Good Grief! The Court Needs A Brief
(And where do I begin?)

By F. Georgann Wing©

This is part one of a two-part article. Next month, the author will cover the Statement of Facts and the Argument.
—J. K.

Many attorneys dread writing a brief more than arguing a motion or trying a case. But the brief is vitally important. "If you file a good brief, you will probably be okay, no matter how ineffective your oral argument.... If you file an ineffective brief, however, you are almost certainly in deep trouble, regardless of your oratorical skills."[1] And as courts continue to limit oral argument, the brief is often the only means the attorneys have to tell the court the whole story. Once the format and a few principles are mastered, even the novice brief-writer can produce a good brief.

The brief must be persuasive, yet honest and accurate in every respect. It must identify the issues and clarify them. It must discuss the controlling law, analyzed without distortion. It must strictly adhere to the court rules. And it must have a good, crisp style. You can do it all—in your briefs!

Format

Although the Michigan Court Rules do not prescribe the format and content of trial court briefs, they are substantially like briefs for the Michigan Court of Appeals. Modify the content sections when it is logical to do so, but otherwise follow MCR 7.212(C) and MCR 7.212(D). Scrupulously find and follow all rules pertaining to the court that you are before.[2]

All briefs should be brief. But the definition of brevity changes with the court. The court rules limit Court of Appeals briefs to 50 double-spaced pages, excluding the tables and indexes.[3] Michigan Supreme Court briefs are limited to 60 typewritten pages, excluding the table of contents, index of authorities, and appendix.[4] A trial judge, however, would be dismayed by a 50- or 60-page brief. The unwritten rule for all trial court briefs is KEEP THAT BRIEF MUCH BRIEFER.[5]

Now for the style and content of briefs.

Title Page

A trial court brief should have a title page that includes the caption[6] and the date. It should specifically identify the brief: Defendant's Brief in Support of Motion for Summary Disposition, Plaintiff's Brief in Opposition to Defendant's Motion for Summary Disposition. Appellate briefs must also have a title page (cover page) that includes the caption for the particular court and identifies the brief: Appellant's Brief, Appellee's Brief, Brief on Appeal—Appellant (or Appellee).[7] The title page on appellate briefs should say: ORAL ARGUMENT REQUESTED or ORAL ARGUMENT NOT REQUESTED.[8]

To add definition, begin all sections of the brief on a separate page.

Table of Contents

After the title page, include a Table of Contents that lists the subject headings of the brief and the principal points of the argument. Give the page numbers, aligned on the right, of the sections and the points of the argument.[9]

Example:

Index of Authorities ii
Statement of Questions Involved 1
Statement of Facts 2
Summary of Argument (include if argument in Supreme Court brief exceeds 20 pages) 4
Argument 5
  I. A point heading (the issue stated affirmatively or negatively) 5
    A. Sub-point/sub-argument 9
    B. Sub-point/sub-argument ... 15
  II. A point heading 20
Request for Relief 25

Index of Authorities

In the index of authorities, cite in separate categories the cases, constitutions, statutes, and other authorities cited in the brief. Cite the cases and other authorities in alphabetical order; cite the codified law in numerical order. Give the page number on which every citation in the brief can be found, and align the page numbers on the right.[10]

"Plain Language" is a regular feature of the **Michigan Bar Journal**, edited by Joseph Kimble for the State Bar Plain English Committee. Assistant editor is George H. Hathaway. Through this column the Committee hopes to promote the use of plain English in the law. Want to contribute a plain English article? Contact Prof. Kimble at Cooley Law School, P.O. Box 13038, Lansing, MI 48901.

