

Seminar in Constitutional Law: Appellate Advocacy

Week 6

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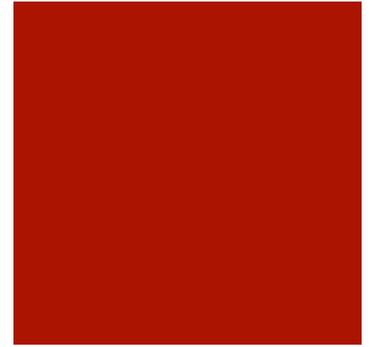
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Wednesday, May 4th, 2016

Agenda

- Hour 1: Lecture on Chapter 6
- Discuss how to conceptualize Oral Arguments.
- Hour 2-3: Work in groups on “Statement of Facts” and “Argument” Section



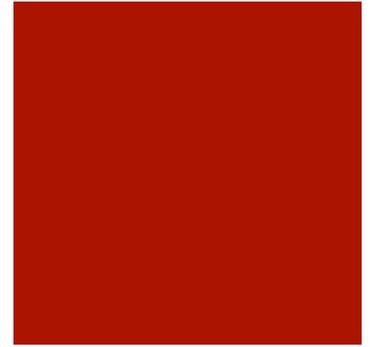
Berry- Chapter 6

Writing the Opening Brief

- Brief Writing Goals
- Preliminary Requirements
 - Cover Page
 - Table of Contents
 - Table of Authorities
- Questions Presented and Statement of the Issues
- Statement of Facts
- Summary of the Argument
- The Argument
- Conclusion



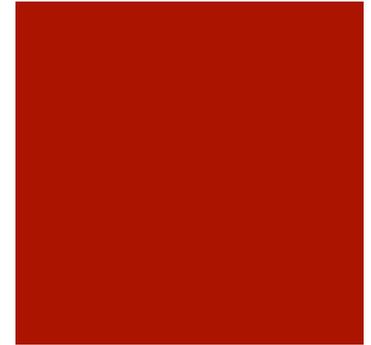
1. Brief Writing Goals



- Accuracy
- Clarity and Precision
- Brevity and Conciseness
- Simplicity
- Creativity
- Conviction

1. Brief Writing Goals

- Accuracy
 - All parts of the brief must be accurate.
 - Includes citations, facts, law (holdings/reasonings), etc.
 - The legal authority you cite must *actually* reflect the accurate meaning of the case.
 - You should argue facts persuasively – but do not make them up, omit key facts, etc. This would be inaccurate.
- Clarity and Precision
 - Persuasive writing must be clear and precise
 - Long complex sentences are the opposite of good legal writing.
 - Judges don't have time to read long/hard sentences.
 - Be short, sweet, and clear.



1. Brief Writing Goals



- Brevity and Conciseness
 - Most judges are overworked
 - They are looking for briefs that are well organized and to the point.
 - They do not want to read the same arguments twice. So make your point once, make it well, and make it succinctly.
 - This is why you should be creating really detailed and specific outlines.

- Simplicity
 - Be simple in your writing.
 - The judges are unfamiliar with each of the cases you are citing/the facts of your case. Spell it out for them simply.

1. Brief Writing Goals



- Creativity
 - A creative argument is going to be more interesting to a judge who is reading your brief than a boring one.
 - Don't distort the issues, but present them with some flare.
- Conviction
 - The appellate lawyer is an advocate.
 - As such, he or she must believe in the cause.
 - That should be abundantly clear throughout the brief.
 - BE PERSUASIVE.

2. Preliminary Requirements

A. Cover Page



- The cover page – should have been completed by all of you by now.
- It provides the court with valuable information
 - i.e. Name of the case
 - i.e. Name of the Court
 - i.e. Title of the Case
 - i.e. Which side's brief

2. Preliminary Requirements

B. Table of Contents



- The Table of Contents is the advocate's first opportunity for arguing their case. It consists of all of their arguments and sub-arguments at the very end.

2. Preliminary Requirements

C. Table of Authorities



- The Table of Authorities presents the citations of the legal materials you are using in your brief.
- The key is to make the Table of Authorities user friendly.

