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10 TIPS FOR BETTER BRIEFS

Over the last several decades, as state and federal courts have seen their caseloads skyrocket, the amount of time judges and justices can devote to each case has declined. As a result, the importance of well-written briefs to the resolution of both the trial and appeal has increased over time. Lawyers who prepare persuasive and reader-friendly briefs, and who demonstrate their professionalism by following to the letter the relevant procedural rules, now have an even greater advantage. Of course, no amount of skill or professionalism can make up for fatal factual or legal weaknesses. But for those cases and issues that could go either way, the following tips should increase the chances of a favorable result.

Tip No. 1: Read the relevant rules

Judges, especially appellate judges, are increasingly airing the view that lawyers who do not follow the rules lose credibility, as well as run the risk of public shaming.[1] In their view, a lawyer who cannot follow fairly straightforward procedural rules is not the most credible person on the subject of whether the trial judge committed reversible error.

Entirely revamped Montana Rules of Appellate Procedure went into effect on October 1, 2007, containing numerous changes, both large and small.[2] And some of those new rules were revised again this October 1. Many of the changes are intended to address problems the Supreme Court has encountered repeatedly in which attorneys failed to

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[1] *See, e.g., Giambra v. Kelsey*, 2007 MT 158, n. 3, 338 Mont. 19, n. 3, 162 P.3d 134, n. 3 (in which the Court singled out appellant's attorney by name in a footnote stating that "this case marks the fifth time in the past three years that Mr. [name redacted] has neglected to provide this Court with materials essential to his client's appeal.")

[2] In Montana it is especially easy to miss recent rule changes because many attorneys rely on the version of the procedure rules published in Title 25 of the most recent Montana Code Annotated. However, because the MCA is only published every other year, it rarely contains recent changes. Instead look for rule changes in *The Montana Lawyer* and check the Internet for the current version.

follow existing case law interpreting older rules. Some lawyers inevitably will fail to comply with the more significant changes, and perhaps lose the appeal as a result. Here's some of the more important or unusual changes, and some potential problems that might result:

- Time limits are now actual filing deadlines. They always include weekends and holidays. They also no longer allow three extra days for service by mail.[3] Mont. R. App. P. 3.

Problem: Deadline for filing notice of appeal in most civil cases runs from date notice of entry of judgment is served. Mont. R. App. P. 4(5). Service is complete upon mailing, with no additional time for service by mail. Mont. R. App. P. 10(3). If notice of entry of judgment is mailed to out-of-town counsel late Thursday, it likely won't arrive until Saturday at earliest and not be opened until Monday. Four days have run before the lawyer was even aware the 30-day deadline to appeal had begun.

Bigger problem: Lawyers unaware that the Montana Rules of Appellate Procedure count time differently than the Montana Rules of Civil Procedure may miss the deadline entirely. Failure to file a timely notice of appeal deprives the Supreme Court of jurisdiction to hear the appeal. Mont. R. App. P. 4(2)(c). *See Reedal v. Reedal*[4] (appeal dismissed with prejudice when notice of appeal was filed one day late because of confusion about the rule changes).

- Notice of appeal is now filed with clerk of Supreme Court, rather than the clerk of the district court, but is also contemporaneously served for filing on district court clerk. Mont. R. App. P. 4(2)(a).

Problem: In *Mountain West Bank v. Western Skys Ltd.*[5], the appellants' lawyer was unaware of the recent change requiring the notice of appeal to be filed in the Supreme Court clerk's office, and filed it with the clerk of the district court shortly before the deadline expired. By the time the attorney was informed of the mistake by the district court clerk, the 30-day deadline had expired. The Court can grant an out-of-time appeal, but only under "extraordinary circumstances [which] do not include mere mistake,

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[3] Lawyers who read *The Montana Lawyer* that came this week learned that this "days are days" method of counting time will go into effect in most federal procedural rules on December 1, 2009. The rules affected include the federal rules of civil, criminal and appellate procedure.

[4] 2008 MT 151, 343 Mont. 235, 183 P.3d 122.

[5] 2008 MT 54, 341 Mont. 448, 177 P.3d 1052.

inadvertence, or excusable neglect." Mont. R. App. P. 4(6). The Supreme Court denied the appellants' petition to file an out-of-time appeal, in essence holding that the attorney's failure to know the rule had changed was not an "extraordinary circumstance."

- If parties do not stipulate to stay the appeal deadlines for 75 days to comply with mandatory appellate mediation, appellant must now order any necessary transcript the same day notice of appeal is filed. Mont. R. App. P. 8(3)(a).

