

**Appellate Brief Writing and Oral
Argument
Government Lawyers CLE
10/21/16**

**By The Honorable Thomas D. Waterman
Iowa Supreme Court**

- **Practice the ABC's**
 - **Accuracy**
 - **Brevity**
 - **Clarity**
- **Combine the ideal brief with the stellar oral argument**

THE IDEAL BRIEF

- **Provides effortless comprehension**
- **Wins the Judge's heart and mind**
- **Gives a roadmap to desired result**
- **Spoonfeeds the facts and law so that ruling practically writes itself**
- **Scalia: “The overarching objective of a brief is to make the court's job easier.”**

ACCURACY

- **Never misstate the law or the facts**
- **Comply with the rules:**
 - **Contents of brief**
 - **Word limits**
 - **Format**
 - **Citation form**
 - **Deadlines**

- **Proofread – zero tolerance for:**
 - **Typos**
 - **Grammar errors**
 - **Misspellings**
 - **Miscitations**
- **Be true to the “record”**

PROOFREADING REMINDERS

- **Borrow another set of eyes**
- **Finish early – well before deadline**
- **Do authority checks:**
 - **Keycite cases**
 - **Check quotations**
 - **Check citations to “record”**
 - **Don’t rely 100% on spell check (examples: principle vs. principal)**

BREVITY

- **Optimize organization (theme and sequence)**
- **Make every word count**
- **Eliminate clutter:**
 - **Useless detail**
 - **Needless repetition**
 - **Weak points**
- **Edit unnecessary words**
- **Prefer the active voice**

CLARITY

- **Scalia: “Value clarity above all other elements of style” Use table of contents with informative headings**
- **Orient the reader:**
 - Provide context up front
 - Give the “big picture” so that supporting detail falls into place; use “themes”
 - Scalia: put question first

- **Consider a “Summary of Argument”**
- **Use bullet points/lists**
- **Use quotations effectively:**
 - **Lead in sentence**
 - **Don’t over-quote**
 - **Proper emphasis**
 - **Internal citations**
 - **Don’t “lead with your chin” by omissions**

- **Use footnotes effectively:**
 - **String citations**
 - **Tangential issues of possible interest**

- **Eliminate distractions:**
 - **Abbreviations that must be decoded**
 - **Awkward sentences**
 - **Big words**
 - **Tough sells**
- **Specify relief requested**
- **Citations:**
 - **Always give jump cites**
 - **Give volume and page number with short cites**

- **Avoid ambiguous “*id.* ’s”**
- **Italicize; don’t underline case names**
- **Emphasis**
 - **Italicize sparingly; don’t underline**

PRACTICE POINTERS

- **Case law selection:**
 - **Cite to both reviewing court and to court of last resort on governing law**
 - **Look for other decisions by same judge or court**
 - **Beware outcome**
 - **Honor duty to cite adverse authority**
 - **String citations (use parentheticals or a lead in sentence or replace with single case that surveys the field)**
 - **“Unpublished” authority**
 - **Analyze key cases**

- **Questions of first impression:**
 - **Brief the law from other jurisdictions (trend? majority rule?)**
 - **Show how your proposed rule fits with existing law (conversely, show how opponent's conflicts)**
 - **Show how policy behind the rule is furthered**
 - **Argue ramifications (slippery slope/flood gates vs. deterrence)**
 - **Get help from Amci**
 - **Address Restatement (Third) position**

- **Attempts to overturn precedent:**
 - *Stare decisis*: argue “precedent on precedent” –
 - Was targeted decision wrongly decided at the time? Dissents?
 - Scholarly criticism? Minority view?
 - Have changing circumstances eroded purpose behind rule?
 - Has rule led to problems or fallen out of step with other developments? [*McElroy*]
 - Legislative acquiescence?

- **Rifle vs. Shotgun – factors to consider:**

- **Don't invite reversible error**
- **Maintain credibility (don't use "loser" argument)**
- **Don't dilute strong arguments with weak ones**
- **Know your audience (will judge split the baby? will the opponent give up?)**
- **Education value (priming the pump vs. spoiling a surprise)**
- **Alternative grounds for affirmance on appeal**
- **Increasing comfort level for desired outcome**

- **Don't get personal (but if you shoot at the king, don't miss)**
- **Frame the issues persuasively**
- **Statement of the facts:**
 - **Tell a story that fits theme**
 - **Correct opponent's "spin"**
- **Prefer understatement to exaggeration**
- **Argue standard/scope of review**
- **Use of governing precedent**

APPELLATE BRIEFS

Before briefing:

- **Determine the “record” early**
- **Ascertain the governing rules early**
- **Expect no second extension of time or relief from page limits – finish early!**
- **Keep opponent honest (Motion to Strike?)**
- **Consider seeking *Amicus* brief(s)**

APPELLANT’S BRIEF (Iowa)

See Iowa R. App. P. 6.903 et. seq.