3. Questions Presented and Statement of the Issues



- The Questions Presented have three purposes:
 - **(1) They identify and describe the legal issues raised by the case on appeal.**
 - This is important because they are specifying what must be decided by this court and emphasize the matters that are important to the case.
 - **(2) They inform the court about the nature of the case**
 - Because the QPs include some facts – they preview what the case is about and what the court can expect coming in the argument section.
 - **(3) They can serve as a persuasive device.**
 - Subtle wording that suggests a favorable outcome is key here.

4. Statement of Facts



- VERY IMPORTANT SECTION
 - Some believe that the statement of facts are often more important if not as important as the Argument itself.
- When we write briefs and argue to the court, we are always tying back our facts to the law.
- You cannot include everything – otherwise you'd be writing forever.
 - So you have to be selective about which facts you choose to include.
 - Think about which facts will help a court best make their decision.
- Recall the two documents you created (facts favorable to your side/facts unfavorable to your side)
 - Think strategically about how to present this information.

5. Summary of the Argument



- The Summary of the Argument is “clear and concise condensation of the argument made in the body of the brief.”
- Basically – summarize your argument (that you make in the main part of the brief) in 1-1.5 pages.

6. The Argument



- This is the BULK of the Brief
 - The purpose: Persuade through logic and reasoning that the outcome your side wants is correct and just.
 - This is where – through **persuasion** – you show that the facts fall within the scope of the appropriate law – and therefore justify a favorable outcome for your side.
- Organization of the points to be argued in an OUTLINE -- first (i.e.)
 - Argument 1
 - Sub-argument 1 (Bullet points of sub-arguments you want to make)
 - Specify the cases and facts that fall in line here
 - Sub-argument 2 (Bullet points of sub-arguments you want to make)
 - Specify the cases and facts that fall in line here
 - Argument 2
 - Sub-argument 1 (Bullet points of sub-arguments you want to make)
 - Specify the cases and facts that fall in line here
 - Sub-argument 2 (Bullet points of sub-arguments you want to make)
 - Specify the cases and facts that fall in line here

6. The Argument



- **Recall the issues in this case as outlined in Item 3 of the USD Problem :**
- (A) Whether the special needs exception to the traditional Fourth Amendment requirements should apply in the context of child abuse investigations?
- (B) If the special needs exception does apply, whether there occurred a search or seizure in violation of the Fourth Amendment in this case?

6. The Argument



- **Where can we find a starting point to answer these two questions?**
- (A) Whether the special needs exception to the traditional Fourth Amendment requirements should apply in the context of child abuse investigations?
- (B) If the special needs exception does apply, whether there occurred a search or seizure in violation of the Fourth Amendment in this case?

6. The Argument

- (A) Whether the special needs exception to the traditional Fourth Amendment requirements should apply in the context of child abuse investigations?
 - This is a question about which LEGAL standard to apply
 - District Court of Kalibraska Opinion came out in favor of Petitioners.
 - District Court: special needs exception applies
 - The Circuit courts that have addressed which constitutional standard applies to searches and seizures committed during a child abuse investigation have **come out divided**
 - The special needs exception comes from New Jersey v. TLO.
 - The protection of children is the central feature of child abuse investigations (Darryl H. v. Coler 7th Cir. 1986).
 - What about Ferguson? Court said its distinguishable
 - Circuit Court Opinion came out in favor of Respondents
 - Circuit Court: no special needs exception applies.
 - The Supreme Court is picky as to which cases it extends the special needs doctrine because it is a “closely guarded category.” Thus, until the Supreme Court instructs otherwise, they decline to extend the doctrine.
 - Argues not similar to probationers and or public school officials.

6. The Argument

- **(A) Whether the special needs exception to the traditional Fourth Amendment requirements should apply in the context of child abuse investigations?**
- When crafting your arguments. GO BACK to these cases and the reasonings they had and the cases they relied on as a guide for your own work.
 - District Court of Kalibraska Opinion came out in favor of **Petitioners**.
 - Circuit Court Opinion came out in favor of **Respondents**.