Problem: Stipulation to stay pending mediation must be filed in writing with clerk. Mont. R. App. P. 7(3)(b). Since without the stipulation the transcript now must be ordered same day notice of appeal is filed, appellant needs to get the stipulation from other side before filing notice of appeal and file it simultaneously. Yet, as noted above, actual time for filing a notice of appeal is likely several days shorter because the notice of entry of judgment now starts the deadline as soon as it is mailed.

- M. R. Civ. P. 54(b) certification by trial judge of partial summary judgment ruling as final for purposes of appeal now requires preliminary Supreme Court review of certification order, which must be attached to notice of appeal, and the appeal can only proceed if the Court approves it. Mont. R. App. P. 4(4)(b).

- Criteria for exercising supervisory control are now codified, with primary test identical to the one announced when the Court created this writ in *State ex rel. Whiteside v. District Court*[6] in 1900: 1) emergency factors making appeal inadequate remedy; 2) a mistake of law; and 3) a resulting gross injustice to petitioner. Mont. R. App. P. 14(3)(a). Cases citing other tests now have questionable value.

- The new rules clarify which interlocutory orders are immediately appealable. They also include a list of interlocutory orders that are not appealable until after a final judgment entered, but which parties frequently try to appeal, such as orders granting sanctions and denying summary judgment. Mont. R. App. P. 6(3), (5).

- Confidential information must be redacted from all documents filed with clerk. This includes social security numbers, financial account numbers, full birth dates, and full names of minor children, and any other information

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[6] 63 P. 395 (1900).

that is confidential under state or federal law. However, an unredacted original of any redacted document must be filed under seal with the clerk. Mont. R. App. P. 10(7).

- A digital version of every brief must be filed in PDF format on a DVD-R disc. Mont. R. App. P. 12(11).

Tip No. 2: Focus on standard of review early, identify it in a separate section, and apply it in the argument

Another new rule change requires the parties to include a section in brief identifying "the standard of review as to each issue raised, together with a citation of authority." Mont. R. App. P. 12(1)(e). Previously, the standard of review was often just identified in the appropriate place in the argument, if at all. Montana is late in adopting this requirement, as many courts have required a separate standard of review section for years. *See* Fed. R. App. P. 28(a)(9)(B).

The reason most appellate courts require setting out the standard of review in its own section is not just so they can find it easily. They have clerks to do that. Having to set it out separately should force lawyers to think about whether their arguments can satisfy the applicable standard. It also is more likely to prevent "shotgunning," in which an appellant raises numerous issues in hopes one will catch the court's fancy. Judges frequently draw negative inferences if a brief raise more than 2-3 issues on appeal. In fact, in its latest rule changes, the Montana Supreme Court actually codified this negative inference by stating that "[p]arties are encouraged to limit the number of issues to 4 or fewer." Mont. R. App. P. 12(1)(b).

If the appeal involves a legal question, the standard is de novo, which is as good as it gets for appellants and not much of a factor in the analysis. But here's an example[7] of how important the standard can be if it is not de novo:

- *Assume the same defendant is sued over identical transactions by two different plaintiffs before two different trial judges in the same district. The defendant files similar answers in each case, and inadvertently fails to deny the same key allegation in both answers. Months later, after discovery has begun in each case, the defendant discovers the omission and moves in both*

[7] This hypothetical is taken from Michael R. Fontham, Michael Vitiello & David W. Miller, *Persuasive Written and Oral Advocacy in Trial and Appellate Courts* 285-86 (2d ed. Wolters Kluwer 2007).

cases to amend its answer to correct the error.

In the first case, the judge denies the motion. The plaintiff then relies on that admission of a crucial fact and wins at trial. In the second case, the judge allows the amendment. The plaintiff, unable to prove this key fact, loses at trial. Both rulings are appealed to the same court, the first by the defendant and the second by the plaintiff. Two judges in the same jurisdiction reached opposite conclusions on the same issue involving the same party. Must the appeals court reverse one of them?

Answering that question requires focusing on the applicable standard of review – abuse of discretion – which gives the trial judges' rulings considerable deference. So the appellate court presumably will reverse neither ruling unless either lawyer can clear that high hurdle. Requiring briefs to include a separate standard of review section should at least result in both appellants' lawyers focusing their argument on the key issue: Why it was an abuse of discretion to either allow the amendment or deny it. For appellees, on the other hand, deferential standards are a great weapon on appeal, one that allows them to argue that not only did the trial courts reach the right rulings on the merits, but that they get the benefit of the doubt.