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Cases

Cruzan v Dir. Missouri Dept of Health, ____ *US* ____; *110 S Ct 2841; 111 L Ed 2d 224 (1990)* *4, 10*

In re AC (On Rehearing), *573 A2d 1235 (DC App, 1990)* *16*

Jarvis v Providence Hospital, *178 Mich App 586; 444 NW2d 236 (1989)* *20, 22*

Constitutions

US Const, Am XIV *5, 12*

Statutes

MCL 333.20201(2)(f); MSA 14.15(20201)(2)(f) *9*

MCL 600.2922; MSA 27A.2922 ... *21*

Other Authorities

Cantor, A Patient's Decision to Decline Life-Saving Medical Treatment: Bodily Integrity Versus the Preservation of Life, *26 Rutgers L R 228 (1973)* *9*

HB 4016 .... *21*

Under pressure, you may decide to omit the table of contents and the index of authorities from your trial court briefs. But these sections can help the court. If the argument is 10 pages or so, it is better to spend an extra few minutes than to divert the court's attention from your argument to hunt for something in your brief.

Statement of Questions Involved

In a complex case, select the strongest two or three questions and state them with enough depth so you can discuss the finer points under subpoint headings. Routine trial briefs (and some appellate briefs, too) may require only one question. "A brief that raises ever colorable issue runs the risk of burying good arguments—those that, in the words of the great advocate John W. Davis, 'go for the jugular.'"[11]

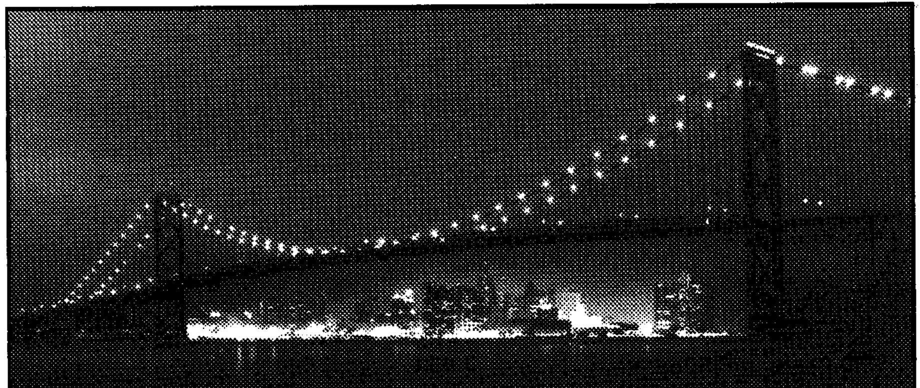
Generally you would state the strongest question first, but this strategy must be tailored by logic. If one of the lesser issues could knock out the action (as a question on the statute of limitation could), that question should be addressed first. And multiple questions should be grouped together in a logical order.

Most issues center around specific law (common law rules or language from statutes or constitutions) and detailed, relevant facts. These detailed questions require skill in organization and drafting so they identify the **parties,** the **law,** and the relevant **facts** in a readable form. In one sentence, they make a complete statement about the case, so they will likely be longer than you would like. This is the one exception to the Plain Language Rule that sentences should be relatively short. For a question that requires specific law and detailed facts—like most questions do—use the following pattern.[12]

1. The **Parties.** Identify the parties by who they are—their legal relationship to each other. Their names are not descriptive of who they are in a legal sense. Usually describing the parties as "the plaintiff" and "the defendant," without more, does not identify them sufficiently for the question. So identify them as the student, the teacher; the husband, the wife; the parent, the child; the landlord, the tenant.

2. The **Law.** Identify the law. Usually it's either common law or codified law such as a statute or constitution.

(a) Common Law: If the law you need to identify is common law, refer to the common law theory, unless it's apparent from the other information in the question. But you can't stop there, because the legal theory is not specific enough. Show also the precise point of law (or rule) in question. For example, in a negligence action the precise legal point in question might be "breach of duty of care." If it's an action for "negligent infliction of emotional distress," the precise legal point in question might be "contemporaneous injury."



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(b) Codified Law: If the law in question is a statute, refer to it by name if possible; otherwise, refer to the subject of the statute. You may want to include the citation, too. Also include from the statute the word or language that is in question. If the statute is the dramshop act, the focus might be on the words "visibly intoxicated." If it's the dog-bite statute, the focus might be on "provocation."

