

CHAPTER 9

Brief Writing

This chapter will summarize the rules relating to the technical requirements for appellate briefs. No attempt will be made to cover every technical requirement, and no long quotations from the rules will be attempted.

Consult the appropriate rules before starting to format your appellate brief. After all, if you can't get the color of the cover right, the appellate courts may also question the accuracy of the body of your brief.

The rules are found in the Kansas Court Rules Annotated, an annual publication of the Kansas Supreme Court. And don't forget to check the advance sheets for any amendments to the rules. Rule amendments also appear on the Judicial Branch website at <http://www.kscourts.org/ctruls>.

§ 9.1 Time Schedule for Briefs—Rule 6.01

Appellant's Brief

Due within 40 days after date of docketing, if a reporter's transcript is not ordered or if a transcript was ordered and has been completed prior to docketing. If a transcript is ordered, brief due within 30 days after service of the certificate of filing of the transcript. See Rule 3.03.

Appellee's Brief/Cross-Appellant's Brief

Due within 30 days after service of appellant's brief.

Cross-Appellee's Brief

Due within 20 days after service of cross-appellant's brief.

Appellee/Cross-Appellee's Brief

Due within 20 days after service of the appellee/cross-appellant's brief.

Reply Brief

Due within 15 days after service of the brief to which reply is being made.

PRACTICE NOTE: A reply brief that is bound with a cross-appellee brief would be due 20 days after service of the appellee/cross-appellant's brief. Rule 1.05(c) states that the appellate courts follow K.S.A. 60-206(d) giving additional time after service by mail. If applicable, the appellate clerk's office does add the 3-day mail time to the briefing schedule.

§ 9.2 Content of Appellant's Brief—Rule 6.02

The appellant's brief shall contain the following (and preferably in the following order):

- A table of contents with page references to each division and subdivision. Under each issue listed in the table of contents, the authorities relied on in support of the issue (with page references) must be listed. An example of a table of contents appears at § 12.36, *infra*;
- A brief statement of the nature of the case and of the nature of the judgment or order from which the appeal is taken;
- A brief statement of the issues to be decided on appeal;
- A concise, but complete, statement of the facts material to the determination of the issues presented by the appeal. The facts shall be keyed to the record on appeal for convenient verification. For example, (R.I., 23). Note that any material fact statement made without a reference to the record on appeal may be presumed to be without support in the record;

PRACTICE NOTE: Under Rule 3.02, the clerk of the district court furnishes a copy of the table of contents of the record on appeal to each party. That table of contents shows the volume and page number of each document in the record; all parties should cite to it. Contact the district court clerk if you are writing a brief and have not received a copy of the table of contents.

- Arguments and authorities relied on, subdivided as needed if more than one issue is presented. Each issue shall begin with citation to the appropriate standard of appellate review and a reference to the specific location in the record on appeal where the issue was raised and ruled upon; and
- At appellant’s option, an appendix consisting of limited extracts from the record on appeal, considered to be of critical importance to the issues presented.

PRACTICE NOTE: Since there is only one copy of the record on appeal to be shared by the appellate justices/judges, use of the appendix can be a major convenience to the courts. But remember, the appendix is not a substitute for the record and is not a substitute for keying the fact statements to the record. Further, if the item is not a part of the record on appeal, placing it in an appendix is not appropriate—it will not be considered by the court. See *Haddock v. State*, 282 Kan. 475, Syl. ¶ 21, 146 P.3d 187 (2006); *In re Gershater*, 270 Kan. 620, 633, 17 P.3d 929 (2001); *Watkins v. McAllister*, 30 Kan. App. 2d 1255, 1259, 59 P.3d 1021 (2002).

§ 9.3 Contents of Appellee’s Brief (And of Cross-Appellant’s Brief Where Appropriate)—Rule 6.03

The appellee’s brief shall contain the following (and preferably in the following order):

- A table of contents, with page references and authority references as required for the appellant’s brief;

- A statement either concurring in appellant's statement of the issues involved or stating the issues appellee considers necessary to disposition of the appeal;

PRACTICE NOTE: If no cross-appeal has been filed, it is probably inappropriate for the appellee to raise additional issues, except as necessary to point out rationales for affirming for reasons not stated by the trial court (case will be affirmed if right for any reason).