- *Example of a de novo standard of review section*:

STANDARD OF REVIEW

This case concerns a high school student's right to free speech under the First Amendment, and whether that right was violated when the principal censored her op-ed in the school newspaper because he disagreed with its point of view. Because the issue is one of constitutional interpretation, this Court reviews the lower court decision de novo. [Cite.]

Tip No. 3: Select an overriding theme to unify your brief

This step is essential for appellate briefs, but is also valuable for summary judgment briefs at the trial level. Before writing anything else, identify the overall theme of your case and then write it out. This is the core message the writer wants to convince the reader that the case is about. Even though it won't appear directly in the brief in this form, it will be incorporated in key places.

- *Theme for Appellant in school newspaper case*:

This is case in which a principal, acting on his own and without guidance

from any official policy, unconstitutionally censored an article that the newspaper's own faculty advisors admits was responsible, accurate and mature, solely because he disagreed with its viewpoint.

- *Theme for Appellee*:

  The principal reasonably exercised his discretion to prevent 14-year-old students from being exposed to the potentially harmful views of a sexually active older student, a viewpoint that the immature younger students could have believed the school endorsed if it were published in the school paper.

Tip No. 4: Incorporate theme into the Question Presented through key facts

The Question Presented is one of the first parts of an appellate brief that a court reads. Use that first exposure to start persuading.

An effective QP should satisfy six criteria:[8]

1. Include the most important facts of the case;
2. Eliminate any unnecessary detail;
3. Be easily understood on first reading;
4. Avoid begging the question;
5. Force the other side to agree, reluctantly, that it accurately states the question; and
6. Persuade, but subtly.

- *Court's neutral phrasing in school newspaper case*:

  Are public schools required to be viewpoint neutral in their regulation of school-sponsored speech on subjects other than illegal drug use?

Don't phrase the question the way a court would. Courts expect advocates to advocate, but to do so accurately.

- *Typical first effort for Appellee*:

  Does the First Amendment require a public high school to publish an article promoting irresponsible teen-age sex in the student newspaper when the

[8] *Id.* at 33.

article's viewpoint violates the school's legitimate pedagogical concerns?

See any problems? There are at least two.

- *Persuasive phrasing for Appellant*:

  Are a high school student's free-speech rights violated when her principal censors her op-ed piece on contraception and safe-sex practices because he disagrees with its viewpoint, even though the school concedes the article was responsible, mature and accurate, and the school paper previously published an article espousing an opposing view?

- *Persuasive phrasing for Appellee*:

  Does the First Amendment require a public high school newspaper to publish an article advocating that students practice safe sex and use contraceptives, rather than practice abstinence, when the newspaper is read by students as young as 14 and who could mistakenly believe the school endorses the 18-year-old student author's views?

Tip No. 5: Subdivide the Statement of the Facts and begin the factual history with an overview paragraph that elaborates on your theme

Many judges say the Statement of Facts is the most important part of brief. Supreme Court Justice Louis Brandeis famously stated: "Let me write the statement of facts, and I care not who writes the law." Montana Supreme Court Justice Jim Rice has described it as "the wind in the brief's sails." Despite some indications to the contrary, judges remain human and humans are more interested in stories about people than in abstractions like rules. Maximize the SOF's persuasive impact by beginning it strongly.

A. Subdivide SOF to avoid beginning weakly with the required procedural history

Many appellate courts require that the Statement of Facts begin with a brief overview of the case's procedural history. The problem is that procedure is often boring, so putting it at the beginning of the Statement of Facts wastes an opportunity to start this important section powerfully. To avoid this problem, subdivide the SOF into two sections designated by Roman numeral headings, like this:

- *Example of how to subdivide a Statement of Facts*

STATEMENT OF FACTS

I. Procedural History

. . . .

II. Relevant Facts

Alternatively, under the new Montana appellate rules briefs can have two separate sections. *See* M. R. App. P. 12(1). Rule 12(1)(c) requires a "statement of the case," which "shall first [sic] indicate briefly the nature of the case and its procedural disposition below," while 12(1)(d) then requires a "statement of the facts relevant to the issues presented for review." Including the word "first" in (c) makes it a bit unclear whether Rule 12 wants two entirely separate sections or one section with two components. Either approach should satisfy the intent of the rule and still allow the procedure to be separated from the facts.