- **Table of Contents**
 - **Informative headings and subheadings should read like a summary of argument**
- **Table of Authorities**
 - **Organization (cases alphabetically; statutes numerically; other authorities)**
 - **No jump cites; “*passim*”**

- **Consistency with abbreviations/citation form in text**
- **Proofreading**

- **Statement of Issues**
 - **Vitally important to frame issues effectively**

Statement of the Case

- **Introductory sentence should orient reader**

- Short procedural history of case**
- **Statement of Facts**
 - Organize chronologically or thematically**
 - Tell a story**
 - Quote favorable passages from ruling(s) below**
 - Don't be conclusory or overtly argumentative – let the facts persuade**

- **Routing Statement**
 - **See Iowa R. App. 6.903(2)(d) & 6.1101**
 - **Strategic Considerations**

- **Argument**
 - **Consider a “summary of argument”**
 - **Standard or scope of appellate review**
 - **How much leeway to be given to tribunal below**

- **Preservation of error**
 - **Purposes:**
 - **Appellate court gets to go second**
 - **Trial court is to get opportunity to correct error**
 - **Opponent to get chance to respond below**
 - **Therefore, can't raise new issue on appeal**

- **Sequence of arguments**

- **Short Conclusion**
 - **Be specific and clear on relief sought**

APPELLEE'S BRIEF

- **(Re)frame issues presented for review**
- **Statement of Case/Facts**
 - **Do own or “tell rest of the story”?**
 - **Quote favorable parts of ruling(s) below**
- **Standard/Scope of Review**
- **Preservation of Error/Waiver**
- **Sequence of Argument**
- **Conclusion**

REPLY BRIEFS

- **Reply Briefs:**
 - **Refocus reader on your world view (without rearguing initial brief)**
 - **Scalia: Reply should be “self-contained” for “retro-readers”**
 - **Highlight opponent’s overt and tacit concessions**
 - **Repair damage to your position**
 - **Distinguish opponent’s cases succinctly**

APPENDIX

- ***See Iowa R. App. P. 6.905***
- **Contents must be from “record”**
- **Index (Table of Contents)**
- **Transcripts – identify witness on every page**
- **Don’t over/under designate**
- **If not in record, try:**
 - **judicial notice**
 - **stipulation**
 - **argue “legislative fact”**
- **Conversion of proof briefs to final briefs**

RESOURCES

1. **Scalia & Garner, Making Your Case, The Art of Persuading Judges**
2. **Strunk & White, The Elements of Style**
3. **Roget's Thesaurus**
4. **Webster's (or your favorite dictionary)**
5. **Black's Law Dictionary**
6. **Bartlett's Familiar Quotations**
7. **The Oxford Dictionary of Quotations**
8. **America's Popular Proverbs and Sayings**
9. **Blue Book (or "Maroon" book) but follow the governing Court Rules (e.g. Iowa R. App. P. 6.14(5))**

WRITER'S BLOCK

- **Leading causes**
 - **Unresolved issues or muddled thinking**
 - **Distractions**
 - **Feeling overwhelmed**
 - **Chicken – egg problems**
- **Remedies**
 - **Think it through**
 - **Outline First**
 - **Write discrete sections (marathon analogy)**

- **Use checklists**
- **Do something else**
- **Quiet time**

INTERLOCUTORY APPEALS

- **Better odds if both sides join**
- **Focus on standards (granted “sparingly” – “fat chance”)**
- **Institutional bias against piecemeal appeals**
 - **increased costs**
 - **disrupts trial court proceedings**
 - **increases workload**
 - **unstated reason -- most issues “go away through settlement or resolution on other grounds**

- **Court will want to know:**
 - **Why can't it wait?**
 - **Did trial court get it wrong or right?**
- **Best candidates:**
 - **Dispositive legal issue that is question of first impression with split in authority in other jurisdictions**
 - **Privilege or confidentiality with irreparable harm that cannot be cured on appeal after final judgment**

Thirty-day deadline (but possible to obtain review of earlier interlocutory orders that are intertwined). *Hammer v. Branstad*

- **Consider conditional resistance/cross-appeal**
- **Consider limited remand**

APPLICATIONS FOR FURTHER REVIEW

- **Focus on grounds in Iowa R. App. P. 6.1103**
- **But still argue merits**
- **20 day deadline**
- **If granted, reversal or modification likely**

ORAL ARGUMENT

- **Objectives (per Scalia)**
 - **Answer court's questions/resolve doubts**
 - **Address new points (sur-reply)**
 - **Reinforce key points in brief**
 - **Sell yourself (trustworthy, forthright, knowledgeable, well-prepared, likeable)**

- **Suggested preparation:**
 - **Update research (file notice of additional authorities?)**
 - **Know your audience**
 - **Anticipate court’s questions**
 - **Do a moot court the week before**
 - **Master caselaw and record**
 - **Memorize beginning and closing; outline the rest (prepare “cheat sheets”)**
 - **Arrive early**

- **Mindset (Scalia)**
 - **“Discussion led by Judges”**
 - **You’re like a junior partner presenting to senior partner (conversational but respectful)**
- **Oral argument should supplement rather than regurgitate written briefs**
- **Appellee’s oral “sur-reply” to opponent’s reply brief**
- **Be bold but not over the top (make it interesting, memorable)**
- **Begin and end strong**

- **Maintain good eye contact with *all* members of court – Don't read from notes!**
- **Be flexible:**
 - **Consider court's questions to opponent**
 - **Always immediately answer court's questions to you (welcome slow pitches) (*Rieff* example)**
 - **Use checklists**
 - **Revise checklist during opponent's argument**
 - **Be careful with concessions, hypotheticals (stick to theme)**
- **Use visuals?**

- **Split the argument? (Scalia: Don't)**
- **Know when to sit down (don't snatch defeat from the jaws of victory)**

THANK YOU