APPELLATE BRIEFS

Rules for appeal generally are more formal than rules for memorandums filed in trial courts. It's absolutely vital to obtain a copy of the rules for filing appeals and do *exactly* what's required. Appeals have been dismissed with prejudice for filing a brief with the wrong color cover. Briefs that don't comply exactly with the rules usually aren't considered. Therefore, the consequences of a mistake are enormous. Typically, an appellate brief includes the parts that are described in this section.

Caption and Title Page

The rules will specify the information that's to be presented, but normally it will include the following:

1. Names of the parties
2. Name of the court hearing the appeal
3. Name of the court from which the appeal was taken
4. Title of the document, i.e., Appellant's Brief
5. Docket number of the appeal
6. Names of the attorneys filing the brief
7. A certificate of service upon the other party (and under some rules, upon the judge from whom the appeal was taken)

Typically, rules will specify that briefs have a certain color cover. For example, the rules might require that the appellant's brief have a red cover and the appellee's brief have a blue cover.

A sample appellate brief appears in Figure 14.

SUPREME COURT OF KENTUCKY

NO. 2012-SC-446

ROBERT JONES — APPELLANT

v. — BRIEF OF APPELLANT

SUSAN BROWN — APPELLEE

On appeal from
Jefferson Circuit Court
97-CI-1333
Court of Appeals of Kentucky
98-CA-107

CERTIFICATE OF SERVICE:

I certify that a copy of the Brief for Appellee has been mailed, postage prepaid, to Hon. William Smith, Jefferson Circuit Judge, 123 Oak St., Louisville, Kentucky 40202; and to Hon. Mary Miller, 555 South Ave., Lexington, Kentucky 40515, attorney for Appellee, this 14th day of August, 2012.

_____

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FIGURE 14—Sample Appellate Brief

Table of Contents

The table of contents not only gives the page number where each part of the brief can be found, it outlines your argument. The headings should be just as they appear in the brief. Subheadings also should be included. The tone should be argumentative. A judge should be able to look at the table of contents and understand what your position will be and what topics you'll address in your brief.

When preparing your brief, you'll necessarily have to prepare the table of contents last, even though it appears first in the brief itself.

Table of Authorities

All of the authority cited in the brief is to be listed alphabetically. Use *complete* citations. Authorities are grouped by type—the cases cited, the statutes cited, the constitutional provisions cited. The page of the brief on which the authority is cited is also given. This allows the judge to find your discussion of a certain authority and compare it with the discussion of the same authority in your opponent's brief.

Some courts combine the table of contents and table of authorities into a single table. An example, using fictitious legal references, appears in Figure 15.

STATEMENT OF POINTS AND AUTHORITIES

PAGE

FIGURE 15—A Sample Table of Contents and Authorities

Jurisdictional Statement

Some courts require a statement of the statute that authorizes the appeal to that court.

Questions Presented

Some courts require that the issues be presented in the form of questions to be answered. Unlike the memorandum prepared for internal consumption that was discussed earlier, the statement should be persuasive, should reveal something about your argument, and should suggest the answer. For example:

> ***Not so good:*** Is the defendant guilty of D.U.I.?
>
> ***Better:*** Can a defendant who is neither operating a vehicle nor on a public highway be convicted of D.U.I.?

In the second example, the reader is tipped off right away that two important facts are that the vehicle wasn't being operated and the defendant was on his own property rather than out on the road.

Opposing attorneys will state the question to be answered in different ways. For example, the prosecution might state the above issue as follows:

> Is an intoxicated driver behind the wheel of an operational vehicle immune from prosecution for D.U.I. merely because he was arrested in the driveway of his home?

The words "merely" and "immune" tip off the reader that the answer should be no. Also, the prosecutor mentions in her statement of the question presented certain facts she will argue are "key" to answering the question. Some important things to keep in mind when writing an appellate brief are the following:

1. *Order in which issues are presented.* Thought should be given to the order in which issues are presented. Sometimes, it will be clearer to the reader if certain issues are addressed first. Some arguments depend upon winning other arguments. Additionally, where there are alternate grounds for your position, the order in which they're presented (and the amount of

space they're allotted) could be important. It's a strategic decision whether to present the strongest or weakest arguments first. Your supervising attorney will make this decision.