Sometimes the focus on codified law is not on specific language from the statute or constitution; rather, the focus is on legal points or rules developed by case law. As an example, the words "intent to accomplish the result of death" do not appear in the first-degree murder statute. Case law has interpreted the word "wilful," in the statute, to require this intent. The focus in the issue, therefore, might be on the defendant's intent, the legal point derived from case law. In an issue like this, you might include the words "intent to accomplish the result of death," or you might also include the language from the statute, "wilful."

3. The **Facts.** Now you are ready to state the facts. Include the legally relevant facts and the facts that make this case different from all others. Usually dates, times, and amounts are not legally relevant, and they clutter the question with useless detail. Also avoid referring to court proceedings.

Avoid:

Whether the defendant's motion for summary disposition should be granted....

Did the trial court err in holding that...?

State the relevant facts very specifically. An issue that is too general is useless.

Avoid:

Did the court err when it held that the defendant did not owe the plaintiff a duty of care? (Too general—needs facts.)

Was the accused deprived of his constitutional right to a trial by an impartial jury under the Sixth Amendment to the United States Constitution, because of the bailiff's statement to the jurors? (Too general—includes the law but not the facts.)

Should the court convict the defendant of first degree murder where he assisted the victim's suicide? (Too general. Needs language from statute or rule in question—"wilful," or intent—and needs facts.)

Now that you have thought about how to describe the parties, the law, and the facts, get your pen moving. On your legal pad, list all the words that you would like to see in the question. Then arrange them where they appropriately fit under the words **whether, where, and where/but where.**

Whether: *(a) Parties*
(b) Law

Common Law
(1) Point or rule in question
(2) Legal theory, unless obvious

Codified Law
(1) Point or rule in question from case law, if any
(2) Words in question from codified law
(3) Reference to codified law by name or subject, possibly including the citation

Where: *Specific relevant facts*

And where/but where: *Add more facts after you have paused to take a breath,*

or

Add that twist in the facts that creates the genuine controversy.

Examples:

Whether *the bystander's injuries were incurred* ***contemporaneously with the airline's negligence [point in question]****, providing the bystander with an action for* ***negligent infliction of emotional distress [theory]****,* ***where*** *the bystander did not see the plane crash,* ***but where*** *he heard the crash and a few moments later watched the plane burn on the runway, knowing that his wife was in the plane.*

Did *a person delivering flowers provoke the dog that bit him, so as to defeat his action under the dog-bite statute, MCL 287.351(1); MSA 12.544(1),* ***where*** *he shook his fist at the dog and in a stern voice told the dog to get out of his way,* ***but where*** *he did not touch the dog?*

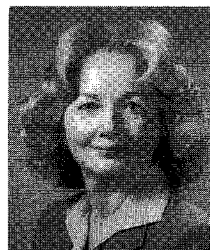
Did *the accused have the intent to accomplish the result of death required to make his conduct "wilful," under the first-degree murder statute, MCL 750.316; MSA 28.548,* ***where*** *in anger he gave his friend a loaded gun to kill himself and told him how to position the gun and pull the trigger,* ***but where*** *the accused walked into another room before his friend shot himself?*

Does *a competent patient's liberty interest under the Due Process Clause of the United States Constitution encompass the right to refuse food, water, and medical treatment that could prolong her life,* ***where*** *the woman has cancer and is 15-weeks pregnant,* ***and where*** *treatment would only extend her life six or seven weeks?*

The facts must be entirely accurate, yet they should be stated in a manner that favors your client.

Now test your question. Is it so complete that if you were to add a yes or a no response, it would be much like a rule of law? Does it immediately tell the reader what the brief is about? If not, go back to your legal pad and add more information about the parties, the law, or the facts.

A point about starting the question with "Whether" or "Whether or not." Either way, it produces an incomplete sentence. Although "Whether," is traditional, you might consider beginning the question with "Does," "Did," or "Can." But if you want to stick with "Whether" the proper punctuation is a period, not a question mark. Of course, no one will be denied access to the



F. Georgann Wing is an associate professor at Thomas M. Cooley Law School. She teaches Research & Writing and administers the Advocacy program.

court because of the question mark. It's just one of those points that adds polish.

