DRAFTING A WINNING APPELLATE BRIEF

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1. Identifying the Issues that Win on Appeal

Trial courts make mistakes. In some cases, they make many mistake. But not every mistake justifies an appeal. After all, the constitution guarantees a fair trial, not a perfect one. A successful appeal depends on knowing which mistakes to include on appeal, and which ones to leave behind. In fact, picking the "right" mistakes to bring up on appeal can be as important to success as writing the brief and making the oral argument—if not more so.

Some arguments are better left behind at the trial court level. For example, challenging a witnesses' credibility may be a winning trial strategy, but it's rarely a successful approach on appeal. On the other hand, some issues that took a backseat at the trial court level may deserve to be brought to the forefront on appeal. For example, if the trial judge summarily rejected a statutory construction argument, this may be an excellent appellate argument since statutory interpretation typically is reviewed *de novo*.

It's natural to want to include all possible errors on appeal. Leaving issues out comes with risk; the risk that the one issue that would have won the case was left out.

Realistically, however, that risk is probably minimal. Odds are that if appellate counsel considers an error minor in the grand scheme of things, so will the appellate court.

Still, the risk is there, however small. Some attorneys on appeal appear uncomfortable with taking that risk, and so write a shotgun brief that contains every conceivable issue under the sun.

This is not a good solution. Long briefs addressing a multitude of issues are almost always difficult to understand and follow. A focused brief is not only easier to understand, it also shows confidence and careful preparation, both of which leads to credibility—and *that* is the real key to success on appeal.

There's also a practical side to this. It's the job of appellate counsel to review the record, and direct the appellate court to the reversible errors, leaving the rest behind. Not every error below is grounds for reversal. So appellate counsel who include all possible errors are in effect asking the appellate court to do their job for them. Few judges appreciate that.

Also, including weak issues takes resources away from the strong ones. Every page spent briefing a marginal issue is one page less available for the strong issues. The Rules on Appellate Procedure set page limits on briefs, and there are only so many minutes given for oral argument. These are precious resources. Why waste them on marginal issues?

2. Standard of Review

The Standard of Review should be a valuable part of any brief. Making it valuable takes more than just including a Standard of Review section because the RAPs suggest that one should be included. RAP 10.3(a)(6). It takes actually *applying* the standard(s) of review in the Argument section.

The standard of review can help make your argument more persuasive. Many standards of review are based in an institutional bias toward affirming (*e.g.*, abuse of discretion, substantial evidence). That's a valuable tool to any appellate lawyer representing the Respondent.

Likewise, an appellate lawyer representing an Appellant should take care to point out whenever an error is reviewed *de novo* since that increases the likelihood that the appellate court will substitute its judgment for that of the trial court.

For example, if the alleged error is an award of attorney fees and your client is the Respondent,

DON'T SAY: The trial court was correct in awarding attorney fees. This Court should affirm.

SAY INSTEAD: The trial court did not abuse its discretion in awarding attorney fees. This Court should affirm.

The first version suggests the appellate court can replace its judgment for that of the trial court. The second version correctly points out that attorney fee awards are generally reviewed for abuse of discretion, and signals to the appellate court that it should affirm the award even if it would have reached a different decision if presented with the question down below.

Use the standard of review to bolster your argument.

3. Framing the Issues

a. Introduction Section

The primacy rule says that a reader is more likely to remember what he or she reads first. Accepting that as true, it means the most important points should be placed as early as possible in the brief.

The first opportunity to introduce the reader to the most important points is in the Introduction section. This is the first opportunity to tell the appellate court what your case is about, and why your side wins.

To be effective, an Introduction should be short, clear and to the point. Citations should be left for the Argument section whenever possible, and legalese should be left out entirely.

An effective Introduction is one that just comes out and says it: *This is what this case is about. This is why we win. And this is what we want you, the court, to do.*

DON'T SAY: Comes now John Smith, Appellant herein, and asks this esteemed Court to reverse the lower court. The trial court ruled against Appellant and in favor of Jane Doe, Respondent herein, based on an erroneous legal standard, and this Court should reverse to set aside a grievous error.

SAY INSTEAD: This is an adverse possession case. John Smith claims to have adversely possessed a part of Jane Doe's property. The trial court ruled in favor of Ms. Doe, but did so based on an outdated legal standard. This Court should apply the new standard recognized in Adams v. Brown, reverse the trial court, and remand for further proceedings below.

