and costs were recoverable because the benefits were overdue, because there was an unreasonable refusal to pay the claim, or because there was unreasonable delay in making payment.

***People v Parks*, S Ct 126509, COA 244553**

Criminal: Whether evidence of prior accusations of sexual abuse by the victim against another person not the defendant is admissible.

Argued October 22, 2008

***Estate of Alice J. Raymond/Morse v Sharkey*, S Ct 134461, COA 267364**

Probate: Whether language in a will is sufficient to convey the possibility that the claims of "brothers and sisters that survive me" might have no members; whether the language "or to the survivors thereof" creates an alternative devise to the descendants of predeceased siblings of the testator which only takes effect if all of the testator's siblings predecease; what significance, if any, should be attributed to the placement of the language "share and share alike" in the middle of the pertinent clause, rather than at the end; and what effect, if any, the antilapse statute should have on the will language.

About the Author

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The Basics of Brief Writing in the Court of Appeals

By Timothy A. Diemer[1]

Know Your Audience

Appellate brief writing is vastly different from brief writing in the trial courts, where, because of volume and time constraints, a brief must grab the trial judge's attention almost immediately to have any chance of success. Briefs in the trial court are often more overtly aggressive and to the point. The same strategy will not necessarily succeed in the Court of Appeals, however, where a brief passes through numerous levels of review, beginning with a prehearing/research attorney, followed by the prehearing/research supervisor, and ending in judicial chambers, where each of the three judges on your panel will be assisted by a law clerk (or two) who will closely review your brief, your opponent's brief, and the prehearing report. Obviously, this more extensive review process allows for a deliberate and reflective analysis of the case, making the punchy style of trial court brief writing unnecessary and, ultimately, ineffective.

This multi-level review process means that misstatements of the record will be caught—as will misstatements of legal precedent. Given what can sometimes amount to an audience of eight, as well as an opponent who will be sure to point out your inaccuracies, it is nearly impossible to sneak a misstatement of fact or a misinterpretation of law past the Court of Appeals. The first rule of appellate brief writing, therefore, must be accuracy and commitment to the record.

Knowing your audience requires some appreciation for the role played by the prehearing division. This is a pool of newer attorneys, primarily first- and second- year lawyers, who examine the parties' briefs and the trial court record before anyone else at the Court.[2] The prehearing attorney will prepare a report that is submitted to the panel of judges assigned to decide your case. This report is intended to be an in-depth review of the file. The prehearing attorney will read all the appellate briefs and the cases cited, review all trial/hearing transcripts, and conduct independent research. The final prehearing report will include a summary of the issues, a statement of facts and procedural history, a legal analysis of the issues in dispute, and a recommended disposition. Again, this process is undertaken before the appeal is even submitted to a panel of judges and their law clerks.

Because the prehearing attorney handling your appeal will actually read the full transcript, misrepresentations of fact will be corrected in the prehearing report. And because the prehearing attorney will conduct independent research into the applicable law, legal errors will also be noted.

In many cases, the prehearing attorney also prepares a proposed opinion. If the assigned panel is satisfied with the prehearing attorney's report and recommended disposition, it may elect to adopt the drafted opinion. Getting the first- or second-year prehearing attorney on your side early in the process can be vital.

One other thing to keep in mind is that the Court of Appeals handles criminal appeals, termination of parental rights cases, zoning disputes, workers' compensation claims, insurance coverage litigation, etc. Just because you understand the

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three different ways to prove acquiescence to boundary lines does not mean your reader does, especially given that the typical prehearing attorney is a first- or second-year lawyer. Although many attorneys are specialists, the chances that any random Court of Appeals judge shares your specialty are quite slim. Write for a generalist audience.

Statement of Facts

The distinction between appellate and trial court briefing may be most evident in the presentation of the facts of the case. In the Court of Appeals, a statement of facts must remain just that: a presentation of the record facts, clearly distinct from any legal analysis. And the recitation of facts should be thorough. Trial court briefs typically feature a melded factual account and legal analysis.

Because appellate courts often resolve disputes of law and not fact, practitioners often assume that the legal argument is the most important part of a Court of Appeals brief. I don't believe this is entirely accurate. Providing an accurate statement of facts is probably the single most important component of an effective brief—it goes first and will shape the contours of the legal discussion to follow. Playing loose with the record will diminish an attorney's credibility, possibly causing the panel to approach the legal arguments with skepticism, not only in that particular case, but for upcoming appeals. While there may be hundreds of trial judges across the State of Michigan, there are only 28 judges on the Court of Appeals. And again, because of the way the Court of Appeals is structured, your brief will be fact-checked on a number of levels, virtually guaranteeing that any misstatement or misrepresentation will come to light.

