

CLASS 18

**DRAFTING APPELLATE
BRIEFS**

Legal Brief

- Usually refers to appellate brief, but can be applied to papers in support of trial court motions as well.
- Briefs usually refer to longer, more complete documents with added features such as case tables and contents.
- The prototypical example of persuasive writing!
- Should be:
 - Well organized
 - Interesting
 - Easy to follow and understand
 - Complete
 - Reliable

Formalities

- Title Page
 - Full designation of the parties
 - Court in which the appeal is being held
 - Names of counsel and date of filing
- Table of Contents
 - Questions presented, statement of facts, arguments, etc.
- Table of Authorities
 - Statutes first, then cases, then secondary authorities
 - Within each group, use alphabetical order
- You may be constrained by a word limit or other financial/time constraints.
- Most court rules require the petitioner's brief to include a separate statement of the source of the court's jurisdiction.

Guide to Brief Preparation

[Adapted from Ohio 9th Appellate Ct. Guide to Brief Preparation]

This is a typical cover page. Examine the court's re what information should be on the cover page.

Court of Appeals case number

Information for counsel, including the name of the party represented and registration number, or if a party is unrepresented, information for the party.

Title of document and the name of the party on whose behalf the document is filed.

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT
SUMMIT COUNTY, OHIO

| | | |
|---|--|---|
| CITY OF AKRON Appellee v. NOAH TURNEY Appellant | | C.A. No. 98765 APPEAL FROM THE AKRON MUNICIPAL COURT, CASE NO. CR 00-00-0000 |
|---|--|---|

BRIEF OF APPELLANT
NOAH TURNEY

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Appellant

John Lawyer
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Guide to Brief Preparation

[Adapted from Ohio 9th Appellate Ct. Guide to Brief Preparation]

Examine the court's re what conventions are required by each party.

List the page on which the section begins.

| TABLE OF CONTENTS | |
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| Statement of the Assignment of Errors | 1 |
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| Statement of the Facts | 3 |
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| Appendix | 8 |
| App. A: January 1, 20... | 8 |

Some court's rules require that the Table of Contents include a list of the items in the appendix.

Guide to Brief Preparation

[Adapted from Ohio 9th Appellate Ct. Guide to Brief Preparation]

All authorities, including cases, statutes, ordinances, and rules, must be listed in the Table of Authorities.

| TABLE OF AUTHORITIES | |
|--|---------|
| | Page(s) |
| CASES | |
| <i>State v. Thompson</i> , 78 Ohio St.3d 380 (1997)..... | 4, 5 |
| CODE SECTIONS | |
| Akron City Code 136.11 (1973)..... | 5 |
| OTHER AUTHORITIES | |
| Article IV, Section 3, Ohio Constitution | 4-5 |

List all pages where the authority is cited.

List all pages where the authority is cited.

Guide to Brief Preparation

[Adapted from Ohio 9th Appellate Ct. Guide to Brief Preparation]

The issues, or the “Questions Presented” are the questions that the Court must answer to reach a decision in the case.

ISSUES PRESENTED FOR REVIEW

Mr. Turney and three witnesses testified that Turney did not disobey a police officer or fight with him. The officer testified Turney refused to follow his directions and struggled with him while cuffing him. Was Appellant's conviction for obstructing official business against the manifest weight of the evidence in light of the conflicting evidence on the events that took place during arrest?

Guide to Brief Preparation

[Adapted from Ohio 9th Appellate Ct. Guide to Brief Preparation]

Appellate briefs require a statement of the case, or a “preliminary statement,” which tells how the case proceeded in the trial court. Only events relevant to the questions presented should be included.

Court rules require references to the record, which identify the evidence proving the fact. In this example, “Tr. at 81” refers to a page of the trial transcript. It could also be “R. at xx.”

STATEMENT OF THE CASE

The city of Akron brought this action against Turney in the Municipal Court of Akron, Summit County, for one count of driving under suspension in violation of Akron City Code 71.07 and one count of obstructing official business in violation of Akron City Code 136.11. The jury convicted Turney on both charges. On November 6, 2002, the trial court ordered Turney to serve 180 days in the Summit County jail. (App. at A-1). Turney timely filed his notice of appeal on November 25, 2002. On December 24, 2002, the trial court released Turney and suspended his sentence.

