Brief Writing

February 7, 2006

Common Problems in Brief Drafts

- Ineffective Persuasive Tone
  - Most read like memos
- Ineffective Organization
  - Put strongest argument first
  - Generally, begin with favorable law
- Ineffective Word Choice
  - Ensure that who you represent is apparent throughout the brief

Point Headings

- Headings should not be generic:
  - "The Appellant was the victim of severe and pervasive harassment because the conduct included verbal and physical harassment"
    - Heading lacks detailed facts to support theory
- Headings should not be generic principle of law:
  - "A systematic pattern of harassment exists if the conduct occurred repetitively over a period of time"
    - Heading is not specific to your case; it is a rule that neither side would dispute

Point Headings

- Incomplete:
  - "The Appellant did not suffer harassment that was severe and pervasive"
    - Heading lacks any facts to support the assertion
- Ensure your description of parties supports your theory

Argument

- Include an affirmative argumentative assertion in each umbrella paragraph
- State a favorable synthesized Rule – one that reflects a standard that supports your theory
  - Zion – consider whether to frame rule around name-calling or around a high standard, or both
  - Katy – frame rule to reflect a standard that you can meet
- Your rule should not read like a memo rule:
  - "Instances of verbal and physical harassment are indicative of severe and pervasive conduct"

Authority

- Ensure you have sufficient authority and counterauthority – what are the other side's best cases?
- Generally, present affirmative authority first – it's easier to argue by analogy than by distinction
  - E.g. Katy would not lead with Cubie; Zion, however, may lead with cases where conduct was "S&P" if theory is setting a high standard that Katy does not meet

Presenting Authority

- Ensure opening rule is persuasive
- Consider whether to frame rule broadly or narrowly
- Goal is to educate and persuade the court as succinctly as possible
- Distill case presentation down to essential information, but be careful not to mislead court on scope of case's ruling

Presenting Authority

- Concisely present authority:
  - In Davis, the victim was subjected to sexual verbal and physical harassment for an extended period of time. Specifically, she had to endure repeated instances of harassment for over five months. In Davis, the plaintiff "was the victim of repeated acts of sexual harassment . . . over a 5-month period." These actions of harassment occurred numerous times during the five-month period and were almost always sexual in nature, both verbally and physically. The Court held that these allegations were sufficient to support the conclusion that the conduct was severe and pervasive.
- Assuming case was used only for duration, it could read:
  - (repeated acts of sexual harassment over a five-month period was likely sever and pervasive conduct)

Presenting the Law

- Use more parentheticals. They help you distill the case down to its relevant and applicable ruling/reasoning and it helps the court readily see the law.
- Consider framing rules that could encompass several cases.

Argument

- Start argument with positive assertion – restate your argumentative position
- Anchor argument around your outcome, using your facts and case law for support
- Use the law – engage in specific analogies and distinctions
- Avoid comparing conclusions – "In neither case did the parties understand the context of the conduct."
- It doesn't matter how many times you say something – it doesn't make it so and it's not persuasive until you support it with law and facts
- Many of you are stuck in memo writing. Some have gone too far the other way and lost complete sight of the case law. Theory is good but it must be grounded in the LAW!!

Argument

- Begin each paragraph with a topic sentence
- Don't overstate your case – if conduct was not "unrelenting" then reconsider arguing it was
- Argue with credibility – find your style and voice

Counterargument

- No one way to include counterargument
  - Present and address it naturally within your argument
  - Present and refute after your argument
- Regardless, DO NOT set out opposition's argument without responding to it in the same sentence

Brief Writing Exercise Answers

Brief Writing Exercise:
I. Questions Presented

A. Did the trial court err in dismissing Ms. Bell's claim against her husband for damages for using an extension telephone to intercept her private communications without her consent?

Problems: Relevant law?; Use of proper names; Narrow legal issue not identified sufficiently.

Correct: Favorable response; some factual specificity; some persuasive language.

I. Questions Presented, cont.

B. Does Title III of the Omnibus Crime Control and Safe Streets Act prohibit the Appellee's interception of the Appellant's telephone conversations?

Problems: Use of litigation designation not description; no determinative facts; no persuasive language.

Correct: Favorable response; relevant law.

I. Questions Presented, cont.

C. Did the trial court err in dismissing the Appellant's claim since her husband's unauthorized actions of intercepting her oral telephone communications are clearly prohibited by Title III of the Omnibus Crime Control and Safe Streets Act and do not come within the exceptions to the Act?

Problems: Use of litigation designation not description; no persuasive language; assumes elements/conclusory; "since"

Correct: Favorable response; relevant law; some facts.

I. Questions Presented, cont.

D. Does Title III of the Omnibus Crime Control and Safe Streets Act, which prohibits an individual from intercepting any wire or oral communication, provide a cause of action for a wife against her husband, who eavesdropped on an extension telephone and secretly recorded her private telephone conversation?

Problems: Not U/D/W order; readability?; ordered for emphasis?

Correct: Favorable response; relevant law; determinative facts, persuasive language, narrow legal issue identified

II. Persuasive Techniques in Sentence Writing (A)

Original: Although the Pennsylvania Supreme Court has never held there is an exception to the employment-at-will doctrine, the lower courts have recognized a limited exception to the doctrine when an employer's discharge violates a clear mandate of public policy.

Better: When an employee is fired in violation of public policy, the court *should recognize* an exception to the employment-at-will doctrine.

Best(?): Pennsylvania courts have recognized an exception to the employment-at-will doctrine when an employer violates *(a clear mandate of)* public policy.

Lesson: Do not highlight the absence of controlling authority; rather, highlight the authority in your favor (without misleading).

Persuasive Techniques in Sentence Writing (B)

Original: In all but thirteen jurisdictions that have recently considered the issue, children cannot sue for loss of parental consortium.

Better: In thirteen jurisdictions that have recently considered the issue, children can sue for loss of parental consortium.

Lesson: Focus on the positive aspects of the legal authority, not the negative aspects.

Persuasive Techniques in Sentence Writing (C)

Original: Generally, a municipality is not liable to an individual for failing to provide police protection. However, there is an exception for police who assume a "special relationship" or "special duty" towards an individual.

Better: A municipality is liable to an individual for failing to provide police protection when the police assume a "special relationship" or "special duty" toward that person.

Lesson: Do not highlight an unfavorable rule. Define the exception instead.

III. Broad v. Narrow Case Holdings (A)

Student's interpretation of *Lee*: Analogize generally

Example (broad rule): Any school action resulting in school prayer is unconstitutional. Lee v. Wiesman.

Example (discussion): In Lee, the Supreme Court instructed that even non-sectarian graduation prayers constitute unconstitutional governmental religious coercion in violation of the First Amendment. Because Mr. Jefferson's school has scheduled a graduation prayer, albeit a non-sectarian prayer, it has violated the First Amendment and should be enjoined from such action.

Broad v. Narrow Case Holdings (B)

School Board's interpretation of *Lee*: Distinguish specifically

Example (broad rule): It is unconstitutional for a school principal to personally invite a clergyman to lead a school prayer at graduation. Lee v. Wiesman.

Example (discussion): In Lee, the Court found graduation prayers imposed by school principals to be unconstitutional. Here, however, the students themselves voted to include the prayer at graduation, rendering the governmental coercion concern absent and the prayer constitutional.

IV. Rebutting Opposing Argument and Authority

A. G (outdated) and I (split decision)
B. D (distinguishable facts)
C. D (distinguishable facts)
D. D (distinguishable facts) and C (different procedural posture)
E. J (wrongly decided)