

Legal Analysis *and* Writing

Third Edition

William H. Putman



External Memoranda—Court Briefs

Outline

- I. Introduction
- II. General Considerations
- III. Trial Court Briefs
- IV. Appellate Court Briefs
- V. Key Points Checklist: *Preparing a Court Brief*
- VI. Application

Learning Objectives

After completing this chapter, you should understand:

- The similarities and dissimilarities between court briefs and office memoranda
- Techniques of persuasive writing
- The elements of trial and appellate court briefs
- How to draft trial and appellate court briefs



Pam Hayes, a paralegal living in the hypothetical state of New Washington, received the following assignment from her supervisor.

To: Pam Hayes, Paralegal
 From: Alice Black, Attorney
 Case: Civil 08-601, *Nick Shine v. Blue Sky Ski Resort*
 Re: Motion to dismiss for failure to state a claim

On December 5, 2007, Nick Shine, an expert skier, was skiing Bright Light, an intermediate ski run, at Blue Sky Ski Resort. At the midway point, the run takes a sharp, slightly uphill turn to the south, then plunges steeply downhill. When Mr. Shine encountered the turn, the sun was shining directly in his eyes; he did not see that the run was completely covered with ice. As a result of the sun's glare, he could not see the ice hazard until it was too late to

avoid it. He immediately lost control and hit a tree, breaking his left arm and leg. There was no warning sign posted to indicate the presence of the ice hazard.

We filed Mr. Shine's complaint against the resort on April 6, 2008. In the complaint, we allege that the resort was negligent in failing to post a warning indicating the presence of the unavoidable and latent ice hazard.

On April 20, Blue Sky Ski Resort filed a motion to dismiss under Rule 12(b)(6) of the Rules of Civil Procedure for failure to state a claim. In the motion, Resort argues that under the Ski Safety Act, the resort does not have a duty to warn of ice hazards. They argue that ice conditions are the responsibility of the skier under the act; therefore, we cannot, as a matter of law, state a claim in regard to duty.

Please prepare a response to their motion for my review.

Note that this assignment is a variation of the assignment presented at the beginning of Chapter 9. The following sections of this chapter introduce the

guidelines that Ms. Hayes will follow when performing her assignment. The completed assignment is presented in the Application section.

I. INTRODUCTION

The focus of this text is on legal analysis and the main type of writing related to legal analysis: the legal research memorandum. Chapters 12 and 13 address the type of legal writing most frequently performed by a paralegal engaged in legal analysis: the office legal memorandum. As discussed in those chapters, the office legal memorandum is designed for use within the law office and is drafted primarily as an objective research and analysis tool. This chapter and Chapter 15 discuss the preparation of documents that use legal analysis and are designed for use outside the law office.

- Documents submitted to a court, such as briefs in support of motions
- Documents designed for other external use, such as correspondence to clients and opposing attorneys.

A paralegal is less frequently involved in the preparation of external use documents than in the preparation of those designed for use within the law office; however, a paralegal may be called upon to prepare the initial drafts of documents intended for external use.

The focus of this chapter is on the considerations involved in the preparation of legal analysis documents designed for submission to a court: trial court and appellate court legal memorandum briefs. A trial court brief is often referred to as a memorandum of law or a memorandum of points and authorities. In this chapter, a legal memorandum brief submitted to a trial court is referred to as a trial brief, and a brief submitted to a court of appeals is referred to as an appellate court brief. The Application section of this chapter provides an example of a trial court brief; Appendix B includes an example of an appellate court brief.

II. GENERAL CONSIDERATIONS

Both trial and appellate court briefs are similar in many respects to office legal memoranda, and the fundamental principles that apply to the preparation of office memoranda also apply to the preparation of court briefs. The similarities are outlined here.

A. *Similarities: Court Briefs and Office Memoranda*

1. Legal Writing Process

Just as it is necessary when preparing an office memo to adopt and use a legal writing process, it is also necessary to do so when preparing a court brief. The basic writing process is the same for both court briefs and office memoranda.

Prewriting Stage

- Assignment—type of brief, audience, and so on
- Constraints—time, length, format (court rules)
- Organization—creation of an expanded outline

Use of an expanded outline
 Writing Stage
 Postwriting Stage
 Revising
 Editing

2. Basic Format

Court briefs follow the same basic format as office memoranda. Both include a presentation of the issue(s), the relevant facts, a legal analysis, and a conclusion.

Refer to Chapters 12 and 13 for information and guidelines concerning the preparation of these components of a brief.

3. Analysis Approach

Court briefs follow the same basic organizational approach to the legal analysis of an issue as office memoranda: the rule of law is presented first, then the interpretation of the rule of law through the case law (if interpretation is necessary), the application of the law to the issues presented by the facts of the case, followed by the conclusion. Exhibit 14–1 presents the basic format of this approach.