The first version says nothing. It's just words; it doesn't tell the reader anything about the case, what happened below, or what the Appellant wants to see happen.

The second version, while perhaps not poetry, leaves little doubt as to what Mr. Smith wants to see happen. It sets the stage for what comes next.

b. Issue Statements

Issue statements go hand-in-hand with the Introduction. They are an opportunity to repeat, in a different format, the points made in the Introduction.

For that to work, issue statements have to be clear and easy to understand. And they should say something about the particular case. Issue statements should be more than a series of academic questions.

DON'T SAY: Whether the trial court erred by ruling in favor of Respondent.

SAY INSTEAD: Did the trial court apply the wrong legal standard by rejecting Adams v. Brown?

The first version adds nothing. It's obvious that one side thinks the trial court erred by ruling in favor of the Respondent. There wouldn't be an appeal otherwise.

The second version reinforces to the appellate court a main theme: the trial court applied the wrong rule.

Ideally, each issue statement should be a single sentence, and that sentence should be short and to the point. If the issue statement turns into a run-on sentence, it's probably because it includes more than one (sub)issue. A solution is to break it into two issue statements, or into a main issue statement followed by two or more sub-issue statements.

EXAMPLE:

1. Did the trial court abuse its discretion by awarding XYZ, Inc. attorney fees?

    a. Did the trial court apply the correct legal standard?

    b. Is the amount of fees awarded beyond the range of acceptable options in a case like this?

These issues, including any sub-issues, then become the framework for the Table of Contents.

A brief that includes, say, two main issues, each with three sub-issues, should have a Table of Contents with two main headers and three sub-headers under each.

Symmetry in this regard is important. It reinforces clarity. Appearances matter. The way your brief looks to the reader's eye is important. A sloppy and disorganized brief is less persuasive than a brief that has a clear structure and flow to it.

c. Summary of the Argument

Summaries of the Argument are optional, not mandatory. RAP 10.3(a)(6). Not every brief deserves a Summary of the Argument. In many cases, the Table of Contents can fulfill the same function as a Summary of the Argument, especially if combined with a clear Introduction.

When a Summary of the Argument section is called for, the following pointers are useful:

- Keep it short. A Summary of the Argument that goes beyond two pages is starting to turn into another Argument section.

- Follow the organization of the Issues, Table of Contents, and Introduction. Again, if the brief has two main issues, each with three sub-issues, the Summary of the Argument section should have two paragraphs with, ideally, three sentences each.

- Leave citations out, unless absolutely necessary. Save them for the Argument and Facts sections.

- Tell the appellate court what you want to see happen (*e.g.*, affirm, reverse, reverse and remand, etc.).

d. Table of Contents

A well-written Table of Contents is an outline of your argument. It should follow the same format as the Issues (and Summary of the Argument). Again, if the brief has two main issues, each with three sub-issues, the Table of Contents should have two main sections with three subsections each.

The Table of Contents also works in conjunction with the Introduction section. Think of the Introduction as a roadmap of what will be covered in the brief, and the headers in the Table of Contents as road markers, telling the reader where the brief is going next.

To accomplish that, headers have to do more than just signaling the next topic; they have to tie into the argument itself.

DON'T SAY:

1. Attorney Fee Award.

    a. Correct Legal Standard.

    b. Amount Awarded.

SAY INSTEAD:

1. The Trial Court Abused Its Discretion by Awarding XYZ, Inc. Attorney Fees.

    a. The Trial Court Should Have Relied on Davis v. Edgar in Making Its Decision on Attorney Fees.

    b. The Trial Court's Award of Fees Is Beyond the Range of Acceptable Options in a Case Like This.

4. Fact Statement

Facts win cases. That's true on appeal same as at trial. Underneath the black robe of an appellate judge is a human being trying to make the right decision; to figure out who are the good guys and who are the bad guys. Facts are what enables them to make that decision, subconscious as it may be.

The Facts statement is as important as the Argument section, if not more so. The facts lay the foundation for the arguments. A persuasively written Facts statement can make the reader more amenable to accepting the arguments.

Writing a persuasive Facts section does *not* mean that facts should be embellished, or that material facts should be left out. It means that facts should be organized and written to form a compelling and interesting story.