2. *Be short and concise.* Generally, stating the issues as concisely as possible, while still being argumentative, is best. If you try to stick references to all of your key facts in a single sentence, the question presented becomes an unmanageable muddle. Remember that your goal is to present information to the judge that can be used to write the opinion deciding in your favor. If the issue can't be boiled down to something clear and concise, the judge will have a difficult time grasping your view or writing an opinion in your favor.

Statement of the Case

This is the equivalent of the statement of facts in an internal memorandum or memorandum for the trial court. The statement of the case isn't argument. It's in the form of an impartial statement of facts relevant and necessary to deciding the questions presented.

A balance needs to be struck between advocacy and the appearance of impartiality. You're more credible to the judge if the statement of facts appears to be complete, accurate, and honest. If you lie about the facts, why should the judge believe what you say about the law? At the same time, how you characterize facts is important in setting up your argument. The facts that you choose to emphasize necessarily are ones important to your position. Spend most of your time on those facts.

Facts that are harmful to your side usually can't be ignored. You know that the other side will bring them up, and if you fail to address them, you leave the judge wondering why (and possibly concluding that those facts are fatal to your claims). If unfavorable facts can be characterized in a favorable, or at least neutral, way, then you should do so. Using the passive voice and placing the mention of unfavorable facts where it calls the least attention to them are ways to de-emphasize.

Some procedural background and a brief description of the type of case usually appear first. For example:

> "This is an appeal from the Fayette Circuit Court of a judgment of punitive damages entered against the appellant. At issue is whether the amount of the punitive damages is excessive."

The facts should be stated in whatever way makes them easiest for the judge to understand. Often, a chronological statement works best. Use paragraph breaks, transitions, subheadings, boldface, and bullets to guide the reader through the information. Emphasize and characterize facts in ways that will help *set up* your argument without obviously going over the line into being part of the argument.

Opening and closing paragraphs are particularly important to the reader, so take care that those paragraphs highlight your strengths.

Summary of the Argument

Some courts require a narrative summary of the argument. This should be no more than a page and should give the court a concise "bottom line" on how you get from the question presented to the answer. Judges are busy, and a clear "bottom line" gives them a road map to follow, hopefully, to the conclusion you want them to reach. Conversely, if your summary of argument is unclear and your opponent's is better, the judge may be predisposed in favor of your opponent from the very beginning because your opponent is making the judge's job easier.

Argument

The argument is the "meat" of the brief. Important factors to consider are as follows:

State the issues persuasively. The way you state the issue or question presented should be persuasive and should go to the very heart of the matter. Writing is an art, and there are techniques you can select from to create an effect. The adjectives you use, the choice of active and passive

voice, the prominence that you give to certain facts all play a role in creating an effect.

The prior discussion on "stating the question presented" applies to this part of the brief as well.

Summarize the law. Next to stating the facts, your summarization of the law is the most important part of the brief. The judge will be looking for the rule that should be applied to answer the question. Often, opposing counsel will be arguing that a different rule should be applied. Your summarization of the law should demonstrate that you clearly grasp the legal concepts involved and that the ruling you seek from the judge is required by controlling authority.

Use precedent effectively. During your research, you'll have identified the rules used to decide similar cases. These rules may be in the form of definitions, tests, or a list of factors to be considered.

Cases with facts different from the facts in your case *can* serve as precedent if the same rule should be applied in your case. It's the rule used, rather than the way it was applied to the facts, that serves as precedent.

However, if the facts in the prior case are similar to your case, and the outcome in that case was the same outcome you desire for your case, that's even better. That means not only the rule used but also *the way in which it was applied* serves as precedent.

Argue the facts, both favorable and unfavorable. Techniques for emphasizing or de-emphasizing certain facts have been discussed. You'll know what facts are harmful or helpful, and whether to emphasize or de-emphasize particular facts. Where certain unfavorable facts can't be dismissed, you'll have to create convincing arguments why facts that are favorable to your argument are more important than the ones that aren't favorable to you.