The organizational approach to the legal analysis of an issue in a court brief

Rule of law—Present the rule of law or legal principle that applies.

Case law (if necessary)—Follow the rule of law with the presentation of the case law that interprets how the rule of law applies.

1. Name of case
2. Facts of case—Sufficient to demonstrate case is on point
3. Rule or legal principle from case that applies to the client's case

Application of law to facts of case—after the presentation of the case law, apply the law or principle in the case to the facts of the client's case.

Include an explanation of why the opposing position does not apply (similar to counteranalysis in office legal memorandum).

Conclusion—Provide a summary of the legal analysis.

Exhibit 14–1

*Legal Analysis—Court
 Brief Organizational
 Approach*

B. Dissimilarities: Court Briefs and Office Memoranda

As noted previously, court briefs, both trial and appellate, are similar in many respects to office legal memoranda in basic format and content. The major difference is in the presentation of the format and content. An office memo is designed to present an objective analysis of the law. The goal is to provide a neutral analysis that thoroughly addresses all sides of an issue and provides the attorney with guidance on how the court may resolve the issue.

Where an office memo is designed to inform objectively, a court brief is designed to convince. A court brief is an advocacy document designed to persuade the court to adopt a position or take an action that is favorable to the client. Therefore, although the elements of an office memo and court brief are basically the same, court briefs differ in that they are drafted to advocate a position and persuade the reader.

The following discussion addresses the guidelines, factors, and considerations involved in the preparation of persuasive court briefs. In order to avoid repetition,

this section addresses the factors involved in the persuasive presentation of both trial and appellate court briefs. Therefore, the detailed discussion of court briefs presented in the Trial Court Briefs and Appellate Court Briefs sections of this chapter does not include information on persuasive presentation factors. The information presented here applies to the preparation of both trial and appellate court briefs and should be kept in mind when preparing those briefs.

Ethics. As discussed in Chapter 7, Rule 3.3(a)(1) of the Model Rules of Professional Conduct provides that a lawyer should not make false statements of law or fact to a tribunal. Broadly interpreted this means that matters should not be presented in a manner which may mislead the court. Also, Under Rule 3.3(a)(3) of the Model Rules, an attorney has an ethical duty as an officer of the court to disclose legal authority adverse to the position of the client that is not disclosed by the opposing counsel. Therefore, when preparing a persuasive presentation of a legal position or argument, you must keep in mind the importance of the rules of professional conduct and intellectual honesty as discussed in Chapter 2. Although designed to persuade, a court brief must present the issue(s), facts statement, and analysis accurately, clearly, and concisely. It should not mislead, distort, or hide the truth. The guidelines for how this is accomplished are presented in the following subsections.

1. Issues: Persuasive Presentation

Once you have identified the issue, introduce each of its elements—the law, the question, and the key facts—in a persuasive manner.

Law Component of the Issue. You should state the law component of the issue persuasively.

For Example

The case involves oppressive conduct by a majority shareholder against the minority shareholders in the hypothetical state of New Washington. The corporation consists of three shareholders. The majority shareholder holds 60 percent of the stock and is employed as president of the corporation. The minority shareholders are not employed by the corporation.

In the case, the defendant, the majority shareholder, controls the board of directors and refused to allow the issuance of dividends for a ten-year period. During this period, he gave himself an annual 40 percent raise each year and an annual bonus equal to 50 percent of his salary. The minority shareholders filed a suit claiming that the majority shareholder's actions constitute oppressive conduct.

Section 53-6 of the New Washington statutes authorizes the court to dissolve the corporation when the majority shareholder engages in oppressive conduct. This example is referred to in this chapter as the corporation example.

In an office memo, the law component of the issue in this example is stated objectively: “Under the New Washington corporation statute, NWSA § 53-6, did oppressive conduct occur when...?” In a court brief, however, the law is presented persuasively. The persuasive language is italicized: “Under the New Washington corporation statute, NWSA § 53-6, *which prohibits oppressive conduct*, did...?”

Note that the persuasive presentation of the law component emphasizes the prohibitory nature of the statute.

For Example If your position is that the statute has limited application, present the law in a manner that focuses on that limitation: “Under NWSA § 51-7, which *limits the requirement of a written contract to . . .*”

If you want to emphasize the applicability of the statute, present the law a manner that focuses on applicability: “Under NWSA § 51-7, which *requires that a contract be in writing when. . .*”

Question Component of the Issue. Present the question component of the issue in a persuasive manner that suggests a result.

