Extra-Special Secrets of Appellate Brief Writing

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Much helpful material has been published over the years on appellate brief writing, including some nice suggestions recently on how to write in plain English. All of this is well and good, of course, but one should not get so caught up in a lot of scholarly stuff or this *nouveau litteraire* fad as to ignore the tried and true principles of appellate briefing. I have not been able to find them in any single guidebook. Given the uniform pattern of practice of most lawyers applying for a writ of error in the Texas Supreme Court, the principles seem to derive from some type of unwritten code. While reading a great many briefs during my several years on the Court, I have tried to deduce those principles, which I present here in one short piece. I hope that giving them greater circulation will clear up many serious confusions and improve the quality of practice not just in Texas but, *mutatis mutandis*, in appellate courts everywhere.

1. *Color of the cover.* Far too little attention is paid to the selection of the color for brief covers. No less an authority than a Justice of the United States Supreme Court has recently remarked, "It is impossible to exaggerate the importance of having the right color, since that is how the Court decides who wins. Last year, the Court gave a little piece of Texas to Louisiana by mistake because of colorblind counsel."[2] I can assure you that in

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1. This is a very scholarly piece, as would have been more readily apparent if the benighted editors had not insisted on sticking to their convention of minimizing footnotes. *But cf. infra* note 2.

2. Frankly, I have lost the cite on this, but I wrote this quotation down when I saw whatever it was I saw, and I am certain it is correct. I could make up a citation, like Letter from Henry Q. Adams to Hon. Nathan L. Hecht, and the reader would be none the wiser. I have chosen instead to be candid in hopes of enhancing the credibility of the article.

our Court, as in the United States Supreme Court, whoever said that you cannot judge a book by its cover was not an appellate specialist. Our Court has traditionally favored covers in blue, red, and gray; but as the ideology of the Court has changed, secondary colors and pastels are enjoying greater acceptance. I know of no better way to ensure serious consideration of an application by the briefing attorney who will read most of it than to begin with a thoughtful color selection for the cover.

2. *"To the Honorable Supreme Court of Texas."* It is mandatory that these words introduce the application. Our Court has had a real problem in the past receiving applications addressed to the supreme courts of other states, especially Montana and North Dakota. It is very aggravating to read through an entire brief only to find that it has been filed in the wrong court. We therefore routinely dismiss all applications that do not begin with these words.

3. *"Comes now . . . ."* Applications should begin, "comes now petitioner [state full legal name and all a/k/a's and d/b/a's] in the above-styled and -[3]numbered cause . . . ." Not infrequently, petitioners in one case will file a brief in a separate, completely unrelated case. Without the clarification, "in the above-styled and -numbered cause," it is impossible to tell whether petitioners are briefing their own case or someone else's. This can result in terrible confusion, which the inclusion of a few simple words easily cures. The same rule applies to respondents and all other parties.

4. *"Hereinafter _____."* It is commonly known that courts prefer that parties be referred to by name rather than by description, such as petitioner or respondent. But some names are so long as not to lend themselves to easy repetition and should be abbreviated. That abbreviation must be introduced by the word *hereinafter*: for example, "Hufflebaker Fluffbeastly & Pfeiffergrottle, P.C., hereinafter Hufflebaker Fluffbeastly & Pfeiffergrottle."

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3. The Court deplores the ever-growing practice of omitting this second hyphen.

Without the *hereinafter*, the Court has no way of knowing whether the firm referred to repeatedly in the brief is the same professional corporation that is a party to the case or some other firm that is perhaps a limited-liability partnership or another kind of entity. This may seem like a small matter, but small matters can sometimes have profound effects.

5. *Summary of the facts.* Just as the story is one of the greatest literary forms, the summary of the factual background in a case can be of great importance. Some elements of style make for the best statement of facts. For example, every sentence should begin with a date, or at least have a date somewhere in it. No attempt should be made to explain the facts in relative time, such as several months before or several days after. Dates are important, even if they have nothing to do with any issue in the case. A Joycean stream-of-consciousness style is usually very effective, inasmuch as this is ordinarily the way evidence is adduced at trial. Please do not try to limit the factual summary to subjects material to the issues in the case, since the Court's curiosity about irrelevancies is unbounded. Above all, the factual statement should not be at all interesting, but should resemble the bones of a skeleton picked clean by desert vultures and disjoined by passing scavengers and nature itself.