Rebut arguments and authority. Shepardize your opponent's authority to see if the authority has been overruled, reversed, or criticized. If not, then consider the following approaches:

1. If there are two different rules being proposed, is there a reason why your rule logically is more applicable to the current case than the rule your opponent cites?

2. Has your opponent mischaracterized the facts or the issues? Point it out and explain why it undermines your opponent's argument.
3. If you both cite cases in support of your respective positions, are there fact similarities with the present case that make the case you cite more like the case at bar? Similarly, is there an important difference between facts in the case your opponent cites and the present case that makes your opponent's case less applicable?
4. Look for ambiguities in language used in the statute or in a case opinion. Perhaps the way a rule is applied depends on how ambiguous language in the rule is interpreted.
5. Does your opponent's argument lead to an unreasonable result? If so, there may be flaws in your opponent's reasoning. However, it won't be enough to say that the result is unreasonable—you need to identify and explain to the court the flaws in your opponent's reasoning.

Use quotations effectively. Quoting directly from cases and statutes has some advantage over simply paraphrasing or giving your own interpretation. The use of quotation marks tells the reader that you're presenting the exact words of the authority you cite, not merely your interpretation of what those words mean. This allows the reader to form his or her own opinion about whether you're accurately representing the authority being cited.

However, to simply quote at length verbatim passages from authority will bore the reader and fail to make your point. To weave excerpts from authority with your argument is best, so that you create a readable narrative. Quote authority, but subordinate it to your ultimate goal of creating a readable, logical argument about your case. Overuse of quotations or use of quotations without drawing the link between the language cited and your own case is ineffective.

When citing authority, state why and how it applies to your case. *State the obvious*. Don't assume that the reader sees the link between the authority you've cited and the conclusion you draw. Always *spell it out*. If you can't spell out the link clearly and obviously, then it's likely that you haven't refined your understanding of the legal issues sufficiently.

Judges don't want to be reversed, and need to know that if they rule in your favor, they're following authority. Weaving quotations from authority in with your narrative argument effectively will reassure the judge that what you seek is consistent with applicable law.

So long as you do so *fairly,* you may quote portions of a sentence, omit words not important to the matter in issue (indicated by ellipsis), or insert words or capitalization to make the quotation grammatically correct in the sentence in which you've inserted it. Never misrepresent what a case says. For example, if the judge wrote, "Defendant's argument is a wonderful fallacy," you can't quote it as "Defendant's argument is…wonderful." This is both unethical, and likely to turn the judge against your argument when he or she looks up the case in the original.

When you quote from cases, give the page number in the case where the quote can be found—i.e., "the *Smith* court held, at page 76, that. . . ."

Conclusion

The conclusion in the appellate brief usually just specifies the relief requested.

Signature and Certification of Service

The brief will be signed at the end and a certification of service, if local rules don't require it to be on the front cover, will appear at the end. A *certification of service* is a statement that certifies that the brief has been served on the opposing party.

Appendix

Briefs often contain appendices. These may include the trial court's opinion, excerpts from testimony, or other information to which reference has been made in the brief.

Self-Check 7

Indicate whether the following statements are True or False.

_____ 1.The caption and title page of an appellate brief is likely to contain the court from which the appeal was taken.

_____ 2.Use of quotations in a brief should be subordinated to the goal of creating a readable narrative that explains why the authority cited supports your argument.

_____ 3.Appellate rules regarding form are somewhat relaxed.

_____ 4.Your goal in summarizing the law is to give the judge controlling precedent that requires her to rule in your favor.

_____ 5.Similarities between facts in cases cited and the facts in your own case may be significant.

_____ 6.When citing authority to support your position, it's not necessary to explain why it applies to your case if it would be obvious to the reader.

_____ 7.Only cases having the same facts as your own can supply rules that can be cited as precedent.

_____ 8.You should Shepardize authority cited by your opponent to see if it has been overruled, reversed, or criticized.

_____ 9.Facts presented in the statement of the case shouldn't necessarily emphasize the facts favorable to your side of the case.

_____10.The summary of argument should make it easy for the judge to see where you're going and how you're going to get there.

Check your answers with those on page 74.