The court rules impose a number of requirements for the statement of facts, mostly intended to ensure the demarcation between fact and law. And although the rules are often ignored without risk of the appellate brief being stricken, the rules do provide useful stylistic suggestions, including that the statement of facts be "clear," "concise," and, importantly, that "[a]ll material facts, both favorable and unfavorable, must be fairly stated without argument or bias."[3]

A statement of facts must also have support in the record created below.[4] Nearly every appellate practitioner has a nightmare story about a perfectly defensible appeal thwarted by an inadequately developed record in the trial court. A trial judge may be familiar with the facts of the case, eliminating any drive to bombard the judge with deposition transcripts and loads of paper. But while a light touch with the record evidence might garner a win at the trial level, it will prove immensely harmful in the Court of Appeals. Only those materials actually submitted to the trial court can be considered by the Court of Appeals.[5] Have a document or deposition transcript that may be dispositive of the appeal? It does not matter if it is not part of the record.

The distinction between appellate and trial court briefing may be most evident in the presentation of the facts of the case.

While the court rules repeatedly instruct that the statement of facts must be neutral and objective, it is still possible to "argue" your client's legal position in an effective and ethical manner. The goal is to introduce and plant the seeds of your argument in the fact statement without resorting to the trial court style brief writing, which can run afoul of effective brief writing in the Court of Appeals.

An effective brief uses the statement of facts to frame or preview the legal issues raised later in the argument section. The fact statement should contain not only the underlying facts, but also the procedural history of the case, which can be used effectively to introduce the legal issues central to the appeal. For example, a dispositive motion in the trial court presents a prime opportunity to outline the positions of the parties and their take on the factual and legal questions involved in your appeal, i.e., "Defendant moved for summary disposition, arguing that the ice hazard was open and obvious, while plaintiff argued that there were special aspects of the hazard thereby precluding application of the open and obvious doctrine." This technique both states the facts of the case and foreshadows the central legal issues tackled later in the brief.

Another method of guiding the legal discussion is to insert a summary of appellate issues or statement of the case before delving into the fact statement. Such a summary is allowable under the court rules, as long as it is clearly marked as such and is not made a part of the statement of facts. Introducing the legal issues gives the Court some sort of context within which to understand and analyze the facts that follow. The statement of questions presented can also serve the purpose of providing the reader with a road map while reviewing the facts.

Never use the statement of facts to disparage opposing counsel or the trial judge. Few tactics will turn off an appellate judge more than character assassinations. Once in the Court of Appeals, it is time to let go of the fact that the defendant failed to timely answer interrogatories or that the plaintiff's attorney failed to show for a deposition. Petty personal attacks do not address the legal issues of the case, and on a more pragmatic level, many Court of Appeals judges were trial judges before taking the appellate bench and will

not appreciate diatribes against the trial judge who decided the case. Personal attacks may even create a natural level of sympathy for the judge or attorney being attacked.

While it is never a good idea to unfairly disparage the trial judge or your opponents, it may be effective to use their misstatements of fact or questionable legal propositions to cast doubt on the reliability of their overall position on appeal. For example, use bizarre quotations from hearing transcripts or trial court briefs to cast doubt on the reasoning of your opponents or the trial judge. In the open and obvious example used above, suppose the trial judge ruled that a sheet of ice in a store's parking lot was not open and obvious because the plaintiff testified he could not see it when he walked past it. This reasoning conflicts with the objective standard our case law mandates for the open and obvious doctrine, and obviously, this misstatement of law should be prominent in the procedural history of the case. This is a way to attack the result below without attacking the trial judge.

By the end of the fact statement, the issues should be framed in the reader's mind, and the answers should be suggested so that the reader is already persuaded or at least leaning your way.

Argument Section

Offering advice on the argument section of the brief is a tougher task. The law is the law, and it is up to you to decide the most effective and logical way to present your argument. Some general guidelines are offered here, and they largely continue the themes developed above. Know that your legal citations and legal reasoning will be scrutinized in the same manner as your factual account. And know that the Court will conduct its own thorough research, going beyond the authorities cited in the parties' briefs.

The Court Rules actually require argument headings in all caps and bold-faced.[6] But again, complying with the seeming hyper-technicalities of the Court Rules actually helps you write a more effective brief. Appellate briefs, including the additional components and statements required, often approach 60 pages; argument headings are necessary to break up lengthy legal discussions. They also serve as a road map to the brief, when set forth in the table of contents, and help ensure for the writer a logical flow in the arguments.

A couple of other requirements: every brief must have a statement of the standard of review and an issue preservation statement.[7] Don't view these two requirements as mere technicalities. An unfavorable standard of review can be the death knell of a compelling legal argument. To prevail on appeal under the abuse of discretion, for example, it is necessary to show that the trial judge's decision was "so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias."[8] This is obviously a high hurdle and if representing an appellant, you want to get out from under this burdensome standard of review if at all possible. Evidentiary issues are reviewed under the abuse of discretion standard, but if the evidence admitted is inadmissible as a matter of law (under a *de novo* standard), an abuse of discretion is shown.[9]

Even more difficult than prevailing under the abuse of discretion standard is obtaining a reversal on an argument that was not raised in the trial court. An unpreserved issue is a virtually guaranteed loser.[10] For unpreserved errors, relief is not available absent plain error affecting substantial rights.[11] The Court of Appeals "may consider an issue not decided by the lower court if it involves a question of law and the facts necessary for its resolution have been presented."[12] But this gives the Court discretion to address the issue or not, a position no appellant wants to face.