In other words, the Facts section should do more than just blandly narrate the facts. It should make the reader want to read the next parts of the brief, which can be a daunting task considering how much appellate judges (or their clerks) read on a daily basis.

a. Organization

There's no right or wrong way to organize facts. In many cases, a straightforward chronological order will do the trick.

But in some cases, it may be worthwhile to step out of the norm and discuss the facts out of order. For example, if a case involves a dramatic event (such an arrest) that happened midway through the chronology of events, it may be more interesting to read about that first. That event has some drama to it. Reading that someone got arrested will make the reader wonder what that person did to get arrested or, depending on the viewpoint, why the police thought they had grounds to make an arrest. Starting with that event and then backtracking to fill in the events that lead up to the arrest can be all it takes to pique the reader's interest.

b. Use of Headings

Headings are not just for the Argument section. They work equally well in the Facts section.

No one really likes to read page after page of uninterrupted text. Headers are a natural breakpoint for the legal reader, the same way that chapters are a natural breakpoint for the recreational reader.

The main difference between headers in the Facts and headers in the Arguments is that headers in the Arguments section can be argumentative. Not so in the Facts.

c. Citations to the Record

Citations to the record are not only required, they are a good way to signal to the court that this is well-prepared brief, which builds credibility.

Whenever possible, pinpoint the citation to a specific page, or pages. Say, for example, the discussion centers on a particular provision of a contract, and that the entire contract is 50 pages long. Citing to all 50 pages forces the judge (and/or the law clerk) to read the entire contract looking for any provisions that support that discussion. Odds are they won't appreciate that as much as a pin cite to the exact page(s) where the relevant provisions are found.

d. Background Facts vs. Facts Specific to Each Argument

There's no rule that says all facts have to be in the Facts section. It's perfectly permissible—and probably preferable—to save some of the facts for the Argument section.

The Facts section is best suited for general background facts. Any facts that apply to a particular argument are better placed just before making that argument, so that they are fresh in the reader's mind. This approach gives the court an overview of the case in the Facts section, and allows the court to focus on the argument-specific facts, one argument at a time.

5. Brief Writing Techniques

a. Dates

Dates can be important, but not always. If a date is not important to the outcome of a case, it's probably better to leave it out. Dates can often be replaced with other time markers, such as "later", "eventually", and the like.

Once a date is included, it signals to the reader that that particular date is important. So the reader will try to remember it, if not consciously by writing it down on a piece of paper, at least subconsciously. If the reader then comes across a second date, the same thing will happen; it will be logged away, consciously or subconsciously. And the next one, etc. Not only will the reader try to remember all those dates, the reader will also expect the author to return to those dates in the Arguments section and explain why those dates are in important. After all, why else were the dates included if they weren't important?

Often times, however, that never happens. Dates are listed in the Facts section, never to be addressed anywhere else in the brief. That is a recipe for a confused reader—or worse, an annoyed one.

b. Unnecessary Verbiage

Lawyers have a tendency to use more words than necessary to get their point across. Perhaps this is a habit picked up in law school, when many of us were trying so desperately to sound like lawyers. The result is unnecessary verbiage or, as it sometimes is known, legalese.

One example of unnecessary verbiage is "*in order to*". This phrase says the same thing as "to", only with two more words.

"*On or about*" is another example. There's no reason to use this approximation when the date is certain. Just say "On July 1, 2004 …" if that's when something happened.

"*It goes without saying*". If it truly goes without saying, then it shouldn't be said. If it must be said, then it should be said without the introductory verbiage.

"*Clearly*". If something is in fact clear, it will be clear to the reader without using the word "clearly". The word "clearly" adds nothing to a concept that's already clear.

EXAMPLE: Water is wet vs. Water is clearly wet.

Water doesn't get any wetter by using the word "clearly". The same applies to other similar words like "obviously", "without a doubt", or "unquestionably".

If, however, the concept is *not* clear, using the word "clearly" could actually have the opposite effect. It could highlight the lack of clarity because the other side is bound to point out that the concept is anything but clear, which will divert the discussion into one over the degree of clarity.

EXAMPLE: The driver was clearly negligent.

Using the word "clearly" in this context is not likely to have the desired result. Instead, it will likely trigger a response from the other side about the degree of negligence, if any, and so highlight the lack of clarity regarding the driver's negligence.

c. Labels

Labels can be effective when used correctly. Labels are best used to illustrate what role somebody or something plays in the case; *e.g.*, "the bank", "the seller", "the guarantee", and so on.