6. The Argument



- Again,
- Where can we find a starting point to answer this question?
- (B) If the special needs exception does apply, whether there occurred a search or seizure in violation of the Fourth Amendment in this case?

6. The Argument



- **(B) If the special needs exception does apply, whether there occurred a search or seizure in violation of the Fourth Amendment in this case?**
- Here, we have the appropriate legal standard.
- This is a question about how facts and how these facts work to your advantage. You should rely on cases to show the facts you rely on are important and convincing..
- The question is if the special needs exception applies, were the search and seizure reasonably conducted under the Fourth Amendment?
 - We have two events: **(a) The INTERVIEW** (seizure) and **(b) The PHYSICAL EXAMINATION** (search)
 - You need to conduct the following analysis TWICE. Once for each event.
 - To determine whether a search or seizure was reasonable in a specific situation, the court weighs:
 - **(1) whether the action was justified at its inception and**
 - DC says: The interview and the examination were both justified at their inception (Doe v. Bagan).
 - COA (Concurrence) says: Neither the two-hour long interview nor the strip search of six-year-old K.P. were justified at their inception.
 - **(2) whether it was reasonably related in scope to the circumstances that initially justified the search or seizure.** T.L.O., 469 U.S. at 341.
 - LAW from TLO: A search is reasonable in scope where “the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.”
 - DC says: The interview and examination were both reasonable in scope
 - COA: doesn’t touch it

6. The Argument



- **(A) Whether the special needs exception to the traditional Fourth Amendment requirements should apply in the context of child abuse investigations?**
 - Here, there is a debate on which legal standard to apply because there is a disagreement in the Circuit Courts
 - Your argument section on this issue will be to convince the court to utilize the legal standard in your favor.
- **(B) If the special needs exception does apply, whether there occurred a search or seizure in violation of the Fourth Amendment in this case?**
 - Here, we all agree on the appropriate legal standard to apply to each search and seizure event at issue (the interview and the physical examination), but we disagree based on the facts
 - Your argument section on this issue will be to argue the facts related to the (a) Interview (seizure) and the (b) Examination – and show that either a special needs exception does apply or does not apply.

7. Conclusion

- The conclusion is the last section of the brief that the court will read.
- This is not a space to rehash all of your arguments.
- Rather, the Conclusion should specifically state a description of what your side is requesting.
- Do NOT make the court guess what you are requesting.
- I.e.

For the forgoing , the Court of Appeal's decision finding _____
should be upheld/reversed.

Respectfully submitted,

_____ (names) _____

Counsel for the petitioner/respondent.



Hour 2: Group work..

Hour 3: Group work..

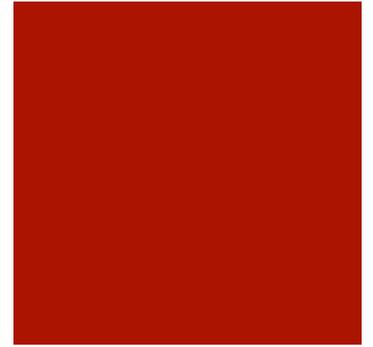
A note on Oral Arguments

- What do you need to do in preparation for oral arguments?
 - **Write** an awesome brief!!!
 - Your oral arguments will PRESENT the arguments you already wrote down to the court.
- Therefore – groups of 3
 - 1 person – Introduction
 - 1 person – Responsible for Argument 1
 - 1 person – Responsible for Argument 2
- You Prepared the list of cases and facts favorable to the OTHER side so that when judges ask you about them – you can defend yourself and you know what to expect

Oral Arguments

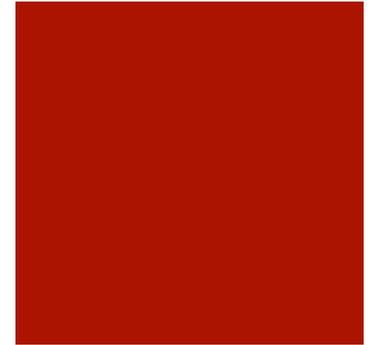
- In weeks 8 + 9, we will write out our oral arguments on paper and we will practice saying our parts out loud.
- Matt and I will give you a list of questions to prepare answers to – so that when when we ask you questions – you will not freak out.