For Example *Objective presentation:* “ . . . did oppressive conduct occur when . . . ?”
Persuasive presentation: “ . . . was the majority shareholder’s conduct oppressive when . . . ?” or “ . . . did the majority shareholder engage in oppressive conduct when . . . ?” Note that in the objective presentation, the focus is on the conduct. In the persuasive presentation, the statement links the conduct immediately to the majority shareholder.

The language used should focus on the result desired.

For Example The key language is italicized: “ . . . does the statute *allow* oral contracts for . . . ?” “ . . . does the statute *require* oral contracts for . . . ?” “ . . . does the statute *prohibit* oral contracts for . . . ?”

Fact Component of the Issue. State the key facts of the issue in a manner designed to focus the reader on the facts favorable to the client and persuade the reader to favor the client’s position.

For Example *Objective presentation:* “ . . . did oppressive conduct occur when dividends were not issued for a ten-year period and the majority shareholder received annual salary increases and bonuses?”
Persuasive presentation: “ . . . did the majority shareholder engage in oppressive conduct when he refused to issue dividends for a ten-year period while giving himself large annual salary increases and bonuses?”

For Example *Objective presentation:* “ . . . when the defendant entered the property after being advised not to enter?”
Persuasive presentation: “ . . . when the defendant intentionally entered the property even though he was warned not to enter?”

Note that in both examples, the persuasive presentation focuses on the defendant and links the defendant directly to the improper conduct.

Exhibit 14–2 presents a checklist for use in the persuasive presentation of the issue(s).

Checklist for use when preparing the issue section

- Law Component—Is the law correctly presented, stated persuasively, and accurately cited?
- Question Component—Are the law, question, and key facts included and stated persuasively?
- Fact Component—Are the key and background facts included and stated persuasively?

Exhibit 14–2

Issues: Persuasive Presentation—Checklist

2. Statement of Facts: Persuasive Presentation

The **statement of facts** section of a court brief presents the facts of the case.

This section is often called the “statement of the case.” In a court brief, just as in an office memo, the statement of facts should include both the background and the key facts. In a court brief, introduce the facts credibly, persuasively, and in a light most favorable to the client’s position. This is accomplished by emphasizing favorable facts and de-emphasizing or neutralizing unfavorable facts.

You may use several techniques to emphasize favorable facts and neutralize unfavorable facts. Some of these are discussed in the following subsections.

Placement. Readers tend to remember information presented at the beginning and end of a section, and usually give the most attention to opening and closing sentences. Therefore, introduce the facts favorable to the client’s position at the beginning and the end of the factual statement. Present the facts unfavorable to the client’s position that you wish to de-emphasize in the middle of the section.

statement of facts

The section of a memorandum of law that presents the factual context of the issue(s) addressed in the memorandum.

For Example

Referring to the corporation example, “The defendant is the majority shareholder and controlling member of the board of directors of XYZ corporation. He has refused to authorize the issuance of dividends for ten years. During this time, the defendant has been the president of the corporation. As president, he has granted himself a 40 percent raise each year. In addition, he has given himself an annual bonus equal to 50 percent of his salary. It is claimed by the defendant that he is entitled to the salary increases and bonuses because he works long hours, is underpaid, and is the person in charge. The defendant has rebuffed the plaintiff’s repeated requests to discuss the defendant’s grants to himself of salary increases and bonuses and failure to issue dividends. The defendant has informed the plaintiff that he does not intend to issue dividends.”

In this example, the facts least favorable to the defendant, his failure to issue dividends and receipt of salary increases and bonuses, are presented at the beginning. His conduct immediately captures the reader’s attention. His conduct is also mentioned again at the end of the presentation. The reader’s first and last impressions are focused on the acts least favorable to the defendant. The facts favorable to the defendant, that he is entitled to the salary increases and bonuses, are de-emphasized by their placement in the middle of the fact statement.

If the fact statement is composed of several paragraphs, place the favorable material at the beginning of the presentation and close with a summary or rephrasing of the favorable key facts. Place the unfavorable facts in the middle of the presentation and mention them only once or as few times as possible.

Note that the goal is a persuasive presentation of the facts. This goal should not be so rigidly pursued that clarity is lost.

For Example It may not be practical to state the favorable facts immediately at the beginning of a paragraph. To ensure clarity, you may need to present transitional or introductory sentences first, then follow them with the presentation of the favorable facts.

Sentence Length. Use short sentences to emphasize favorable information and long sentences to de-emphasize unfavorable information. Shorter sentences generally draw the attention of the reader, are easier to understand and remember, and therefore are more powerful.

For Example “The defendant is the majority shareholder and controlling member of the board of directors of XYZ corporation. He has refused to authorize the issuance of dividends for ten years. During this time, the defendant has been the president of the corporation.
As president, he has granted himself a 40 percent raise each year.”