B. Then begin the Relevant Facts section with an overview theme paragraph

Begin the actual fact section of the SOF with a an overview paragraph highlighting the facts that support your theme. Don't waste this prominent place in the brief by starting chronologically with earliest facts.

- *Typical first effort from student newspaper case*:

> Northbrook High School is a public school in the Broderick School District, and Ed Rooney is its principal. [Cite.] Northbrook High has one of the highest rates of teen pregnancy and sexually transmitted disease in the region, but has no official policy on whether to promote abstinence as the only way to avoid those problems. [Cite.] The school's newspaper, The Bugle, has a column on the opinion page for student's to voice their opinions on various matters. [Cite.] On October 1, 2002, it published in this Student Voice column an article by a student, Florence Sparrow, entitled "Abstinence: The Only Safe Way." [Cite.]
>
> In response, Appellant Sloane Peterson submitted . . . .

Does this version even tell the reader which attorney wrote it?

- *Persuasive phrasing for Appellant:*

> On October 1, 2002, Ed Rooney, the principal of Northbrook High School, overruled the faculty advisor in charge of the school newspaper and ordered her to remove a student op-ed piece because he disagreed with its viewpoint. [Cite.] Rooney censored the article even though the faculty advisor, Cameron Frye, testified that the article was "well-written,

responsible, mature and accurate." [Cite.] Fry also testified Peterson's article provided students with valuable information on a timely and important subject – how to avoid teen pregnancy and sexually transmitted diseases. [Cite.] Rooney admitted that he censored Peterson's article based solely on its viewpoint. [Cite.] He further admitted that he had previously allowed another student to publish an article on the subject of teenage sex in the Student Voice because he agreed with that student's viewpoint. [Cite.] Rooney testified he allowed the abstinence article to be published because it coincided with his personal views that abstinence is the proper choice for all teens. [Cite.] Rooney conceded, however, that the school district has not adopted an abstinence-only policy for its sex education classes, [cite], and Fry described Rooney's viewpoint as "unrealistic" for today's high school students. [Cite.]

Northbrook High is an urban high school with one of the highest rates of teen pregnancy and sexually transmitted diseases in the area. [Cite.] On October 1, 2002, ...

- *Persuasive phrasing for the Appellee*:

Appellee Ed Rooney, principal of Northbrook High, has the responsibility of protecting the students under his charge from being exposed to ideas that are inappropriate for young teens. [Cite.] In response to the school's high rate of teen pregnancy and sexually transmitted diseases, Northbrook's sex education classes have chosen to emphasize the importance of abstinence to students, many of whom are as young as 14. [Cite.] Therefore, when Principal Rooney learned that Appellant Sloane Peterson, a sexually active 18-year-old senior, had submitted to the school newspaper an op-ed piece promoting safe-sex practices, he told the paper's faculty advisor, Cameron Frye, not to publish it because younger students might attribute its liberal views on sex to the school. [Cite.] Even though Frye personally thought that Peterson's article was an appropriate response to another student's article promoting abstinence, Frye recognized that teenage sex is a sensitive subject, especially for parents. She also recognizes that Rooney is the school official charged with ultimate responsibility for approving the paper's content. [Cite.]

On October 1, 2002, the school paper, The Bugle, published . . .

Tip No. 6: Write remaining SOF paragraphs to enhance credibility

Two of the most effective methods of using the facts persuasively in a SOF also have the benefit of enhancing your credibility as a writer, which in turn makes your SOF

more persuasive.

A. State key favorable facts in your own words, then prove them by using the record

Readers subconsciously assume that the more space devoted to something, the more important it is. Therefore, you want to go into great detail on favorable facts, while discussing unfavorable facts briefly and generally. An effective way of doing this is by summarizing key facts in your own words, and then proving your summary is true by using supporting details from the record. This technique not only provides the reader with valuable detail, but also makes you more credible as a writer because you have "proven" your assertions.

- *Compare this typical fact paragraph from school newspaper case . . . :*

  When Peterson submitted her article, the title itself – "Benefits of Safe Sex" – raised warning flags with the paper's faculty advisor, Cameron Frye. [Cite.] Frye had previously rejected two other articles Peterson had submitted on the topic of teen sex, concluding they were inappropriate for a high school paper. [Cite.] Therefore, even after Frye decided Peterson's latest article – unlike the previous two – was accurate, mature and well written, she knew the subject was delicate enough that Principal Rooney had to be informed before publication. [Cite.]

