

**Effective Legal Writing
for the Digital Audience**

Presented By:

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Effective Writing for a Digital Audience (in a hybrid world)

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The Reality

An electronic brief is more
than a PDF printout of a paper brief.

The mechanics of electronic and paper briefs are all the same (required sections, page limits, font requirements, etc.).

But the reader of an electronic brief processes the information differently.

Examples:

- No easy method of flipping back and forth between sections.
- Justified margins are harder to read on a screen.
- Footnotes are the bane of a digital reader's existence.

The Problem

How do you effectively convey your position to a
(partially) digital audience without losing the
persuasive power of a paper brief?

Put another way, how can you adapt your writing within the existing rules so that it will be equally compelling in both digital and paper form?

The Point

Effective brief writing in a hybrid world requires a
reexamination of attorneys' traditional practices—in
terms of both *form* and *substance*.

Digital Formatting Tips

This is not just about making your brief look "fancy" or "lawyerly." The form of your brief is a persuasive tool.

Below are a few easy (and a few controversial) formatting suggestions for immediate improvements.

Easy changes that will make all the difference:

- Avoid ALLCAPS and underlining like the plague. These are hard to read in digital form and cause your reader to skip the information you're attempting to emphasize. This tip applies across the board—for emphasis, case names, issue statements, and headings.
- Avoid fully justified margins; judges across the board prefer ragged right margins because they're easier to read.
- Use *italics* for emphasis and case names. Use **bold** sparingly and only for headings (not for emphasis); it is distracting. Never use the two together.
- Organize your brief mindfully, and choose a numbering system that reminds the reader where he or she is within the structure of your brief. (In other words, adopt a nested numeric format—1., 1.1, 1.1.1.—instead of a traditional outline system with Roman numerals and letters.)
- Don't overlook the power of a well-constructed Table of Contents.
- Remember that white space, when used consciously, provides judges an important opportunity to think and to reflect on your position.

And a few *outside-the-box formatting suggestions* for advanced writers:

- Placing important statutory language in the corner of every page where it might be relevant and helpful to the discussion.
- Using tables for comparison.
- Choosing a font type and size that is easier to read in digital form—maybe even (gasp!) a sans serif font.

Substantive Suggestions to Improve Your Writing (in both digital and paper form)

The #1 improvement on judges' wish lists, regardless of court or subject matter, is for lawyers' writing to be *more concise*.

This is particularly important for the digital reader, who reviews a document progressively (from beginning to end) and does not have an opportunity to physically flip between sections. Convey your point early and effectively.

A note about terminology:

Conciseness \neq Brevity (though there is often a correlation between the two).

Conciseness is saying everything you need
without distractions or clutter.

In a nutshell, conciseness

- implicates organization, word choice, editing, and polish;
- involves a thoughtful consideration of your brief as a persuasive whole (not just its individual parts);
- requires an understanding of who your audience is (judges, clerks) and how they consider the information you provide.

Does everything in your brief "spark ~~joy~~ meaning"?

To this end, there are three sections where you can make immediate and marked improvements in every brief:

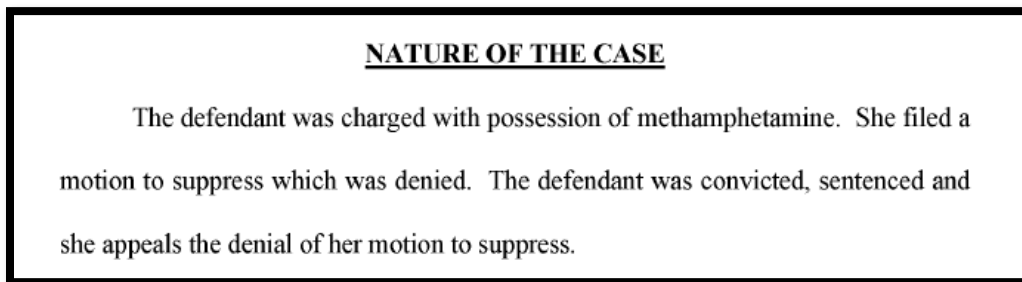
- Nature of the Case
- Statement of the Issues
- Conclusion

Nature of the Case

Defined in Supreme Court Rule 6.02(a)(1)(2) (Appellant's Brief):

- "A brief statement of the nature of the case—e.g., whether it is a personal injury suit, injunction, quiet title, etc.—and a brief statement of the nature of the judgment or order from which the appeal was taken."
- Nothing about Appellee's Brief. But see Rule 6.03(a) ("An appellee's brief must contain"—not must *only* contain—"the following . . .").