- A factual statement of the case, or a statement acknowledging the accuracy of appellant's factual statement. Appellee may also add corrections and supplemental facts as considered necessary. Appellee's factual statements must also be keyed to the record on appeal, the same as required for appellant's brief;
- Arguments and authorities relied on, as is required in appellant's brief. For each issue, appellee shall either concur in appellant's citation to the standard of review or offer additional authority;
- At appellee's option, an appendix, with the same requirements as with an appendix to appellant's brief; and
- If appellee is also a cross-appellant, a separate section for the cross-appeal with content comparable to that of an appellant (e.g., issues to be determined on the cross-appeal, etc.). If appellee is a cross-appellee, the cross-appellee portion of the brief should also be in a separate section.

Cross-appellant should not duplicate statements, arguments, and authorities already contained in the appellee's portion of the dual brief.

§ 9.4 Contents of Cross-Appellee's Brief—Rule 6.04

Content of a cross-appellee's brief shall be comparable to that of an appellee's brief without duplication of statements, arguments, and authorities already contained in the appellant's brief.

§ 9.5 Reply Briefs—Rule 6.05

This rule is probably violated, or at least bent, as often as any. No reply brief is permitted unless made necessary by new material contained in appellee's or cross-appellee's brief.

The reply brief must make specific reference to the new material being rebutted. Under no circumstances shall the reply brief duplicate, except by reference, statements, arguments, or authorities already made in the previously-filed briefs. See *Edwards v. Anderson Engineering, Inc.*, 284 Kan. 892, Syl. ¶ 2, 166 P.3d 1047 (2007).

§ 9.6 Briefs of *Amicus Curiae*—Rule 6.06

Amicus briefs may be filed only after an order of the appellate court granting an application which has been served on all counsel of record.

Amicus briefs must be filed not less than 30 days prior to oral argument. Any party to the appeal may respond to an *amicus* brief within 20 days after service of the *amicus* brief.

An *amicus* is not permitted to orally argue the case.

PRACTICE NOTE: Application to file an *amicus* brief should be made as early as possible and must state some reasons of substance. An application not stating those reasons of substance is likely to be denied. These applications are not granted automatically.

§ 9.7 Format for Briefs—Rule 6.07

This, obviously, is the most technical of the rules pertaining to briefs. You really must consult the rule itself to ensure your formatting is proper. Since many, if not most, lawyers are now producing briefs in-house, once the proper formatting is locked into the word processor, you should incur few problems.

An example of a properly formatted cover for a brief appears at § 12.35, *infra*. In general, briefs are to be on 8 1/2 x 11-inch paper, with the text on a page not to exceed 6 x 9 inches. The left margin must be at least 1 1/2 inches and the other margins not less than 1 inch.

Text shall be printed in a conventional style typeface with no more than 12 characters per inch. If typewritten, the text shall be no smaller

than 10 characters per inch. Text shall be double-spaced, except block quotes may be single-spaced.

Color code for briefs:

Appellant—yellow

Appellee, appellee/cross-appellant, or appellee/cross-appellee—blue

Cross-appellee—yellow

Intervenor or amicus—green

Reply brief—grey

Petition for review—white (see Rule 8.03(a)(4))

The name and address of only *one* lawyer shall be placed on the cover. The Kansas attorney registration number must also be listed. If there are several parties separately represented and joining in the brief, a lawyer for each shall be shown. And a lawyer may be shown as being of a named firm.

Unless otherwise authorized by the appellate court, page limitations for briefs (exclusive of cover, table of contents, appendix, and certificate of service) are as follows:

Appellant—50 pages

Appellee—50 pages

Appellee and cross-appellant—60 pages

Appellee and cross-appellee—60 pages

Cross-appellee—25 pages

Reply brief—15 pages

Amicus brief—15 pages

Any motion to exceed page limitations must be submitted prior to submission of the brief and include a specific total page request.

The certificate of service shall be included as the last page of any brief.

A final note about format: If a brief is not in substantial conformity with the provisions of Rule 6.07, it will not be accepted for filing.

The submission of briefs on a single interactive compact disk, read only memory (CD-ROM) (e-brief) is allowed and encouraged. The e-brief is in addition to the written brief and must comply with the current technical specifications available from the Appellate Clerk's Office or posted at www.kscourts.org.

The e-brief must be identical in content and format (including pagination) to the printed version, except the e-brief may also provide hyperlinks to the complete texts of authorities cited or other materials in the record on appeal.

The e-brief must also contain a statement verifying the absence of computer viruses and describing the software utilized to ensure the e-brief is virus free.

At least 5 disks must be filed with proof of service of at least 1 disk on each other party to the appeal.

An e-brief, if filed, must be accompanied with the appropriate number of printed briefs. See Rule 6.07(g).

§ 9.8 References Within Briefs— Rule 6.08

Unless the context requires a distinction between parties as appellant or appellee, they should be referred to by their status in the district court—*e.g.*, plaintiff or defendant. The parties may also be referred to by name.