STATEMENT OF FACTS

On August 26, 2002, at approximately 8:00 p.m., Turney was driving eastbound on East Market Street in Akron, Ohio. At the same time, a police officer was also traveling eastbound on East Market Street in a marked police vehicle. [Tr. at 79] The officer then followed Turney from Market Street to his home where he initiated a traffic stop. [Tr. at 81, 82] At trial, the officer testified that Turney failed to pull over when he turned on his warning lights, but instead continued to drive about a half of a block where he turned into his driveway at home. Id.

The officer also testified that, after the traffic stop was initiated, Turney refused to shut off his car, used profanity, and told the officer to shut the car off himself. [Tr. at

If the appendix includes a copy of the item cited, a reference in the brief to the location of the item in the appendix is required.

Statement of the facts, which tells the facts, but only those relevant to the questions presented should be included in the statement of facts. There must also have been evidence in the record to support the facts.

Guide to Brief Preparation

[Adapted from Ohio 9th Appellate Ct. Guide to Brief Preparation]

84] The officer stated that there was a struggle when he attempted to place Turney under arrest. [Tr. at 85-87] The officer handcuffed and then pepper sprayed Turney. [Tr. at 87]

Turney and three other witnesses all testified that the officer did not turn on his warning lights until Turney pulled into the driveway. [Tr. at 142, 160-61, 196] Turney and two of the witnesses testified that the officer pushed Turney against the car while he was attempting to put him in handcuffs. [Tr. at 143, 178, 197] Turney and all three witnesses further testified that, after the officer placed the handcuffs on him, the officer caused Turney to drop to his knees and then pepper sprayed him. [Tr. at 143, 161, 179, 197]

ARGUMENT AND LAW

ASSIGNMENT OF ERROR

Appellant's conviction for obstructing official business was against the manifest weight of the evidence in violation of Article IV, Section 3, of the Ohio Constitution. (Tr. Passim)

The Ohio Supreme Court set forth the following standard that an appellate court must use to review a claim that a conviction is against the manifest weight of the evidence:

The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of the witness and determines whether in resolving conflicts in the evidence, the jury clearly

Each question presented should be argued separately.

Ct. rules usually require that the standard of review to be included in the argument.

Guide to Brief Preparation

[Adapted from Ohio 9th Appellate Ct. Guide to Brief Preparation]

Block quotes should be single-spaced.

Citations to cases, statutes, and rules, should be in the body of the brief, not in footnotes.

lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction.

State v. Thompkins, 78 Ohio St.3d 380, 387 (1997). Ohio Constitution, Article IV, Section 3(B) provides that:

No judgment resulting from a trial by jury shall be reversed on the weight of the evidence except by the concurrence of all three judges hearing the cause.

If all three judges of the appellate court agree that the judgment is against the manifest weight of the evidence, the conviction must be reversed and defendant given a second chance to seek an acquittal through a new trial. *See Thompkins*, 78 Ohio St.3d at 387.

In this case, the conviction for obstruction of official business must be reversed because the evidence did not support one of the elements of the crime. Under Akron City Code Section 136.11, for a person to be guilty of the crime of obstructing official business, that person must, without privilege to do so and with the *purpose* of obstructing the performance of a public official of any authorized act within his official capacity, do an act that hampers or impedes the official in the performance of his lawful duties. Akron City Code 136.11 (1973). The greater weight of the evidence in this case establishes that Turney did not intend to hamper or impede the officer in performing his duties.

At trial, the officer stated that he decided to arrest Turney for obstruction of official business because he failed to stop immediately when the officer turned on his warning lights, used profanity with the officer and refused to turn off his car after he

Case names should be in italics or underlined.

Guide to Brief Preparation

[Adapted from Ohio 9th Appellate Ct. Guide to Brief Preparation]

Include references to the record to support your argument.

