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THOUGHTS ON WRITING A PERSUASIVE APPELLATE BRIEF

I am a solo practice attorney who concentrates, among other things, in appellate advocacy. I also teach appellate practice as an adjunct faculty member for the moot court program at Saint Louis University School of Law. This article pulls together some thoughts on how to write a persuasive appellate brief.[1] These thoughts are designed to provide general guidance to any Missouri lawyer facing an appeal. If you are not familiar with the appellate process, however, I encourage you to seek the help of an experienced appellate advocate.

Develop a Compelling Theme: An appellate brief must do more than just articulate reasons for how the trial court did or did not err. The appellate judges want to do justice. You must present an overriding and compelling theme on why justice would be served if your client wins the appeal. And this theme should permeate the entire brief.[2]

Present the Facts Fairly and Accurately: In drafting the Statement of Facts in your brief, you should always try to present the facts fairly and accurately. The appellate rules create inherent tension between the requirement that you avoid argument in this section of your brief and your desire to leave the court with a favorable impression of your client's position. Here is where the art of appellate advocacy becomes important. You want to create a favorable impression with unassailable facts from the record. But do not try to oversell your point with

[1] I do not contend that the ideas presented in this article are original with me. Over the years, my own appellate brief writing has evolved from a collection of books, articles and seminars on the subject. Where I can specifically recall the source, I have tried to pay homage here to the published works of legal writing scholars.

[2] See, T. Posey, "'Why?' Wins: Theming the Appellate Brief," Appellate Issues, p. 7 (ABA, Council of Appellate Lawyers, Spring 2012).

unprovable adjectives and adverbs. The classix axiom is: "Show, Don't Tell." And do not get bogged down in unecessary details or irrelevant dates. You do not have to include everything. Yet if there are "bad" facts, you had better include them or it will look like you are trying to hide something. Your credibility is important.

Be Selective in Identifying the Issues for Appeal: The appellate lawyer's ability to identify winnable issues is critical to the success of any appeal. You never want to take a "shotgun" approach. Instead, you should be selective and present only those issues on which you have a reasonable chance of winning. And unless the logic of your argument dictates otherwise, you should go with your strongest issues first.

Frame the Issues Favorably to Your Client's Position: Without being argumentative, you should try to frame each issue favorably to your client's position.

Most appellate courts call for a "notice method" of identifying the questions presented. This is the approach taken under the Federal Rules of Appellate Procedure. Under the notice method, you only include enough facts to make the issue concrete and not abstract. You do not need to spell out each detail necessary for the court to rule in your favor. This method allows you to be creative in framing the issue in a way that suggests a favorable result.

When working under the Missouri Rules, you must use a "full disclosure" method of identifying "points relief on."[3] An appellant must state the basis of the claim of trial court error and explain in the body of the point relied on wherein and why the court erred. The point must be presented in substantially the following format: "The trial court erred in *[identify the challenged ruling or action*] because [*state the legal basis for the claim of reversible error*] in that [*explain why the legal reasons, in the context of the case, support the claim of reversible error*]." [4] This approach often results in convoluted points that are difficult to digest. Because of this problem, some Missouri lawyers try to tinker with the points to make them easier to follow. But be careful! Missouri appellate courts routinely dismiss scores of appeals for non-compliance with the rule on points relied on.[5]

The Missouri Supreme Court added a new layer of complexity to the rule on

[3] Mo. Sup. Ct. Rule 84.04(d)(1).
[4] *Id.*
[5] See, *Thummel v. King*, 570 S.W.2d 679 (Mo. banc 1978).

points relied on in *Ivie v. Smith*, 439 S.W.3d 189 (Mo. banc 2014). Because of the general standard of review in a court-tried case, appellate lawyers often would raise a single claim of trial court error on the ground that the challenged ruling was not supported by substantial evidence, was against the weight of the evidence and involved a misapplication of law.[6] But in *Ivie*, the Court took aim at this combined approach.[7] The Court ruled that these were distinct claims that must appear in separate points relied on to be preserved for appellate review. Although the Supreme Court gratuitously addressed the merits of the appellant's claims in *Ivie*, the Court declared: "Appellate counsel should take caution to follow Rule 84.04(d)."[8]

Define the Standard of Review and Apply that Standard to Each Issue: The Missouri Rules require that your argument "include a concise statement of the applicable standard of review for each claim of error."[9] When the standard of review is the same for all issues, it may be easier to set this apart as a separate section of the argument to avoid redundancy. Regardless of how you present the standard, this element is critical to the ultimate success or failure of your appeal. You need to explain in your argument why your client should win under the applicable standard of review for each issue. The facts must be analyzed consistent with this standard. And the cases you cite will be far more persuasive if the courts in those cases apply the same standard of review as your appeal.

Avoid Common Research Mistakes: In conducting legal research for your brief, you certainly should be aware of the difference between controlling and persuasive authority. At the risk of being pedantic, I encourage you to check Shepards® or Keycite® for all your cited cases. This often leads to more recent or compelling precedent than the original case. And, of course, it may save you from committing the egregious error of relying on a vacated or overruled decision.

From my experience, the most important point to emphasize in legal research is to look beyond the headnote or legal proposition for which you are citing a case. Make certain that the ultimate result is favorable to your client's position. If the result is bad, then go find another case for the same legal proposition. You do not want to put yourself in the position where your own cases

[6] See, *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976).
[7] *Ivie v. Smith*, 439 S.W.3d 189, 199, n. 11 (Mo. banc 2014).
[8] *Id.* at 199, n. 11.
[9] Mo. Sup. Ct. Rule 84.04(e).

are used against you in an opposing brief. By the same token, you should review the results of the other side's cases carefully. One of the most effective ways of revealing weaknesses in the other side's argument is to cite their own cases against them.