As for the heart of the argument section, there is no "blueprint" for effectively making your point. Style and structure will vary according to the issues involved and whether you are the appellant or appellee. An appellant's brief, naturally, will be more emphatic, critical, and argumentative, while the appellee will try to paint the lower court result as reasonable, fair, and legally accurate. Furthermore, the tenor of your brief should also correspond to the issue being addressed. There's no need to rant about the trial judge's denial of $250 in taxable costs—this will compromise the effectiveness of those arguments where screeching advocacy is called for.

As for technique generally, writing styles vary greatly, and a good result can be obtained with an explanatory style of appellate brief writing as well as with a more bellowing diatribe about the injustice of the result below. Lastly, the sheer bulk of brief reading performed by the judges who will decide your case begs for some level of creativity or effort to make the brief an interesting read.

Conclusion

An appeal in the Court of Appeals will likely be your last opportunity to prevail in the case. A trial court victory can be quickly squandered with an ineffective appellate brief, and conversely, a trial court loss can be rectified with an effective appellate brief. If you are a trial attorney, it is imperative to approach the brief writing task with a proper understanding of the review process in the Court of Appeals. It may even be worth your while to consult with an appellate specialist, who will likely provide a different and valuable perspective of how to best present your case at the appellate level.

Endnotes

1 Timothy Diemer is a former prehearing attorney at the Court of Appeals. Currently, Tim is an associate concentrating in appellate practice at John P. Jacobs, P.C.

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2 Not all appeals go through the prehearing division. Complex matters often instead go directly to judicial chambers for a report or alternatively, to another, more experienced pool of research attorneys.

3 MCR 7.212(C)(6).

4 See MCR 7.210(A)(1); *Sherman v Sea Ray Boats, Inc*, 251 Mich App 41, 56; 649 NW2d 783 (2002).

5 *Reeves v Kmart Corp*, 229 Mich App 466, 481, n. 7; 582 NW2d 841 (1998).

6 See MCR 7.212(C)(7).

7 MCR 7.212(C)(7).

8 *Franchino v Franchino*, 263 Mich App 172, 193; 687 NW2d 620 (2004).

9 *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

10 See *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999) (defining unpreserved error as that which was not raised in the trial court).

11 *Hilgendorf v St John Hosp & Med Ctr Corp*, 245 Mich App 670, 700; 630 NW2d 356 (2001).

12 *Michigan Twp Participating Plan v Fed Ins Co*, 233 Mich App 422, 435-436; 592 NW2d 760 (1999).

Recommended Reading for the Appellate Lawyer

By Mary Massaron Ross

For this issue, I have reviewed several books about politically important trials that have taken place in this country and abroad. They will take you on a journey to our nation's capitol, Washington, D.C., to Germany, and to South Africa.

The United States v. I. Lewis Libby

Edited & with Reporting by Murray Waas
(Union Square Press 2007)

Reading this book will take you on a busman's holiday. Appellate lawyers and judges spend a significant part of their time at work reading transcripts, and while appellate decisions repeatedly refer to the record, including transcripts, as the "dry record," a phrase that suggests reading it must be boring, I often find them fascinating. You don't have to be Art Linkletter to believe that "people are funny," and trial testimony offers a window onto the human condition with all of its glory and all of its duplicity. Reading transcripts offers insights of many sorts. Besides hearing people obfuscate, prevaricate, and outright lie, one learns all sorts of things about the world. I once read volumes of testimony about milking machines, barn cleaning, and the diseases that cows will suffer if the machines don't function well and the barn is not clean.

If you are not too tired of reading transcripts at the end of the day, this book offers a fascinating picture of politics, journalism, and the practice of leaking stories to the press. The transcript from the Libby trial is edited and surrounded with editorial aids to follow its content. The book starts with a timeline that will allow you to follow the testimony and keep events in chronological order, something that is often difficult to do without extensive notes when you read transcripts. The book also lists key figures in the trial, including a short description of the defendant, Scooter Libby, and defense witnesses, including Ari Fleischer, Judith Miller, Robert Novack, and Bob Woodward. It's too bad jurors didn't get such editorial aids when they decided the verdict in some of the trials I have studied on appeal.

The book offers an introduction, which describes Dick Cheney's trip to Norfolk, Virginia to watch Nancy Reagan christen a carrier ship, and his conversations with Scooter Libby on the return flight. The editor offers one perspective on Joseph Wilson's charge that the Bush administration had deliberately "twisted" the intelligence to make the case for invading Iraq, and his later claim that his wife's identity as a CIA agent had been deliberately leaked to the press. But the actual transcript allows you to decide whether you agree or disagree. Whatever conclusion you come to about what happened in this classic tale of Washington power, spies, and leaks to the press, you will find the testimony fascinating. Anyone who has ever wondered who leaked a story to the *Washington Post* or the *New York Times* or some other paper will find this trial testimony enlightening.

As a lawyer, you will find it fascinating as well. You can read the testimony, and second-guess the trial attorney's strategic decisions to your heart's content. You can study the indictment, the opening statements, and the closing arguments. You can evaluate the jury instructions. You can review and annotate the trial testimony. And having done so, you can evaluate the manner in which the trial was conducted, and