With the exception of block quotes and footnotes, the text of the brief is to be double-spaced.

had stopped. [Tr. at 81-82.] Turney's witnesses, however, stated that they did not see the officer turn on his warning lights until Turney was at, or almost at, his driveway. [Tr. at 142, 160-61, 196] Even if the jury believed one hundred percent of the testimony of the officer that he turned on his warning lights approximately one half a block before Turney stopped, the city still failed to prove that he noticed that the officer's warning lights were on immediately after he turned them on. For Turney to intend to continue driving and obstruct official business as the city has contended, he would have had to have seen the warning lights several seconds before he stopped. The overwhelming weight of the evidence, however, established that he did not fail to stop after he noticed that the warning lights were on.

The officer also indicated at trial that Turney's refusal to shut his car off was another reason why he was arrested for obstructing official business. It is unclear why the refusal to shut off the car would be relevant to a charge of obstructing official business under the circumstances of this case. The officer testified that he had pulled into the driveway behind Turney who had pulled his car all the way to the back of his driveway. Failing to turn off the vehicle did not hamper the officer in conducting his duty as the vehicle was blocked and could not have gone anywhere. Nor would the use of profane language obstruct the officer in his duty. Thus, the evidence failed to establish that the officer was hampered in performing his duties by any of the actions of Turney.

Use party names or descriptive terms rather than "appellant" and "appellee" in the brief.

Guide to Brief Preparation

[Adapted from Ohio 9th Appellate Ct. Guide to Brief Preparation]

Ct. rules usually require a conclusion stating the relief requested.

CONCLUSION

For the foregoing reasons, Turney prays that this Court reverse the trial court's decision and remand the matter for a new trial.

Noah Turney
Appellant

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief and Assignments of Error was sent to Appellee's counsel, John Lawyer, Prosecuting Attorney, 789 His Street, Histown, Ohio 00000, by ordinary U.S. mail on the 20th day of March, 2002.

Noah Turney

Ct. rules usually require all documents filed with the Court to include proof of service stating to whom the document has been sent, how it was sent, and when. Proof of service must be separately signed.

Style in a Brief

- Try to be as clear as possible
 - Using “appellant” may not be effective as using a more descriptive title
- Use forceful “action” verbs
 - Damaging arguments can be relegated to passive verbs
- Avoid legalese and complex language
- Avoid extended quotations
 - Readers tend to gloss over quotations
 - The key to effective legal writing is to be brief and articulate. A legal document written in short, simple, straight-forward prose is easy to follow and usually flows well. Shorter is (almost) always better.

Other Style Points

- Brief should be complete vs. oral argument, which is much shorter and more focused.
- Editing
 - Eliminate or modify passive voice.
 - Avoid legal jargon.
 - Replace adjectives and adverbs
 - John Trimble, Writing With Style: “Minimize your adverbs . . . especially trite intensifiers like very, extremely, really, clearly, and terribly, which show a 90% failure rate.”
 - Transitional words and phrases (“furthermore,...” “Even more...”) can create powerful links between ideas in your paper and can help your reader understand the logic of your brief

Organization

- Use “Mapping”: Tell your court at the beginning of the brief where you are going and how you will get there. Provide a roadmap to the reader in advance, through an introduction or opening paragraphs. Don’t bury your lead point.
- Table of contents should be a map of your argument
- Point headings are an important part of your persuasive presentation of your argument in an Appellate Brief. It is usually the first language a judge will see in reviewing your brief, so it is important to guide your reader to your conclusions in your point headings

Questions Presented

- Number
 - Each question/argument should relate to a core theory you're putting forth.
 - Use only as many as necessary to distinctly put forth your strongest arguments.
- Structure
 - At the beginning of the argument
 - Questions should be independent of each other.
 - Try to avoid sub-clauses and complex sub-issues.
- Substance
 - Questions presented are phrased in a manner that states the desired result.
 - The question presented should include a reference to the governing law

Statement of Facts

- Identifying the facts
 - Substantive
 - Procedural (how the case got here)
- Choosing the facts
 - Relevant to the questions on appeal only
- Using the record
 - Citation to the record rules vary by court
- Negative facts (facts that are not shown) can be used to show that the other side has not met its burden etc.