6. *Vilification of opposing parties and counsel.* At least one-third of an application for writ of error should be devoted to vilifying opposing parties and counsel. Pointed accusations of unprofessionalism are essential, and allegations of criminal conduct are helpful. The truth is, if you lost to a nice guy, there's just no reason for the Court to worry with the case further. By the same token, judicial outrage, elicited by charges that thieves and pirates are having their way in the judicial system, prompts a more favorable response. Respondents should always reply to each personal allegation made by the petitioners, and add a like number of countercharges. If the application and response are sufficiently devoted to character assassination, the reply brief will be entirely consumed by answering charges and hurling new ones.

7. *Footnotes.* The flavor of the argument depends on the presence or absence of footnotes. Footnotes give the application a literary flair, while their absence creates the appearance of a primal cry for justice. The decision whether to include footnotes in the application can be critical, therefore, because it suggests to the Court how it should write the opinion — i.e., whether the principal audience will be casebook readers or newspaper readers. Of course, the Court has other ways of anticipating how its decision will be received, but the signal that footnotes give is helpful. If footnotes are used, most of the substantive argument should be relegated to them, leaving only a few abstract legal propositions and some lengthy string citations in the text of the argument itself. Also, footnotes should be in a reduced type size, slightly smaller than what can be read, since they won't be.

8. *Points of error.* The heart of an application for writ of error in Texas is the statement of points of error — the complaints on appeal. All points of error must be typed in all capital letters. If your word processor allows for bold letters or double underscore, this is also helpful. However, the Court will summarily overrule any point of error that is not typed in all capital letters. Points of error must be printed three times in the application: first in the table of contents, then in the summary of the points of error, and finally at the beginning of each section of argument. These repetitions of the points of error must be identical, and if there is any variance in the repeated statements — say, in the table of contents and the beginning of each section of argument — the point will be summarily overruled. Each point must be a single sentence but should contain no fewer than 150 words. Semicolons and commas may be liberally employed, although they are not necessary. If it is possible to understand the petitioner's complaint after reading the point of error, then it will be summarily overruled.

9. *Typesize.* The size and style of type selected for different portions of the application signal their relative importance. As already noted, for example, points of error should be in all capital

letters, and footnotes should be too small to read. Anything that counsel wants the justices themselves to consider should be in all capital letters and underlined or boldfaced. Argument addressed to the law clerks should be in ordinary type without underlining.

10. *Subsequent citation of cases.* After a case has once been cited, all later references should be to some shorthand style rather than the full cite. Select the shorthand reference with care. Consider using the appellee's name in the case style rather than the appellant's, so that the full citation will be most difficult to locate in the table of contents. One good method is to put the initial citation in a footnote and to use *supra* for all later citations to the case, so that the full citation cannot be found at all. This reduces the possibility that a law clerk will actually look up the case to see whether it says what you say it says. Thus, "the well-established rule in *Jones*," referred to repeatedly throughout, becomes virtually irrefutable. This simple rule goes a long way in avoiding attacks on your arguments.

11. *String citations.* Our Court is constantly concerned with the relationship between Texas jurisprudence and that of other jurisdictions. Citations to cases from other jurisdictions are frequently helpful. An important caveat is that federal cases and cases from some states are never regarded as authoritative, and reliance on them may seriously prejudice your position. Prudent counsel will ascertain which states are which. To maximize the benefit of a long string cite of decisions from other states, while minimizing the likelihood that those cases will actually be compared to the issues in your case, limit citations to the official state reporter and omit any citation to the West regional reporter system.

12. *"Respectfully submitted."* Every application should conclude with the words, "Respectfully submitted." Frequently counsel will have done such a thorough job of vilifying the opposition and criticizing the folly of the lower courts that the

impression may be left with this Court that some of the vituperation is directed at it. This simple phrase avoids that misimpression.

Conclusion

These rules have served lawyers before the Texas Supreme Court in good stead for many years, and I hope this collection of them will prove helpful to the bench and bar.