When reviewing your issue for completeness, structure, and punctuation, also check for a couple of taboos: self-evident propositions and conclusions. A self-evident proposition is a non-issue, a "given." A conclusion is merely what you would like the facts to be. The question should not be a statement of what the client contends, but a statement of the precise legal question. Save the conclusions for the point headings.

Avoid (conclusions and self-evident propositions):

> *Can an injured 16-year-old pedestrian recover damages from a bar owner in a dramshop action, where the bar owner served alcohol to a patron* ***after he was visibly intoxicated,*** *and where the patron* ***negligently lost control of his car*** *and struck the pedestrian while he was walking on the sidewalk?*

Under these facts alone, the pedestrian would recover, of course. So why does this action exist?

State the question fairly so that your opponent will accept it. (It's more comfortable working with your own issue.) If your opponent doesn't like the question, he or she may prepare a counter-statement of questions involved.[13]

The Michigan Court Rules require that the questions be numbered separately. Follow each question by the trial court's answer to it (or note that the trial court failed to answer it) and the appellant's answer.[14]

The trial court answered "No."

The appellant answers "Yes."

Since the questions are so intricate and fine-tuned, you may want to postpone drafting them until after you have drafted the argument and the statement of facts. Before you pick up your pen to write, you may think you know the relevant law and facts and how to state the issue. Often, though, you see things differently after you have drafted the argument and pulled the law from the authorities and put it on paper. This is not to say that you can blindly draft the argument without understanding the question that you must address. It's just that the fine-tuning and the polishing might be done more effectively later. ■

Footnotes

1. Dernbach, *The Wrongs of Legal Writing,* 16 Student Lawyer, 18, 20 (1987), quoting Chief Judge William J. Bauer of the U.S. Court of Appeals for the Seventh Circuit and William C. Bryson, special counsel to the U.S. Department of Justice, in a newsletter from the National Institute for Trial Advocacy.
2. Appeals to the circuit court from the district court and probate court (MCR 7.101(A)(1) and MCR 7.101(I)(1)), and appeals to the circuit court from administrative agencies (MCR 7.104 and MCR 7.105(K)(1)) must comply with MCR 7.212(C) and MCR 7.212(D) prescribing the content of briefs in the Court of Appeals. Michigan Supreme Court briefs in calendar cases (MCR 7.306) must also comply with MCR 7.212(C)(D). Review Appellate Rules, MCR 7.101 through 7.323.
3. MCR 7.212(B).
4. MCR 7.306(B) and MCR 7.309(A)(1). Use 8½ x 11 inch paper.
5. The Michigan Supreme Court has proposed amending MCR 2.119(A)(1)(d) to include: "The combined length of the motion and the brief in support, if any, may not exceed 20 pages, except on leave of the court."
6. MCR 2.113(C).
7. The rules as to form vary somewhat. Check rules for the specific appeal. See also MCR 7.309(A)(3).
8. MCR 7.101(K), MCR 7.105(K)(3), MCR 7.212(C)(1), MCR 7.212(D), and MCR 7.214(A).
9. MCR 7.212(C)(2) and MCR 7.212(D).
10. MCR 7.212(C)(3) and MCR 7.212(D).
11. *Jones v Barnes,* 463 US 745, 753; 103 S Ct 3308; 77 L Ed 2d 987 (1983), quoting Davis, *The Argument of an Appeal,* 26 ABA J 895, 897 (1940). This same point is made in Bentele & Cary, *Appellate Advocacy: Principles and Practice* (Cincinnati: Anderson Publishing Co, 1990), pp 150, 162.
12. See generally Statsky & Wernet, *Case Analysis and Fundamentals of Legal Writing* (St Paul: West Publishing Co, 1977), pp 384-392.
13. MCR 7.212(D)(1).
14. MCR 7.212(C)(4) and MCR 7.212(D).

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