The sentences in this example are short, clear, and draw the reader’s attention. Longer sentences that string together several facts tend to downplay and reduce the impact of each fact.

For Example “It is claimed by the defendant that he is entitled to the salary increases and bonuses because he works long hours, is underpaid, and is the person in charge.”

In this example, if each of the defendant’s actions were presented in separate sentences, they would stand out and be clearer.

Active Voice. Voice is important. Use active voice to emphasize favorable information and passive voice to de-emphasize unfavorable information. When active voice is used, the subject of the sentence is the actor. When passive voice is used, the subject is acted upon. Active voice draws the attention to and emphasizes the actor. Passive voice draws attention away from and de-emphasizes the actor.

For Example *Passive voice:* “It is claimed by the defendant that he is entitled to the bonuses” The use of passive voice draws attention away from the actor, the defendant.

Active voice: “The defendant claims he is entitled” is less wordy and focuses the attention on the actor.

voice

The relationship of the subject to the action of the sentence. *Active voice*—the subject of the sentence is performing the action in the sentence (The automobile hit the child.) *Passive voice*—the subject of the sentence is acted upon (The child was hit by the automobile.)

Word Choice. Ideally the words you choose should introduce the client’s facts in the most favorable light and the opponent’s facts in the least favorable light. Present the client’s position in the most affirmative manner and the opponent’s position in the most questionable manner.

For Example “The plaintiff states that...?” “The defendant alleges...?”

In this example, notice that the plaintiff’s presentation sounds stronger because it is presented as a statement. The defendant’s position is presented as a charge—an “allegation” rather than a statement of fact. There are numerous ways in which you can present positions in a strong or weak manner. Be sure to check your word choice.

It is easy, however, to get carried away and state the facts in such a slanted way that your bias is painfully obvious.

For Example “The defendant stubbornly and unreasonably refuses to issue dividends.”

In this example, the presentation of the facts is clearly biased and heavy-handed. It is better just to note that the defendant has refused to issue dividends. When in doubt, exercise restraint.

Refer to the techniques presented in the preceding text when preparing a persuasive presentation of the facts. Exhibit 14–3 presents a checklist for use in conjunction with the guidelines for the persuasive presentation of the statement of facts.

Checklist for use when preparing the statement of facts section

- Placement—Favorable and Unfavorable facts—Are the facts favorable to the client’s position placed at the beginning and end of the factual statement?
- Sentence Length—Are short sentences used to emphasize favorable information and long sentences used to de-emphasize unfavorable information?
- Active/Passive Voice—Is active voice used to emphasize favorable information and passive voice used to de-emphasize unfavorable information?
- Word Choice—Are words chosen that introduce the client’s facts in the most favorable light and the opponent’s facts in the least favorable light?

Exhibit 14–3

*Statement of
Facts: Persuasive
Presentation—Checklist*

Many of the considerations involved in preparing the statement of facts section of an office memo are the same as those involved in preparing the statement of facts section of a court brief. The Statement of Facts section of Chapter 12, therefore, will prove helpful when preparing this section.

3. Argument: Persuasive Presentation

The persuasive tone of the court brief is initially established in the issue and fact statements. The persuasive techniques discussed in the previous sections of this text, such as word choice, sentence length, active and passive voice, and so on, also apply and should be employed when crafting the argument section of a court brief.

The **argument** section is the heart of the court brief. It is the equivalent of the analysis section of an office legal memorandum. Unlike the analysis section of an office memo, however, the argument section of a court brief is not an objective presentation of the law. Because the goal of the argument section is to persuade the court that your position is valid, it should be crafted in a persuasive manner. This is accomplished by persuasively drafting the following:

- The law in support of your position
- The analysis of the law
- The argument that your analysis is valid and the opposition's analysis is invalid

The following text presents a summary of the techniques you may use to ensure that you present the argument component of a court brief in a persuasive manner. Several helpful guidelines apply to both trial and appellate court briefs. The Trial Court Briefs and Appellate Court Briefs sections of this chapter introduce additional information concerning the format and content of the argument section. Those sections focus on the differences between trial and appellate court briefs.

Organization. The organization of the argument section is similar to that of the analysis section of the office memo: *the rule of law is introduced, followed by an interpretation of the law (usually through case law), then an application of the law to the issue raised by the facts of the case.*

The opposing position is included in the presentation of the argument rather than in a separate counteranalysis section.

Issue Presentation. Where there is more than one issue or where there are issues and subissues, discuss the issue supported by the strongest argument first. There are several reasons for this.