In saying that you should only cite cases with favorable results, I recognize that you may need to distinguish or counter cases that you know the other side will rely on. But the point I am trying to emphasize is that you should try to be selective in the cases you cite for your own argument.

Structure Your Arguments to Answer the Judges' Questions: When I teach moot court students, I encourage the students to use Ross Guberman's approach to structuring the argument section of their briefs. Under the Guberman approach, you match your structure to the judges' questions, not your authority. Guberman places great emphasis upon the proper use of topic sentences. Make sure that the topic sentence of every paragraph, if true, helps you win. And make sure that the topic sentences, in sequence, create a cogent argument.[10]

Most law students are taught to use the traditional TREAT or IRAC format. For those of you who cannot recall your legal research and writing class, TREAT stands for Thesis, Rule, Explanation, Application, and a restatement of the Thesis in the conclusion. IRAC stands for Issue, Rule, Application and Conclusion. The approach is essentially the same for both formats. I consider this format to be a useful way of answering the judges' questions in most appeals. Yet I must caution you about the need to exercise some flexibility with this approach. I would always weave into the format an explanation of why the judges should not adopt the other side's argument. In my mind, that is an essential question you need to answer in your brief.

Try to Use a Synthesized Approach to Presenting Cases: The most tedious way to present your case analysis is go through the cases individually, with each paragraph beginning with something like, "In Smith v. Jones…." Try to use a more synthesized approach. That is, if you have multiple cases that stand for more or less the same proposition, you begin with that holding. You can follow by citing the individual cases separated parenthetically with a brief explanation of how the rule was applied in different factual settings. And then you synthesize the cases by emphasizing the overriding principle or rule. This approach shows the weight of

[10] See, R. Guberman, Point Made: How to Write Like the Nation's Top Advocates (Oxford Univ. Press 2011).

your authority and is far more persuasive than just going through a series of individual cases.

Keep it Simple: An appellate judge is forced to plod through countless briefs. You should not make the judge's task more difficult by using convoluted sentences, long paragraphs, abstract sentence subjects, passive verbs, and arcane legal jargon. You want the main points and theme of your brief to come across in a cold first reading – because that first reading may be all you get. The modern trend of appellate advocacy is to make briefs simpler to read. Ross Guberman admonishes lawyers to trim "flab and clutter" with an extensive list of specific cuts lawyers should make.[11] Judge Mark Painter suggests that you use what he calls "the 1818 Rule."[12] You should try to structure your sentences so that they average no more than 18 words per sentence, and you should use a passive voice for no more than 18% of your sentences. You can view readability statistics from your word processing program to track these numbers.[13] Whatever approach you use, you should try to keep it simple.

Additional Tips or Goals: Against the background of this discussion, I leave you with ten final tips or goals to improve your appellate briefs:

1. Use short and simple sentences. Resist the temptation to string together related concepts with conjuntions and dependant clauses.
2. Avoid long paragraphs that run longer than half the page. If the paragraph is running too long, break it into manageable parts.
3. Minimize the use of lengthy block quotations. Judges gloss over them. If you feel compelled to use a block quotation for something like a statute, you should preface the quote with an introductory explanation of what you wish to emphasize. This approach will get your point across even if the judges gloss over the precise language of the quotation.
4. Avoid an excessive number of footnotes. This is not a law review article. A few footnotes may be useful to raise key explanatory points collateral to your main argument. Or it may be a useful way to present

[11] *Id.*
[12] M. Painter, The Legal Writer, pp. 66-79 (3d ed. Jarndyce & Jarndyce Press 2005).
[13] In case you are wondering, this article contains an average of 16.6 words per sentence, and a passive sentence rating of 10%.

multiple statutes or case citations without cluttering up the body of your brief. But keep it to a minimum.

5. Avoid words like, "clearly," "obviously," "plainly" and "patently." They add nothing of substance and they can be an irritant to the judges. If the issues were so clear, you probably would not be in the appellate court.
6. In a similar vein, avoid bombastic words like "absurd" and "ridiculous." One lawyer once described the use of such words as "the written equivalent of shouting."[14]
7. Define your terms early and be consistent. For instance, if you wish to refer to Appellant/Defendant John Smith as "Smith," use this word consistently throughout the brief. Do not make interchangeable references to "Smith," "Mr. Smith," "Appellant," or "Defendant."
8. Minimize the use of archaic legal terminology. In my mind, there is no justification for using words like "aforesaid" or "hereinafter." Judge Bright of the Eighth Circuit wrote an article some years ago on the "Golden Rules" of Appellate Briefwriting. One of his main rules was, "Write in English, not legalize."[15]
9. Do not personally attack the methods or integrity of your opposing counsel. The judges do not want to hear gripes of this nature. The gripes reflect more on you than they do on the other lawyer.
10. Have someone else proofread your document. It is very easy to overlook your own typographical errors and to read into the document what you meant to say.

DISCLAIMERS: This article contains general information for discussion purposes only. The author is not rendering legal advice, and this article does not create an attorney-client relationship. Each case is different and must be judged on its own merits. Missouri rules generally prohibit lawyers from advertising that they specialize in particular areas of the law. This article should not be construed to suggest such specialization. The choice of a lawyer is an important decision and should not be based solely upon advertisements.

[14] C. Lutz, "Why Can't Lawyers Write?" 15 Litigation 26 (Winter, 1989, ABA).
[15] M. Bright, "Appellate Brief Writing: Some 'Golden Rules," 17 Creighton L.Rev. 1069 (1984).