Statement of Facts

- **Tell a story.** Your facts should read like a novel or short story. The story should have a clear beginning, middle and end. Instead of summarizing trial testimony or exhibits in the order in which they were entered, it should focus on the underlying story.
- **Organize your facts to maximize persuasion.** Whatever organization you choose, make it clear to the reader from the outset. If necessary, help the reader with subheadings.
- **Include details that advance your theory.**
- **Emphasize favorable facts.**
- **Avoid sarcasm, hyperbole, and argument.**

Statement of Facts

- Although facts should be presented in a manner favorable to your side, your credibility rests on a complete and accurate presentation of all relevant facts
 - From: Hickman v. Fraternal Order of Eagles, Boise No. 115, 114 Idaho 545, 546, n.1 (1988).

"We first learned of Davis' drinking subsequent to the Christmas party when reading Respondent's Brief. Counsel for appellant Hickman failed to include these facts in his brief, contrary to Idaho Appellate Rule 35, which requires that appellant give an accurate statement of the facts. Counsel for appellant further failed to provide an adequate transcript of the trial proceeding. Counsel for appellant damages both his credibility and his client's position when he fails to state the facts to this Court with the utmost candor."

Statement of Facts

- Organization
 - Labeling parties
 - Words with effective connotations
 - Introduce the characters and facts
- Handling adverse facts
 - Don't omit a fact just because it hurts your side
 - Downplay it or (later) explain why it is irrelevant
- Separating facts from arguments
 - Don't slant the facts or misrepresent
 - It's a fine line
 - Wait until the analysis section to distinguish or argue.

Arguments

- This is the main part of your brief
- Presents the “core theory” of your appeal or defense of appeal
- More important than oral argument.

Arguments

- Argument headings
 - Usually the first language a judge will see in reviewing your brief
 - Useful to help the reader understand what is coming
 - Identify the applicable law
- Subheadings
 - In briefs, these are often long and detailed

Arguments: Standards of Review

- Standards of Review
 - Must be based on authority
 - *De novo*
 - Clearly erroneous
 - Abuse of discretion
- As an advocate for your client, you should be looking for authority, including policy arguments, that supports the most favorable standard of review possible.
- If you're representing the appellant, you should argue for the least restrictive standard, the standard that maximizes appellate court's authority to overturn the challenged decision.
- If you represent the appellee, on the other hand, you should argue for the most restrictive standard, one that limits the appellate court's authority to overturn the trial court's ruling.

Arguments 2

- Use CRAC or RAC (Issue was already presented)
- Substance
 - All assertions of law must be supported
 - Facts of the case must be interwoven to analyze them in light of applicable law
 - Public policy arguments
 - Can be persuasive, but are risky and difficult to make
- Rebuttal and preemption of opponents' arguments
- Always argue in the alternative, your “fallback” position

Use of Authority

- Cite the best authority and the most on point.
 - No need to cite many authorities when few will do just as well.
 - Appellate judges (and their clerks) have a tremendous amount of reading to do.
 - Remember, the point of an appellate brief is to make it easy for the court to rule in your client's favor.
 - Boggling down your brief with extraneous and unnecessary citations creates more work than necessary for the court and reduces your room to make substantive arguments.
- There is no need to discuss tangential related cases in long form-- Use parentheticals

Use of Authority

- Contrary authority
 - Must be cited if the authority is mandatory
 - Rule 3.3(a)(2) of the American Bar Association (ABA) Model Rules of Professional Conduct states that a lawyer shall not knowingly “fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel.”
 - “Would a reasonable judge properly feel that a lawyer who advanced, as the law, a proposition adverse to the undisclosed decision, was lacking in candor and fairness to him? Might the judge consider himself misled by an implied representation that the lawyer knew of no adverse authority?” ABA Comm. on Prof’l Ethics & Grievances, Formal Op. 280 (1949)
 - Can be cited otherwise, as the opponent likely will, and should be explained or distinguished in a manner that favors your client

Losing Your Cool in Writing

- Words not to use:
 - "Ridiculous"
 - "Ludicrous"
 - "Disingenuous"
 - "Preposterous"
 - "Absurd"
 - "Outlandish"
 - "Absolutely False"
- Don't insult the trier of fact.