- First impressions are lasting. The tone of the argument is set at the beginning. By presenting the strongest argument first, you set a tone of strength and credibility.
- If you introduce the strongest argument first, the court is more likely to be persuaded that your position is correct and look more favorably on your weaker arguments.
- Judges are often very busy. On some occasions a judge may not read or give equal attention to all the sections of a brief, especially if the brief is a long one. In such instances, the judge may not read your strongest argument if you do not present it first or near the beginning of the brief. For this reason, if there are several arguments in support of a position, omit the weak arguments. Arguments or positions that are weak or have little supporting authority detract and divert attention from the stronger arguments.

Rule of Law Presentation. Present the rule of law, whether it is enacted or case law, in a manner that supports your argument.

For Example *Objective presentation:* "The statute that governs oppressive conduct is"

Persuasive presentation: "The statute that prohibits oppressive conduct by a majority shareholder is" The first example merely indicates that the statute governs the area. The second example persuasively emphasizes the prohibitory nature of the statute.

For Example *Objective presentation:* “The courts of other states are split on what constitutes oppressive conduct. Most courts follow *Smith v. Jones*, which provides A minority of courts follow *Dave v. Roe* . . . The majority view is based on the premise that the conduct need be either wrongful or improper”

Persuasive presentation: “The majority of courts follow the definition of oppressive conduct presented in *Smith v. Jones*. In this case, the court defined oppressive conduct as This definition is based on the well-reasoned view that the conduct need only be wrongful or improper. A minority of courts follow”

In this example, the persuasive presentation more forcefully introduces the majority view in a manner that indicates that it is preferable. The objective view is passive and treats both the majority and minority views equally. It does not emphasize one view as favorable. Refer to the discussion in the Issues: Persuasive Presentation section of this chapter when drafting the rule of law component of the argument section of a brief.

Case Presentation. When introducing case law, discuss the favorable case law first, follow with the unfavorable or opposing case law, then include a response or rebuttal that emphasizes why the favorable case law should be followed. This is similar to the format followed in the fact statement: *the placement of the unfavorable material in the middle of the presentation following the favorable material tends to minimize its importance.*

The discussion of the case law should emphasize the similarities and applicability of the case you rely on and the dissimilarities and inapplicability of the case relied on by the opposition.

For Example “The term ‘oppressive conduct’ is defined in the case of *Tyrone v. Blatt*. In *Tyrone*, the majority shareholder refused to authorize the issuance of dividends. The defendant granted himself four major pay increases, quadrupling his salary during the period dividends were not issued. In the holding, the court noted that there was no justification for the salary increases and ruled that his conduct was oppressive. The court stated that ‘oppressive conduct’ occurs when there is wrongful conduct that inures to the benefit of the majority shareholder and to the detriment of the minority shareholders.”

“In our case, just as in *Tyrone*, the majority shareholder refused to issue dividends. In our case, like *Tyrone*, the majority shareholder gave himself large salary increases. In both cases, there was no justification for the increases. Therefore, the court should apply the standard established in *Tyrone* and find that the defendant engaged in oppressive conduct.”

“It is argued by the defendant that the court should apply the holding reached in *Wise v. Wind* and find that the defendant’s conduct was not oppressive. The defendant’s reliance on *Wise* is misplaced. In *Wise*, there was evidence that the salary increases were justified.”

“Our situation is distinguishable. There is no evidence that the salary increases the defendant awarded himself and the refusal to issue dividends were justified. Therefore, the *Wise* opinion is not on point and is not applicable. The *Tyrone* opinion is on point and should be followed.”

Argument Order. When interpreting and applying a rule of law, always introduce your arguments first, address the counterargument, then present your response. In addition, spend more time affirmatively stating your position than responding to the opponent's counterargument. There are several reasons for this:

- Just as with the presentation of the fact statement and organization of the argument, the reader tends to remember and emphasize information presented at the beginning and end of a section or paragraph. You want to draw attention to and emphasize your argument; therefore, address it first.
- By introducing your argument first, you have the opportunity to soften the impact of the opposing argument through the strong presentation of your position.
- By following the counterargument with a response or rebuttal that sums up your position, you remove the counterargument further from the reader's attention. It is buried in the middle of the argument where its significance is downplayed and it is de-emphasized. The defendant's position is italicized in the following example.

For Example "It is appropriate for the court to allow the admission of the INDM test results. The court of appeals in *State v. Digo* ruled that scientific tests are admissible when the reliability and scientific basis of the test are recognized by competent authorities. The INDM test, developed in 1985, is universally accepted by all competent authorities as scientifically valid. *It is argued by the defendant that the test results should not be relied on by the court. Defendant relies on the case of Ard v. State to support this argument. Defendant's reliance on Ard v. State is misplaced. In this 1985 case, the court of appeals did not allow the admission of the INDM test results because the INDM was a new test not universally accepted.* The ruling in *Ard* is no longer applicable. The INDM test is no longer a new test and is universally used and accepted."