- *With this example using details from the record to prove the asserted facts:*

  When Peterson submitted her article, the title itself – "Benefits of Safe Sex" – raised warning flags with the paper's faculty advisor, Cameron Frye. [Cite.] Frye had previously rejected two other articles Peterson had submitted on the topic of teen sex. [Cite.] Fry described those articles, which were entitled "America's Hangup on Sex" and "Against Sexual Paradigms," as "immature and inflammatory" and said they "glorified sex." [Cite.] She said she specifically informed Peterson that both columns would not be printed because of their inappropriate message. [Cite.] Therefore, even after Frye concluded Peterson's latest article – unlike the first two – was accurate, mature and well-written, she knew the subject was delicate enough that Principal Rooney had to be informed before publication. [Cite.] "Sex is a very sensitive subject when you are dealing with high school students," Frye testified. [Cite.]

The first version is 81 words long, the second is 130 words. Of course, you have to decide where to tighten and where to devote extra space. But given the importance judges ascribe to the SOF, this may well be the most effective use of space.

B. Couple unfavorable key facts with favorable facts

One of the fastest ways to lose credibility is to ignore the unfavorable facts that the other side is going to stress. Doing so allows the other side to point out the omission, which the Court may reasonably interpret to mean the lawyer was trying to mislead it. Instead, maintain credibility by raising the worst adverse facts, but couple them with favorable facts in a way that de-emphasizes the bad and emphasizes the good.

One way to do that is to place the bad fact in a dependent clause at the start of a sentence, and offset it with a good fact in an independent clause at the end of the sentence. The reader is left with the sense that the good fact is more important.

- *Example*

  Even though Frye personally thought that Peterson's article was a reasonable response to another student's article promoting abstinence, Frye also recognized that teenage sex is an extremely sensitive subject, and also that Principal Rooney was the school official responsible for deciding whether the article was appropriate for the paper's young audience. [Cite.]

The "bad" fact that the faculty advisor thought the article was responsible is in a

dependent clause at the beginning of a long sentence that ends with favorable facts likely to resonate with the audience in the grammatically stronger independent clause. It also helps to bury sentences like these in the middle or toward the bottom of a paragraph. Like any technique, this one can be overused, but when used selectively for the most dangerous facts, it can be effective. Of course, the bad and good facts need some logical relationship, or the juxtaposition will seem strained: "Although he shot her husband before the play ended, Mrs. Lincoln had always enjoyed the lead actor's performances."

Tip. No. 7: Write the Argument headings persuasively and with the Table of Contents in mind

Because headings in an appellate brief are reproduced in the brief's Table of Contents, they have a potential to persuade that is greater than in a trial level brief. Appellate judges frequently look at the outline of the argument and compare it to the other side's outline before beginning to read the briefs. Therefore, if you write the headings persuasively, you can begin to shape their view of the case on the first page. But even in a trial brief, a persuasive heading allows the writer to make the point of a section clear before the judge begins reading it.

The following method of writing headings[9] allows the writer to maximize their persuasive potential. 1) For the major Roman numeral headings, called "pointheadings," begin by identifying the ruling you want, then provide the key reasoning or facts that support that ruling. 2) For all other headings, called "subheadings," omit the information about the ruling sought and instead provide more detail about the reasoning on that issue.

- *Example from the school's brief:*

I. The district court correctly granted summary judgment because no First Amendment violation occurred when the school restricted a student's school-sponsored speech based on its viewpoint.

A. Viewpoint-based restrictions on some school-sponsored speech are appropriate because in *Kuhlmeier* the Supreme Court abandoned viewpoint neutrality when a student speaker advocates views school administrators believe are dangerous.

B. The school's reasons for censoring the article satisfy *Kuhlmeier's*

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[9] *See* Linda H. Edwards, *Legal Writing: Process, Analysis and Organization* 271-77, 310-16 (4th ed. Aspen Pub. 2006).

requirement that speech restrictions must be for legitimate pedagogical concerns, in this case the school's goal to reduce the rates of teen pregnancy and sexually transmitted diseases.

C. Northbrook's decision not to publish an article advocating safe-sex practices as an alternative to abstinence was reasonable because the newspaper bore the imprimatur of the school, which could lead immature and impressionable students to wrongly believe the school endorsed that viewpoint.

Note that, when read together, the headings provide not just an outline, but a persuasive overview of the key reasoning on each theory or issue. However, as with Questions Presented, the headings need to be read easily to be effective.