Labels don't work as well when used to point out someone's litigation role (unless that's truly important, which would be rare). Labels like "Plaintiff", "Appellant", or "Respondent" tend to be confusing rather than helpful to a reader trying to figure out who did what to whom.

d. References to the Court

Sometimes, it's important to point out which court rendered the decision being discussed. But that's not always the case.

The important question in this regard is what message the reader should take away. For example, if the reader should know that equitable liens are enforceable in Washington, then all the brief needs to say is just that. There's no reason to include a reference to the court that said as much (the citation will do that):

EXAMPLE: Equitable liens are enforceable in Washington. *Smith v. Jones*, 123 Wn.2d 123, 125, 446 P.2d 654 (1984).

CONTRAST: In *Smith v. Jones*, 123 Wn.2d 123, 125, 446 P.2d 654 (1984), the Washington Supreme Court held that equitable liens are enforceable.

In the second version, the message—that equitable liens are enforceable—is effectively hidden from the reader. In the first version, the message is the star and the case/court plays a backup role.

In rare cases, the deciding court will be important. For example, if there is a split among various jurisdictions, it may be important that, say the Washington Supreme Court, as opposed to some other court, has declared equitable liens to be enforceable. In those cases, the second version may be more appropriate than the first one.

e. Passive Voice

Passive voice hides the message. It's less clear, and not as powerful as active voice.

EXAMPLE: Passive voice should be avoided.

ACTIVE VOICE: Avoid passive voice.

There may be times when hiding the message is exactly what the writer wants to do. For example, if the writer is trying to minimize the impact of bad facts or an unfavorable precedent, passive voice may be a good tool to use.

But as a general rule, active voice is more effective, and certainly more persuasive.

f. Latin

Avoid Latin phrases, except when necessary (*e.g.*, *res ipsa loquitur*). In today's world, there's no good reason to say "*inter alia*" when "among other things" works just as well. The same is true for most other Latin phrases. Sprinkling an argument with Latin phrases will not make it more persuasive.

g. Value-Laden Characterizations

If your opponent's argument is wrong, just say so. Don't be shy:

"ABC Corporation is wrong when it suggests that its breach was immaterial."

This is a perfectly permissible point to make in a brief, as long as it's followed up with argument establishing what ABC is in fact wrong.

But be professional and respectful. Avoid words like "absurd", "ridiculous", "outrageous" and the like. These attack the person making the argument, not just the argument itself.

If you find yourself attacked by words like these, or worse, do *not* respond in kind. There is nothing to be gained. The appellate court will not be impressed, and neither will your client.

h. Citations

The strength of a brief is not necessarily tied to the number of cases cited. In fact, in many cases it's the opposite. A short Table of Authorities is not a sign of weakness. It's a sign of strength.

A string cite signals to the reader that that particular argument is not based on a strong case; that it had to be pieced together by synthesizing select parts of several cases. Sometimes, there's no choice in this regard, but when not placed in that position, there's no need to string-cite cases. More is not necessarily better—especially not when they all say the same thing.

Having said that, there is one situation in which string cites are proper (in fact necessary): to follow up a statement to the effect of "Courts have held …". That should not be followed up with a citation to a single case.

6. Appendixes

Appendixes are an excellent way to focus the reader's attention on certain aspects of your case, or to make the appellate judge's job easier by including key materials with your brief for ready access.

Also, it's not unusual for judges (or their law clerks) to read briefs in locations other than their chambers. When they do, they typically don't have access to the appellate record, which tends to be voluminous, or to research sources. Appendixes can help overcome this.

Examples of suitable appendixes:

1. The lower court's decision(s) (*e.g.*, judgments, orders, letter rulings, findings of fact and conclusions of law, verdicts)

2. Key Washington statutes or cases

3. Out-of-state statutes or cases

4. Relevant portions of cited treatises

5. Demonstrative exhibits (*e.g.*, timeline of events, cast of characters, map of real properties)

The key to appendixes is moderation. If appendixes become too large, they will start to undo the purpose for including appendixes in the first place, which is to focus the reader's attention on *select* portions of your case.

7. Conclusion

A successful brief is one that is just that: brief. A short and crisp brief is more likely to persuade (not to mention establish credibility) than a shotgun brief that raises every conceivable issue and does it using run-on sentences and paragraphs that go on for a page or two. Don't let your argument get lost in the words.