Word Choice. Careful word selection is an invaluable aid when crafting a persuasive argument. You can significantly enhance the argument by the use of forceful, positive, and confident language.

For Example *Ineffective:* "We believe that the defendant engaged in oppressive conduct."
Effective: "The defendant engaged in oppressive conduct."
Ineffective: "It is the defendant's position that the search was illegal"
Effective: "The search was illegal"

Present the opposing position in a manner that de-emphasizes its importance or credibility.

For Example *Ineffective:* "The defendant *states*"
Effective: "The defendant *alleges*"
Ineffective: "The defendant's *position* is"
Effective: "The defendant *claims*"

Point Headings. A **point heading** is a summary of the position advocated in the argument. Point headings are presented at the beginning of each argument. The Trial Court Briefs section of this chapter addresses the details of format, content, and presentation of point headings. This section discusses the persuasive nature and presentation of point headings.

The persuasive role of a point heading is to focus the reader on the position advocated in the argument. Therefore, you should draft a point heading in a manner that provides a positive presentation of that position.

For Example *Not persuasive:* “The court should not grant the motion to suppress . . .”

“The photos of the victim were inflammatory and should not have been admitted into evidence by the trial court.”

Persuasive: “The court should deny the motion to suppress . . .”

“The inflammatory nature of the photographs of the victim outweigh their probative value, and their admission was highly prejudicial to the defendant and was improper.”

The difference in the two presentations in this example is that the persuasive presentation more affirmatively and positively characterizes the position argued. The discussions in the previous section concerning word choice and active voice apply to point headings.

Exhibit 14–4 presents a checklist for use in the persuasive presentation of the argument in a court brief.

Checklist for use when preparing the argument section

- Argument Organization**—Follow the standard organizational format: rule of law, followed by the interpretation of the law through case law, followed by the application of the law to the issue.
 - Issue Presentation**—If there is more than one issue, discuss the issue supported by the strongest argument first.
 - Rule of Law Presentation**—Present the rule of law in a manner that supports your argument.
 - Case Presentation**—Discuss favorable cases first, followed by unfavorable cases, then a rebuttal emphasizing why the favorable cases should be followed.
- Argument Order**—When applying the rule of law, introduce your argument first, then the counter argument, and conclude with your response.
- Argument—Word Choice**—Present your argument with forceful, positive and confident language.
- Argument—Point Headings**—Draft point headings persuasively.

point heading

A summary of the position advocated in the argument section of a trial or appellate brief.

III. TRIAL COURT BRIEFS

In many instances, when a trial court is in the process of ruling on a motion or an issue in a case, the judge requires the attorneys to submit a memorandum of law. The memorandum of law presents the legal authority and argument in support of the position advocated by the attorney. In this chapter, a memorandum of law submitted to a trial court is referred to as a **trial court brief** or trial brief.

Exhibit 14–4

Argument: Persuasive Presentation—Checklist

trial court brief

An external memorandum of law submitted to a trial court. It presents the legal authority and argument in support of a position advocated by an attorney, usually in regard to a motion or issue being addressed by the court.

A trial brief is similar to an office memo in many respects. Both are designed to inform the reader how the law applies to the issues raised by the facts of the case. Most of the considerations involved in the preparation of an office memo also apply to the preparation of a trial brief. Therefore, when preparing a trial brief, in addition to this chapter, refer to Chapters 12 and 13 for guidance.

The guidelines for preparing a persuasive trial brief are discussed in the previous section. This section addresses other considerations involved in the preparation of a trial brief, such as the application of the writing process.

A. Audience

The audience for the trial brief is the judge assigned to the case. Trial court judges are usually busy with heavy case loads and may rule on several motions a day. They may not have time to read lengthy, drawn-out briefs carefully. Therefore, a judge usually appreciates a trial brief that consists of a well-organized and concise presentation of the law.

B. Constraints

Court rules are procedural rules that govern the litigation process. Many trial courts have local rules that govern various aspects of a trial brief such as format and style. The major constraints on a trial brief are usually imposed by the local court rules.

court rules

Procedural rules adopted by a court that govern the litigation process. Court rules often govern the format and style of documents submitted to the court.

For Example

A local rule may establish a maximum length of a trial brief and require the permission of the court before that length can be exceeded.

Always consult the local rules when preparing a trial brief.

Usually there is a time constraint. The court or the local rules often require the submission of the brief within a certain number of days. Become aware of the time deadline and allocate your time accordingly. Usually, but not always, extensions of time may be granted by the court upon request.

C. Format/Content

The format of a trial brief varies from court to court and jurisdiction to jurisdiction. In many instances, the local court rules establish a required format. Generally, a trial court brief includes some or all of the components presented in Exhibit 14–5.