Tip No. 8: Use CRAC structure for each issue or subissue in the Argument

Each discrete legal issue should be organized around the Conclusion, Rule, Application, Conclusion (CRAC) model for legal analysis, a persuasive variation of the more common IRAC paradigm.

A. Start CRAC by rephrasing your "global thesis" on this issue

Begin a particular issue by stating assertively the conclusion the court should reach on the issue. Think of this as the "global thesis" sentence (to distinguish it from paragraph level thesis sentences discussed in Tip No. 9 below). A good section heading also should do this, but the writer should substantially rephrase the same point at the start of the section's text, either in a sentence or brief paragraph.

- *Example of global thesis that restates substance of heading*

B. The school's reasons for censoring the article satisfy *Kuhlmeier's* requirement that speech restrictions must be for legitimate pedagogical concerns, in this case the school's goal to reduce the rates of teen pregnancy and sexually transmitted diseases.

Principal Rooney withheld the article because he was legitimately concerned that its message contradicted the school's educational efforts to combat the high rates of pregnancy and sexually transmitted diseases among its students. Therefore, his actions did not violate Peterson's rights.

The repetition of the substance of the heading won't bother the reader as long as it is rephrased substantially and brings in new information. What's new in the global thesis that was not in the heading?

B. Explain the governing rules persuasively to foreshadow analysis

After stating the overall conclusion, then identify and explain the governing rules in a favorable, assertive way, starting with the most general and moving to the more specific. This section should foreshadow the application of the rules to the facts, which comes next. This foreshadowing allows the judges to begin applying the law to the case facts before the brief does. Then, when the brief begins expressly reaching the conclusions the judges have tentatively reached already, they feel ratified and are more likely to be persuaded.

- *Sample beginning for rule explanation following example in section A*:

> ". . . did not violate Peterson's rights.
>
> The decision whether or not the article was contrary to the school's educational efforts is for the school, not a court, to decide. *Pico,* 457 U.S. at 863. The Supreme Court has held that school newspapers are part of the curriculum, regardless of whether they are part of a class or extracurricular. *Kuhlmeier,* 484 U.S. at 271. Schools must be allowed to create and apply their curriculum "in such a way as to transmit community values . . . be they social, moral, or political." *Pico,* 457 U.S. at 864.
>
> The facts in *Kuhlmeier* illustrate the breadth of discretion a school has in deciding whether articles in a school newspaper are appropriate pedagogically. There, . . ."

Notice how favorably but accurately the rule of *Pico* is phrased. The reader can see its clear application to the facts even though that application hasn't occurred yet.

C. Apply the facts to the rules just explained

After structuring the rule explanation favorably, then–and only then–apply those rules to the facts. Begin the application by restating your global thesis once more, but again rephrasing it from both the heading and the first sentence of the section.

- *Example that would follow rule explanation in Section B above:*

> The Bugle was part of Northbrook High's curriculum, so decisions

concerning whether Peterson's article was appropriate for the paper's young audience come under the broad discretion schools have to decide curricular matters. The school determined that the article was contrary to its pedagogical efforts because . . . .

D. Restate the global thesis again as a conclusion at the end of the section, this time focusing on facts just applied.

If arguing a pure legal issue, the application will be short and suffice as a conclusion to the entire CRAC. If the facts are important and the discussion lengthy, then end with a restatement of the global thesis, but phrased in yet a different way.

> Peterson's article would have been published as part of the Northbrook's curricular activities, yet doing so would have violated the school's legitimate pedagogical concerns regarding the high rates of teen pregnancies and sexual diseases among Northbrook students. Therefore, Principal Rooney acted properly by withdrawing the article from the Bugle.

Tip No. 9: Use a thesis sentence, as opposed to a topic sentence, at the start of each paragraph within the CRAC structure

While a topic sentence announces a paragraph's subject, a thesis sentence is much more focused and tells the reader up front how that paragraph will further the argument. Use them in rule paragraphs and application paragraphs.

- *Contrast this rule paragraph beginning with a topic sentence* . . . :

> In *Tinker*, school authorities banned students from wearing black armbands in protest of the Vietnam War. The Court framed the issue as a question of "direct, primary First Amendment rights akin to 'pure speech,'" as opposed to "speech that intrudes upon the work of the schools." *Tinker,* 393 U.S. at 508. The Court held that school regulations, unless adopted "as part of a classroom exercise," were only constitutionally valid when they proscribed student speech that would "materially and substantially disrupt the work and discipline of the school." *Id.* at 513. By excepting classroom exercises from its holding, the Court indicated that a school has much more authority to regulate curricular speech than non-curricular "pure speech."