Typical example—and missed opportunity:



Questions for consideration:

- Is this an appellant's or appellee's brief?
- What are the important issues we will be considering?
- Are there facts that we should be watching for?
- Does this inspire active/engaged reading or a passive, surface review?

The Nature of the Case (or Introduction/Overview) is the opportunity to provide an executive summary and frame your case before the judges read further.

- What is this case about?
- Who are the key players?
- What are the salient issues we will be discussing?
- Why should the court be interested in resolving the case in your favor?

These same principles apply in a Prayer for Review (Petition for Review) or an Introduction/Overview (if you represent the appellee or respondent).

Another example:

This is a case about fault. The wrongful-death action underlying this garnishment arose out of a farm accident. In that case, there were three parties whose actions could have contributed in some way to the accident: the decedent, the decedent's father (██████████ insured), and the farm-equipment manufacturer. A few months before trial, the father gave a \$1,500,000 consent judgment to the plaintiffs—his adult grandchildren and daughter-in-law—in exchange for a covenant not to execute against his personal assets. The consent judgment approved by the district court made no finding as to any party's negligence, but remained silent on these issues so the plaintiffs could litigate their claims against the manufacturer at trial. In fact, the district court explicitly noted it had not made any finding regarding the father's fault in approving the \$1,500,000 judgment.

Because there were other claims of fault, the case proceeded to trial. After the jury heard all the facts, it concluded *none* of the three parties were at fault for the accident. The plaintiffs then brought this garnishment action against ██████████ in an attempt to recover the \$1,500,000 plus interest and attorney's fees. On appeal, the Court of Appeals correctly recognized that under Kansas law, judgments must reflect the degree of the parties' comparative fault. Because the consent judgment against ██████████ lacked this essential element, the Court of Appeals held it was not enforceable against ██████████.

This well-reasoned decision does not warrant this court's review. Rather:

- Comparative fault is well-established in this state; the unpublished Court of Appeals' opinion in this matter creates no new rule of law. Instead, it correctly applies the analysis adopted by this court's previous case law.
- This case does not present a matter of public concern or repeatability. The plaintiffs have cited no other case where parties have attempted to take a judgment against a defendant without assessing fault. In fact, Kansas law specifically proscribes the claim-splitting attempted by the plaintiffs here.

The Nature of the Case section should stand alone on one (and only one) page. Use this opportunity to immediately engage your reader and frame your case.

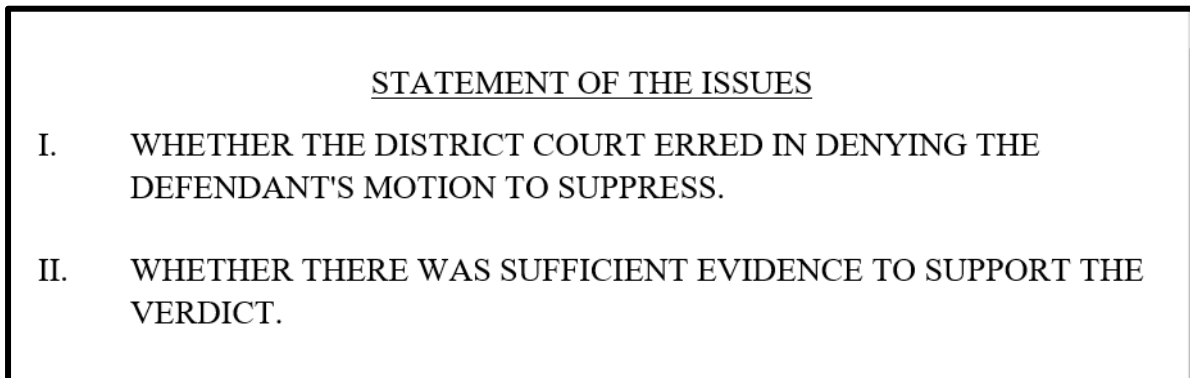
Note that these considerations apply regardless of whether you are the appellant or appellee, but your posture will cause you to frame the section differently.

Statement of the Issues

Defined in Supreme Court Rule 6.02(a)(1)(3) (Appellant's Brief) and Rule 6.03(a)(2) (Appellee's Brief):

- Appellant: "A brief statement, without elaboration, of the issues to be decided in the appeal."
- Appellee: "A statement either concurring in the appellant's statement of the issues involved or stating the issues the appellee considers necessary to disposition of the appeal."