PRACTICE NOTE: To avoid possible confusion, try to be consistent. Referring to “plaintiff” on page 5 and to “Bill Jones” on page 10 can be annoying.

Reported cases are to be cited to the official reporter, followed by a cite to any generally recognized reporter system.

§ 9.9 Service of Briefs and Additional Authority—Rule 6.09

Two copies of briefs shall be supplied to all adverse counsel united in interest. Simultaneously, proof of service and 16 copies of the brief shall be filed with the clerk of the appellate courts.

When relevant authorities not previously cited come to counsel's attention after the brief is filed, or after argument but before decision, counsel shall promptly advise the court by letter. The courts neither expect nor want another brief. There must be a reference in the letter either to

the pages of the brief being supplemented or to the point argued orally. A brief statement may be made concerning applicability of the citations.

The letter shall be served on all adverse counsel united in interest “as set out in subsection (a)” [of Rule 6.09]. This means two copies to opposing counsel.

The letter, with proof of service, shall be filed with the appellate court clerk, along with 16 copies. Any response must be made promptly.

§ 9.10 Briefs in Criminal and Post-Conviction Cases—Rule 6.10

In all criminal matters and post-conviction proceedings, briefs shall be served on the attorney general. All briefs filed by the State or an officer or agent of the State must be approved by the attorney general or a member of the attorney general’s staff.

The attorney general’s approval must be endorsed on the cover of the State’s brief.

PRACTICE NOTE: The Attorney General’s approval is not required for juvenile offender appeals.

§ 9.11 Some Tips for Effective Brief Writing

Writing briefs is a peculiarly individual institution. No two people write exactly alike, nor should they attempt to. Try to find a style with which you are comfortable, and stick with it.

The following general comments are based mostly on common sense. Use them to the extent they may prove helpful to your individual purposes.

Chief Judge Alex Sanders of the South Carolina Court of Appeals observed there is no Nobel prize for law, because law is the only human endeavor that does not reward original thought. Perhaps that’s why Professor Rodell of Yale remarked that there are only two things wrong with legal writing: style and content.

Remember the purpose of the brief: bluntly put, the purpose of the brief is to convince the court your position is correct. Period. The brief is your first contact with the appellate court. In order to convince the court of the correctness of your position, you must first obtain and hold the court’s attention.

To the end of convincing the court of the correctness of your position, give the court all the help you can. The brief should contain all the court needs to know in order to decide the case (hopefully, in your favor) and should be capable of serving as the basis for the opinion.

The ultimate purpose of the brief is to make it easy for the court to want to decide the case in your favor. Accordingly, no independent research should be necessary by the court or its staff if you file an adequate brief.

Please remember, briefs have replaced old style, leisurely oral arguments as the primary means of communicating with the appellate court. Briefs have become the roadmap.

So focus on:

- *what* you want the court to do;
- *why* it should do it; and
- *how* it can do it within the limits of the language of the law, precedent, and policy.

If a politician's first obligation is to get elected, then the first obligation of an appellate brief writer is to get read. And in this regard, a good brief is short. Why? Because the easier it is to read, the better the chances are of grabbing and holding the court's attention. The longer the brief, the greater the risk that the reader will lose interest. Consider, for example, the reaction of a judge who has been reading for several hours preparing for a docket when that judge comes to your brief which takes fifty pages to say what could be better said in twenty pages. That judge will be less than impressed.

A basic rule: to be persuasive, your writing must be understandable. The difficulty is not just words. Before you can explain a point to someone, you must understand the point yourself.

Therefore, a good argument is little more than a good explanation.

Lawyers and judges seem incapable or unwilling to write plain, simple English. We tend to use fourteen words to say what should be done in two. In our attempt to be cautious, we simply become verbose.

Unlike the novelist searching for an unknown audience, you have the luxury of usually knowing your audience: the appellate judges who are professional buyers of ideas. So use that knowledge.

Use space intelligently: Wide margins, short sentences, short paragraphs, subheadings to break up the story line. Nothing is more discouraging to the judicial eye than a great expanse of black print with no guideposts and little paragraphing.

First impressions are important. So don't forget the simple things like spelling and grammar. The judge whose attention you are trying to grab won't pay much attention to your brilliant argument if every other word is misspelled and every other sentence is not one. Simply do everything you can to make the judges *want* to read your brief. Remember, to convince the court, you must *help* the court—educate the court on what it may not know.