- *With the same paragraph preceded by a thesis sentence*:

> *Tinker's* requirement of viewpoint neutrality is limited to speech not

sponsored by the school. In *Tinker*, school authorities banned students from wearing black armbands in protest of the Vietnam War. The Court framed the issue as a question of "direct, primary First Amendment rights akin to 'pure speech,'" as opposed to "speech that intrudes upon the work of the schools." *Tinker,* 393 U.S. at 508. The Court held that school regulations, unless adopted "as part of a classroom exercise," were only constitutionally valid when they proscribed student speech that would "materially and substantially disrupt the work and discipline of the school." *Id.* at 513. By excepting classroom exercises from its holding, the Court indicated that a school has much more authority to regulate curricular speech than non-curricular "pure speech."

The benefits of using thesis sentences to start each paragraph include:

- Readers generally pay attention more at the start of paragraphs than elsewhere, so telling the reader the purpose of the paragraph at the beginning allows the reader to track the analysis much more easily.

- Paragraph thesis sentences also benefit the writer because they make it much more likely the body of each paragraph is focused and actually "proves" the point in the thesis. This also enhances the writer's credibility.

- Using thesis sentences effectively allows the writer to easily test the coherence of an argument section. Take the first sentence of each paragraph and put them all in one paragraph to see if the result is a persuasive summary of that section, like this:

A. *Kuhlmeier* modified *Tinker's* viewpoint neutrality requirement and held that school sponsored curricular speech is subject to greater restriction by school officials, including viewpoint discrimination if necessary for legitimate pedagogical concerns.

[¶1 Global thesis] By distinguishing *Tinker* and emphasizing the tendency of the Court to defer to school officials in matters of school governance, the Court in *Kuhlmeier* authorized viewpoint discrimination in limited circumstances, such as those here. . . . [¶ 2] The facts of *Tinker* indicate that its viewpoint neutrality requirement only applies to "pure" student speech and not to school sponsored curricular speech. . . . "[¶ 3] This distinction between curricular and non-curricular speech was at the center of the Court's reasoning in *Kuhlmeier*. . . . [¶ 4] While the Court in *Kuhlmeier* did not use the term "viewpoint neutral," its characterization of

Tinker as only applying to pure student speech indicates that it was creating an exception to the requirement of viewpoint neutrality in non-public forums when the speech could be attributed to the school rather than the speaker. . . .[¶ 5] Furthermore, the dissent in *Kuhlmeier* recognized that the majority opinion was altering the viewpoint neutrality requirement. . . . [¶ 6] The Tenth Circuit correctly interpreted *Kuhlmeier* when it held that Columbine High School could discriminate against certain viewpoints in an art project designed to commemorate the infamous shooting at that high school. . . . [¶ 7] Finally, as noted by the Tenth Circuit, the Supreme Court has implicitly recognized that viewpoint discrimination is allowed in its most recent school speech case, *Rosenberger v. University of Virginia*. . . . [¶ 8 Conclusion] A close reading of *Kuhlmeier* and *Rosenberger* shows the Supreme Court has modified its viewpoint neutrality requirement in cases involving school-sponsored speech, as opposed to pure student speech. . . .

- These summary paragraphs from each major issue, minus the concluding sentence and revised to flow smoothly, can become a paragraph in the Summary of the Argument section.

Tip No. 10: Read the brief backwards

Finally, even the most compelling briefs will lose effectiveness if their are enough typographical and other editing errors to detract the reader from the briefs substance. Lawyer's are really highly paid professional writers. So when a judge notices more editing errors than they think appropriate for professional writers, they start making judgments about the writers professionalism, and become more skeptical of the writer's arguments.

The difficulty in proofreading, especially one's own work, is the tendency to get caught up in the content and read over the little mistakes. Spellcheck programs will catch most but not all spelling errors, and won't catch punctuation, grammar and citation errors. The most effective way to catch those mistakes is to read the brief sentence by sentence, including citations, from the end to the beginning. Little mistakes, such as "there" for "their" and apostrophe misuse, that the eye leaps over when reading sentences in the proper order will leap out when a sentence is viewed in isolation and out of context. Use this technique to read the paragraph above this one to see if it works.

Professor Larry Howell
The University of Montana School of Law
Continuing Legal Education Seminar
9:30 – 11:30 a.m. October 10, 2009

10 TIPS FOR BETTER BRIEFS

FACTUAL AND LEGAL BACKGROUND FOR EXAMPLES IN OUTLINE

FACTS[1]

1. Northbrook High School's newspaper, The Bugle, is published by students under the supervision of a faculty adviser. It has a "Student Voice" column in which students not on the paper's staff can publish commentaries.