Typical example—and missed opportunity:



Easy improvements:

- Get rid of ALLCAPS, Title Case, and underlining. Just write like a human.
- Don't use a "Whether" issue, or a one-sentence run-on strewn with facts and law that is difficult to understand (a style you may have learned in law school). You don't want to make the interpretation of your issue statement a chore for the reader.
- Consider using a short title/heading (i.e. Motion to Suppress, Constitutionality of K.S.A. 60-455, Evidence Supporting the Ruling, etc.).

For more advanced writers:

- Frame your issue as a *Deep Issue*.

Originally described by Bryan Garner, a Deep Issue breaks an issue statement down into a multi-sentence syllogism.

First sentence – Concisely describes the applicable law.

Middle sentences – Describe salient facts (without argument).

Final sentence – Provide a short question ("Did the district court err?" "Did the district court correctly apply the law?" "Was the verdict supported by evidence in the record?")

Strive to keep your issue statement to about 75 words.

Another example:

STATEMENT OF THE ISSUES ON APPEAL

I. **DAMAGES UNDER K.S.A. 58a-1002(a)**. K.S.A. 58a-1002(a) states that a trustee who commits a breach of trust "is liable for the greater of" three formulas for the statutory-damages calculation. The formula that would provide the greater recovery here is in K.S.A. 58a-1002(a)(3), which sets damages for embezzlement or conversion at "double the value" of the amount taken. The trial court found that [REDACTED], the trustee of the [REDACTED] had embezzled and converted \$1,541,827.59, but when calculating the damages the court did not double the value of the amount taken.

Was it error for the trial court to refuse to apply the statute's plain language?

II. **PUNITIVE/EXEMPLARY DAMAGES UNDER K.S.A. 58a-1002(c)**. K.S.A. 58a-1002(c) states that an award for a trustee's breach of duty "shall not exclude an award of punitive damages." One purpose of punitive/exemplary damages in Kansas is to deter others from engaging in similar conduct. The trial court found that [REDACTED], while trustee of the [REDACTED], willfully breached his duty by embezzling and converting Trust funds, but the court refused to consider the beneficiaries' request for punitive/exemplary damages, solely because [REDACTED] died prior to the trial.

Did the trial court err in refusing to consider the request for punitive or exemplary damages when such claims are explicitly authorized by the statute?

Your Statement of the Issues should stand alone on one page. This allows your reader to process this information before moving on to the rest of the brief.

Note that your Statement of the Issues should correspond with the organization of your Argument. But the headings in your argument should not merely be a cut-and-paste of your issues.

- The two sections serve different purposes.
- The Statement of the issues is syllogistic abstract of your position.
- The headings in your Argument tell the story and provide a roadmap for your discussion.

The Goal

After considering your Statement of the Issues, your reader should be focused on the key arguments in your brief (and have this context for when he or she reads the Statement of Facts).

Conclusion

The Supreme Court Rules do not mention a Conclusion. But virtually all briefs include one. Why?

Typical example—and missed opportunity:

CONCLUSION

For all the foregoing reasons, Appellee respectfully requests this court to affirm the district court's ruling.

What is the point of a Conclusion like this? What does it convey to the judge?

Broadly speaking, the Conclusion provides a final chance to frame your issues, reminding the judge what he or she has read and why the court should rule in your favor.

A few tips for effective Conclusions:

- Briefly summarize your salient points, reinforcing the reasons the court should take your position.
- Include any facts that are particularly compelling to reiterate these points.
- Specifically identify the relief or outcome you are seeking (don't leave the disposition to fate).

Finally, a quick reminder—don't give up on other persuasive sections!

- Statement of Facts (without argument—let the facts tell the story)
- Argument (using persuasive headings, organized according to your issues but worded more concisely to allow the argument to flow)

The Bottom Line

Concise writing is effective writing!

You have no control whether your brief will be read in paper or electronic form. So you must use every section in the brief to "spark meaning," regardless of the reader's chosen medium.

Think of your brief as one persuasive work, not a collection of individual sections.

Instead of throwing together Nature of the Case, Statement of the Issues, and Conclusion at the last minute before you file, spend some time crafting each section so you can frame your issues and give your reader direction and context.

Always remember your reader.

This is where your brilliance as an advocate shines!