Appellate Brief

February 28, 2006

Announcements

- Briefs are due Monday, March 13, 2006 by 9:00 a.m.
  - Colored covers
  - Turn-in box
  - Put my name on it
- New Exam numbers are available
- Extended Office hours this week and next week
- Bailiffs should sign-up to bailiff
- Volunteers to do practice round

Brief Writing

- Word Choice
- Organization

Questions Presented

- Include Governing Law
- Include Determinative Facts – not legal conclusions
- Focus on Correct Legal Issue
  - Student-on-student Title IX claim

Statement of the Case

- Opening sentence and paragraph should reflect who you represent – I saw some very creative beginnings
- Present procedural status at the end
- Cite to the Record
- All facts discussed must be included
- Should be persuasive but not overly argumentative

Summary of Argument

- Structurally Similar to Conclusion in Memo
- State overall argumentative assertion
- Systematically work through disputed elements
- Begin each paragraph with positive assertion
- Support each assertion with facts
- Ask for relief

Point Headings

- Ensure they are persuasive and factual to your case
- If they can be inserted in any other brief they aren't effective
- Avoid the "claim succeeds/fails because elements met/not met" style

Argument – Opening Paragraphs

- Opening sections should be concise
- Opening Argumentative Statement
- Rule
- Transition to sub issues and sub-sub issues
- Ask for relief – either at beginning or at the end

Argument -- Organization

- Organization -- Make it Work

Favorable Rules

- Consider how you formulate Rule
- Begin each case presentation with favorable rule
- Even counter authority should begin with rule that implies how case is distinguishable;
  - Shaming penalties are only enforceable when their deterrent value outweighs their rehabilitative value. Cite or See e.g.

Case Presentation

- Don't assume court knows the law -- some degree of education is required
- Determine where you are within the argument and what point you are trying to establish – focus case presentation on that narrow point
- How much authority
  - Determine importance to your argument
  - Determine level of skepticism

Argument -- Application

- Structure argument around the law
- Each paragraph should lead with your argument -- your affirmative point
- Use case law as support for your argument
- Do not resummarize the cases just to say your case is the same or different
- Don't restate all your facts without arguing their legal significance
- Generally, stronger to analogize than distinguish but it depends on the authority

Counterargument

- See exercise on responding to counterargument
  - Case is factually dissimilar
  - Case is bad law
  - Case should not be used to set the standard
  - Case against the trend
  - Challenge opposing counsel interpretation of case – e.g. not entitled to a specific remediation

Tone

- Don't overargue/misargue – "Zion was negligent in failing to remedy the harassment.'
- Do not overstate your case – "Tom engaged in a relentless campaign of terror against Katy that Zion condoned."
- Do not understate your case – "Tom merely touched Katy's arm while they were in the hallway."
- The more you say it does not make it more true

Consider

- Consider opposing side is on one shoulder
- Consider judge is on other shoulder
- Don't need to be afraid of any fact or any case

Miscellaneous

- Policy considerations, particularly on "D.I."
- Stipulation – drop it in a footnote
- Watch the standard for "D.I" – "not clearly unreasonable"
- Consider context of play – don't mislead court
- Ask for the relief you are seeking

Writing

- Organization must be clear
- Topic sentences for each paragraph – your point should be readily identifiable
- Experiment with persuasive writing techniques, but not at the expense of clarity
- Zion is an "it" not a "they"
- No contractions unless in quotes

Advice

- Strike for the appropriate balance
  - of your time constraints
  - of your page constraints
- Don't lose credibility
- Citation – you can have perfect cites!
- Ensure compliance with Format
- Don't be late!