Ok.. Onto groupwork



Task 1 – one more mistake (sorry)

- Open your Template Brief
- Go to the Table of Contents
- Delete “Procedural History”



Task 2: Doodle Polls



- Schedule a time to Meet with Me and Matt on our respective doodle polls for next week to show us your Memorandums.
- Send us your briefs at least the night before so we can have time to read them and give you notes.

- Doodle for Nazita (Petitioners)
- <http://doodle.com/poll/aq4ih4qq6yyfhb8z>

- Doodle for Matt (Respondents)
- <http://doodle.com/poll/etn3zvsui326hnngn>

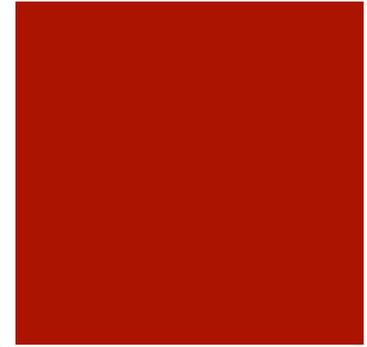
The Rest of Hours 2-3: Group Work



- What your group should have completed by now:
 - (F)IRACing of 19 cases by each member of your group
 - Cover Sheet
 - Standard of Review
 - Questions Presented
 - Compiled a document with all the facts + cases favorable to your side.
 - Compiled a document with all the facts + cases favorable to other side.

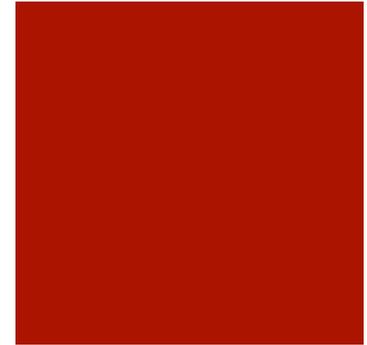
- Tips for group work today (choose to ignore if you want):
 - All members should have their laptops open and contributing to the google drive/dropbox documents
 - Assign someone to do the typing while the rest of you indicate what should be included in the document

The Rest of Hours 2 & 3



- Work in your groups to develop the following sections:
 - **(1) Statement of Facts** (~ 3-4 Pages Double Spaced)
 - Use the documents with the facts and cases on your side and the facts and cases on the other side. Use these facts to create a Statement of Facts. Tell a story. Do not *make up* facts or omit key facts detrimental to your side. But make sure you write persuasively.
 - **(2) Argument** (~12-14 pages double spaced)
- Think about creating a DETAILED OUTLINE of your argument today. And if you start writing – great
 - Issue 1:
 - What is the position you want the court to adopt/apply here? Which legal standard?
 - What is your legal argument here?
 - What is the standard the other side wants the court to adopt? And why should the court not do so?
 - Issue 2:
 - What is the position you want the court to adopt/apply here? Were the INTERVIEW and the PHYSICAL EXAMINATIONS each **searches or seizures in violation of the Fourth Amendment?**
 - What is your argument here for each event? (apply these two elements to each event)
 - **whether the action was justified at its inception ?**
 - **whether it was reasonably related in scope to the circumstances that initially justified the search or seizure?**
 - What does the other side want? And why should the court not do so?

Where your group should be by early next week



- Draft of Appellate Memorandum to show me and Matt in Extended office Hours NEXT WEEK.
 - To Finish Over the Weekend and by Next Week:
 - Table of Contents
 - Summary of Argument (1-1.5 pages double spaced)
 - Argument ***** (12-14 pgs double spaced) What we really want to help you with)
 - Conclusion (a few sentences)

- What should be completed by end of today:
 - Cover Sheet
 - Standard of Review
 - Questions Presented
 - Statement of Facts
 - DETAILED Argument Outline
 - List of Facts and Cases favorable to your side and to the other side