The front end of the brief—nature of the case, issues, facts—is of vital importance. To the extent that appellate judges tend to be result oriented, they want to do justice. And that is hard to do without knowing what the case is about. Marshal your best facts in a story line that becomes both compelling and interesting. If the court can be persuaded to take your particular view of the facts, the legal conclusions follow almost automatically.

Do not shortchange the facts. Huge bodies of favorable law are of little help unless the court is convinced the fact pattern of *this* case demands the application of those legal principles. But do not editorialize. Candor and accuracy are uncompromising absolutes.

The statement of facts is important because you get to work on the reader's mind a bit. If you write only of rules and never of facts and never of people, your brief will not be very convincing.

So try to arrange an interesting story line. Put the facts together so they make sense. There is no single correct way to tell a story. You can start where you want and end where you want. You can be short and quick or slow and long. But if you are confusing, your case is in trouble.

Part of the problem is language and part of the problem is organization. Tell your story so the reader will instinctively feel your client is right, *assuming there were no law at all*.

When the court finishes reading your statement of facts, you want the court to think, "Wow, if there is *any* justice in the world, this party should win. Let's see if we can scare up some law permitting us to rule that way."

Do not be afraid to present material in bite-sized chunks—you really are trying to spoon feed the judges.

The questions presented section of the brief is largely overlooked, although it is of vital importance. Why? Because it sets the agenda for the reader and also forces you to frame/clarify the real questions you want the court to decide.

Phrase the issues strongly but objectively—perhaps in question form that can only be reasonably answered one way: yours. A good example of this can be found in *Jones v. Thigpen*, 741 F.2d 805, 811 (5th Cir. 1984), *cert. denied*, 479 U.S. 1087 (1987). The prisoner’s attorney stated the issue thus: “Should *Edmund* be applied retroactively, or should the State be permitted one last cruel and unusual punishment before *Edmund* takes effect?”

Appellants should not simply reargue what lost the case in the trial court. Try for a fresh approach, a fresh emphasis. Appellees should not be content to simply refute appellant’s arguments; appellees must affirmatively establish the value of their position.

Avoid long string cites and long quotations. If the quote is that great, you may assume the court may want to read the entire case. The point is: merely citing and quoting cases without giving logical reasons why they apply to your case will not convince anyone. Long string cites and long quotes make it easier for the reader’s concentration to wane, if not disappear altogether.

Likewise, it is not necessary to go into minute detail of the facts of cases cited. Discuss only enough of the facts to demonstrate the relevance of the cases cited.

Convenience of your reader should be your guiding principle. Try to minimize legalese—it does little more than hide the weakness of your position behind cosmetics. Remember, the simpler the language, the easier it is to get and hold the court’s attention; therefore, the easier it is to explain; and therefore, the easier it is to convince your known audiences. It is a waste of time, for example, to say a car is green in color—that merely distinguishes it from a car green in size.

Repetition is not the best way to convince. Most appellate judges will catch on the first time. So repeating the same argument a second or third time is unnecessary. Make it easy for the court to *want* to read your brief.

If you want the court to reject an existing rule, make sure you understand and convey to the court the *reasons* for the existing rule. Only then can you explain why the rule needs changing. Then show the court in some detail the direction you want it to take and why the court should follow your roadmap.

Always remember what standard of review applies to a given issue (See Chapter 8, *supra*). The problem to avoid: You might find yourself trying to play one game when the rules for an entirely different game are in force. And the rules require the citation to the appropriate standard of review.

Finally, make time to read and edit your brief. The attention of your known audience is precious; don't waste it by creating distractions that can only be detrimental to your task. Look for redundancies, consistent style and above all, look for simplicity and readability.

Ask someone else to read and comment on your brief. If they can't figure out which side of the case you are on after reading your brief, neither will the court. And that spells trouble.

The court must *understand and remember* your position before it can agree with it. And a stylish, easy-to-read brief is usually more *understandable* and, therefore, much more *memorable*.

Please remember the bottom line: your job is to make the decision makers happy. How do you do that? Well, mostly the decision makers are happy when your brief:

- Complies with the rules;
- Actually explains issues;
- Refrains from personal attacks on opposing counsel; and
- Contains arguments that are cogent, clear and understandable.

Candor and credibility are your only assets as an appellate advocate. So please try not to unduly bankrupt yourself.

Never allow the appellate court to say to you what Justice Fontron said in a criminal case: “[W]e are constrained to comment briefly on the state’s scant brief. Its two and one-half pages are without a single citation of authority. We suggest that the brief would have been of greater assistance to the court had the author, in preparing it, touched on the law.” *State v. Law*, 203 Kan. 89, 92-93, 452 P.2d 862 (1969).

§ 9.12 Bibliography

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