
  – “The trail judge erred . . .”
- Use “readability statistics”
Using Authorities Effectively

- Do not distract the reader with authorities

Example:

In Groch v. General Motors Corp., 117 Ohio St.3d 192, 2008-Ohio-546, the Ohio Supreme Court held that S.B. 80’s ten-year statute of repose is constitutional on its face after revisiting its previous decisions in Sedat v. Knowlton Constr. Co., 49 Ohio St.3d 193, 551 N.E.2d 938 (1990), and Brennman v. R.M.I. Co., 70 Ohio St.3d 460, 1994-Ohio-322, and determining that the reasoning in Sedat should be followed.

- Reliance on long block quotes is rarely effective

Using Authorities Effectively

- Must link quoted material to your case
- Introduce block quote in a way that makes it relevant to your case
- String cites generally not effective – use sparingly and purposefully
- Parentheticals after citations – use complete quoted sentence or “ing” phrase
  - (affirming dismissal of complaint on basis that the parties agreed to arbitrate the discrimination claim)
  - ("The trial court held the discrimination claim fell within the scope of the arbitration agreement.")
Using Authorities Effectively

- Use the proper citation form
- Ohio rules changed in 2002 to include Ohio Supreme Court WebCite citations
  - citations include WebCite, plus print citation if available
    - Groch v. General Motors Corp., 117 Ohio St.3d 192, 2008-Ohio-546

Using Authorities Effectively

- Other notable 2002 changes
  - Ohio Supreme Court’s website is official repository of opinions
  - Cases to be italicized (not underlined)
  - If numbered text paragraphs are available, pinpoint page references not needed
Using Authorities Effectively

- January 1, 2012 – Supreme Court of Ohio Writing Manual
- Notable changes:
  - Date of opinion now appears at end of citation
  - Signals italicized
  - Citations of print published appellate cases now identify the appellate district

Using Authorities Effectively

- Citations of non-print published appellate cases now identify the appellate district and the county.
  - State v. Jones, 10th Dist., Franklin No. 02AP-1390, 2003-Ohio-5994
- Federal circuits now identified using “Cir.” instead of “C.A.”
  - “6th Cir.” instead of “C.A.6”
- Federal statutes now cited using “U.S.C.”
Using Authorities Effectively

- What is controlling authority?
  - Under Ohio’s rules, the law may be found in the syllabus, the text, and the footnotes of Ohio Supreme Court opinions (S.Ct.Rep.Op.R. 2.2) (eff. July 1, 2012)

  - No distinction between "controlling" and "persuasive" appellate court opinions
    “All opinions of the courts of appeals issued after May 1, 2002 may be cited as legal authority and weighted as deemed appropriate by the courts without regard to whether the opinion was published or in what form it was published.” (S.Ct.Rep.Op.R. 3.4) (eff. July 1, 2012)

Persuasion Through Appearance

- Font matters
  - serif font has “wings”
    • Garamond
    • Times New Roman

- Never use all caps in headings

- Not much justification for justified text

(Ruth Ann Robbins, *Painting with print: Incorporating concepts of typographic and layout design into the text of legal writing documents*, Journal of the Association of Legal Writing Directors (Fall 2004))
Persuasion Through Appearance

- Use lists and bullet points to improve readability of text

Example:
Smith contends that the trial court erred by granting summary judgment for State Mutual concerning (1) the commercial automobile policy; (2) the commercial general liability policy; (3) and the common law claims.

Persuasion Through Appearance

Original
In the NTSB database, an event is classified as an accident or an incident. An occurrence associated with the operation of an aircraft that takes place between the time any person boards the aircraft with the intention of flight and the time all such persons have disembarked, and in which any person suffers death or serious injury, or in which the aircraft receives substantial damage, is classified as an “accident”. The NTSB defines “incident” to mean an occurrence other than an accident, associated with the operation of an aircraft, which affects or could affect the safety of operations.
Persuasion Through Appearance

Revised
In the NTSB database, an event is classified as an accident or an incident.

- An **accident** is an occurrence associated with the operation of an aircraft that takes place between the time any person boards the aircraft with the intention of flight and the time all such persons have disembarked, and in which any person suffers death or serious injury, or in which the aircraft receives substantial damage.
- An **incident** is an occurrence other than an accident, associated with the operation of an aircraft, that affects or could affect the safety of operations.

SHORTER IS BETTER!