If the brief is short, such as in the case of a single issue brief, a table of contents, table of authorities, or preliminary statement may not be required. In many instances, it is clear from the motion what the issue is and the brief will consist only of a brief fact statement, argument, and conclusion. Trial court briefs are often informal in such situations.

For Example

A motion to dismiss a complaint is filed for failure to include an indispensable party. The issue is clear from the motion and the memorandum in support of the motion may simply consist of a brief summary of the facts, the legal argument, and a conclusion.

Each of the components in Exhibit 14–5 is briefly discussed in the following subsections. For examples of these components, refer to the Application section of this chapter and Appendix B.

A trial court brief includes some or all of the following components

Caption
 Table of Contents
 Table of Authorities
 Preliminary Statement
 Question(s) Presented—Issue(s)
 Statement of the Case (Fact Statement)
 Argument
 Conclusion

Exhibit 14–5

Components of Trial Court Brief

1. Caption

Every brief submitted to a trial court requires a caption. The format varies from court to court, but the caption usually includes

- The name of the court
- The names and status of the parties
- The file number and type of case—civil or criminal
- The title of the document, such as BRIEF IN SUPPORT OF MOTION TO DISMISS.

2. Table of Contents

If a table of contents is required, it follows the caption page. The table allows the reader to locate the various components of the brief. The **table of contents** lists each component of the brief and the page number. If point headings are used in the argument section, they are stated in full in the table of contents. For an example of a table of contents, see the appellate brief presented in Appendix B.

3. Table of Authorities

If a table of authorities is required, it is presented after the table of contents page. A **table of authorities** lists all the law used in the brief and the page on which the law is cited in the brief. This allows the reader to locate quickly where the authority is discussed in the brief. Present the case law and enacted law in separate sections. List the case law in alphabetical order by case name. For an example of a table of authorities, see the appellate brief presented in Appendix B.

4. Preliminary Statement

The preliminary statement introduces the procedural posture of the case. It usually includes the following:

- An identification of the parties
- The procedural events in the case relevant to the matter the court is addressing
- A description of the matter being addressed by the court, such as “This matter is before the court on a motion to dismiss the complaint.”

- The relief sought, such as “This memorandum is submitted in support of the motion to suppress the evidence seized during the search.”

For Example**PRELIMINARY STATEMENT**

Edna and Ida Tule, the plaintiffs, are minority shareholders in Tule, Inc. Their brother, Thomas Tule, is the defendant in this action, the majority shareholder, and president of Tule, Inc. On January 9 of this year, a request for the production of company records relating to salary increases and bonuses granted to Mr. Tule was delivered to him. Mr. Tule refuses to produce the company records. This memorandum is submitted in support of a motion to compel the production of those documents.

5. Question(s) Presented: Issue(s)

This section of a brief persuasively presents the legal issue(s) addressed in the brief. The issue should include the rule of law, legal question, and the key facts. When there is more than one issue, list the issues in the order in which they are discussed in the argument section of the brief. Chapter 12 addresses the presentation of the issue(s) in an office memo. Refer to that chapter when preparing the issue.

6. Statement of the Case (Fact Statement)

This section is often referred to as the statement of facts. It corresponds to the statement of facts section of an office memo. Its purpose is to introduce the facts of the case in a light that most favors the client’s position. The Statement of Facts: Persuasive Presentation section of this chapter discusses the persuasive nature of the fact section. The fact section should be accurate and complete and should include background and key facts. For additional guidance when drafting the fact section, refer to the Statement of Facts section of Chapter 12.

7. Argument

The argument section of a trial brief, like the analysis section of an office memo, is the heart of the document. It is unlike the analysis section of an office memo in that it is not an objective legal analysis. Rather, it is designed to persuade the court to adopt your interpretation of the law. The Argument: Persuasive Presentation section of this chapter discusses the considerations involved in crafting the argument in a persuasive manner. This section addresses the basic organization of the argument and the components. Exhibit 14–6 presents the organization and components of this section.

The format in Exhibit 14–6 is a recommended one and is not necessarily followed in every office, and a different format may be required by local court rule. In some instances, a summary of the argument may not be required, and some local court rules and office formats do not require point headings. This is often the case when the brief is short and involves a single issue. All of the components of the argument section are presented here so that you will be familiar with them when they are required.

The standard organization and components of the argument section of a trial court brief

1. Summary of argument
2. Point headings
3. Argument
 - Rule of law
 - Case law (if necessary)—interpretation of rule of law
 - Application of law to the issue being addressed
 - Discussion of opposing position (similar to counteranalysis in office legal memorandum)

Exhibit 14–6

*Organization and
Components of Argument
Section of Trial Brief*

Summary of Argument. The argument section of a trial brief begins with an introductory paragraph that summarizes the argument. It presents the context of the argument, the issues in the order in which they will be discussed, a summary of the conclusions on each issue, and the major reasons that support each conclusion.