2. The Bugle published a Student Voice column by a student that promoted abstinence as the only way students could be sure to avoid sexually transmitted diseases (STDs) and pregnancy.

3. Appellant Sloane Peterson, an 18-year-old senior, submitted a Student Voice column directly responding to the abstinence column. Peterson's column advocated safe-sex practices, and provided accurate information on the effectiveness of various contraception methods in preventing STDs and pregnancy.

4. The Bugle's faculty advisor agreed to publish Peterson's column because she found it was well written and presented the information on safe sex and contraceptives in an accurate, mature and responsible manner. The advisor had previously rejected two other articles by Peterson on the same subject because they were immature and inappropriate for a high school audience because they glorified sex. The school presented no evidence disputing the advisor's testimony.

5. The school's principal, Ed Rooney, ordered the faculty advisor not to run Peterson's latest column because he believed it promoted teen sex. He also believed impressionable high school students, including ninth graders as young as 14, might think the school was endorsing Peterson's viewpoint.

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[1] These facts have been adapted from a problem in *Moot Court Casebook*, vol. 27 (New York Univ. School of Law (2003)).

6. The school district, located in an urban area, has higher rates of teen pregnancy and STDs than other nearby districts.

7. Neither the school nor the school district has any official policy on whether to teach abstinence as the only proper approach for students, but the school does stress abstinence in sex education classes.

8. Peterson sued the school district and Principal Rooney, alleging her First Amendment rights had been violated. The trial court granted the defendants summary judgment, and Peterson appealed.

ISSUE ON APPEAL

Whether public high schools are required to be viewpoint neutral in their regulation of school-sponsored speech if that speech does not promote illegal activities.

CONTROLLING LAW

The issue fits into a circuit split created after a 1988 U.S. Supreme Court case on the issue of censorship of students in public schools, an issue the Court visited again in 2007.

Generally, in a non-public forum the government cannot discriminate against speech based on the speaker's viewpoint, but can discriminate based on the general content of the speech. In other words, the government generally could prohibit all discussion of a subject, but not allow one viewpoint on it while prohibiting another. *See Cornelius v. NAACP Legal Defense & Education Fund,* 473 U.S. 788 (1985). In 1969, the Court expressly held that this viewpoint neutrality rule applied to public schools: "Clearly, the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible." *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 511 (1969).

However, twenty years later, in *Hazelwood School District v. Kuhlmeier*, the Court held that a school can impose reasonable restrictions on the school-sponsored speech of students, as opposed to students' purely personal speech, as long as the restrictions are "reasonably related to legitimate pedagogical needs." 484 U.S. 260, 273 (1988). That case concerned a school newspaper, but the news articles at issue were actually censored

because of their subject matter, not their viewpoint. Nevertheless, in dicta the Court appeared to authorize censorship of certain viewpoints when it said that a school "must also retain the authority to refuse to sponsor student speech that might reasonably be perceived to advocate drug or alcohol use, *irresponsible sex*, or conduct otherwise inconsistent with 'the shared values of a civilized social order . . . .'" 484 U.S. at 272 (emphasis added). The majority opinion in *Kuhlmeier* never mentioned *Tinker's* requirement of "viewpoint neutrality" much less how its decision changed that requirement, if at all.

As a result of that omission, some circuits have held that the Supreme Court would not have changed its longstanding requirement of viewpoint neutrality without expressly stating as much, while others, seizing on the viewpoint discrimination allowed in the examples in *Kuhlmeier*, have held that certain student views can be censored. More recently, in *Morse v. Frederick* (a.k.a. the "Bong Hits 4 Jesus" case), the Court returned to the issue and narrowly held that schools are allowed "to restrict student expression that they reasonably regard as promoting illegal drug use." 127 S. Ct. 2618, 2629 (2007).

However, whether the Court has abandoned the viewpoint neutrality requirement in cases that do not involved promotion of illegal drugs remains unclear. Two of the concurring justices in *Morse* only did so with the caveat that the decision "provides no support for any restriction of speech that can plausibly be interpreted as commenting on any political or social issue, including speech on issues such as 'the wisdom of the war on drugs or of legalizing marijuana for medicinal use.'" *Id.* at 2636 (Alito & Kennedy, JJ., concurring) (citation omitted).