For Example On December 12, 2006, John Jones, the defendant, was arrested for possession of cocaine. On January 1, 2007, he was indicted for possession of four ounces of cocaine. The trial commenced on October 25, 2007. On November 11, 2007, he was found guilty by a jury and convicted of possession of four ounces of cocaine. This matter is before the court on Mr. Jones’s motion for a new trial, filed March 7, 2008. Mr. Jones’s motion is based on the claim that new evidence has been uncovered that shows the drugs belonged to a Mr. Tom Smith, a visitor in Mr. Jones’s home. In order for a new trial to be granted on the basis of newly discovered evidence, the defendant must demonstrate that the newly discovered evidence was not available or discoverable at the time of trial. The information concerning Mr. Smith was available at the time of trial. The defense made no effort to interview Mr. Smith or in any way discover whether the drugs belonged to him. The evidence regarding Mr. Smith is not newly discovered evidence, and the motion should be denied.

The use of an argument summary is valuable when you believe the judge may not have time to read the entire brief. It may not be necessary if the brief is short or when a single issue is involved. It should be a complete summary; the reader should not have to refer to the body of the argument to understand the summary.

Point Headings. Point headings are a summary of the position you are asking the court to adopt. They should be drafted persuasively. The Argument: Persuasive Presentation section of this chapter addresses the guidelines for drafting persuasive point headings.

Point headings are designed to do the following:

- Organize, define, and emphasize the structure of the argument
- Act as locators—they allow the reader to find specific sections of the argument quickly
- Focus the court’s attention on the outcome you advocate and provide an outline of your theory

Point headings may not be required in a trial brief, especially when the brief is short or addresses a single issue. In such instances, they are not needed as an organizational tool, nor are they needed to guide the reader. Check the court rules and office format to determine when they are required.

In regard to point headings, note the following guidelines:

1. Place the point headings at the beginning of each section of the argument and include them in the table of contents.
2. Divide the point headings into major and minor point headings. There should be a major point heading for each issue presented. Use minor headings to introduce significant points supporting the major heading.

For Example

ARGUMENT

- I. THE TRIAL COURT ERRED WHEN IT RULED THAT MR. SMITH'S CONDUCT DID NOT CONSTITUTE BREACH OF CONTRACT BECAUSE THE GOODS WERE DEFECTIVE AND DELIVERED LATE.
 - A. Mr. Smith's delivery of the widgets ten days late constituted a breach of the contract (Text of argument).
 - B. The delivery of the widgets with a five-pound spring instead of a ten-pound spring constituted a breach of the contract (Text of argument).

3. Each heading and subheading should be a complete sentence.
4. Each heading should identify the legal conclusion you want the court to adopt and the basic reasons for the conclusion.

For Example

"THE TESTIMONY OF DR. SMITH IS PROBATIVE OF THE
DEFENDANT'S INTENT AND THEREFORE IS ADMISSIBLE."
"THE DISTRICT COURT'S SUPPRESSION OF THE EVIDENCE WAS IMPROPER
BECAUSE THE SEARCH WARRANT WAS SUPPORTED BY PROBABLE CAUSE."

5. Use minor headings only if there are two or more. The rules of outlining require more than one subheading when subheadings are used. Minor headings present aspects of a major point heading in the context of the specific facts of the case. Note that the minor point headings in the example in number 2 above present two aspects of the major point heading. State the minor point headings in the specific context of the facts of the case as illustrated in the following:
 - A. Mr. Smith's delivery of the widgets ten days late constituted a breach of the contract.
 - B. The delivery of the widgets with a five-pound spring instead of a ten-pound spring constituted a breach of the contract.
6. Type major headings in all capitals and minor headings in regular type. Minor headings may be underlined. Check the court rules for the proper format.

The example in number 2 above illustrates the format for major and minor point headings.

Argument Format. The argument section of the trial brief is similar to the analysis section of an office memo; refer to the Analysis section of Chapter 13 when preparing a trial brief. The same basic IRAC format is followed

Rule of law

Case law (if necessary)—interpretation of rule of law

1. Name of case
2. Facts of case—sufficient to demonstrate case is on point
3. Rule or legal principle from case that applies to the issue being addressed

Application of law to the issue being addressed

Discussion of opposing position (similar to counteranalysis in office legal memorandum)

The major difference between the argument component of an office memo and that of a trial brief is that the trial brief introduces the argument in a persuasive rather than an objective manner. A trial brief is designed to persuade, and you should draft the argument in a persuasive manner. Refer to the Argument: Persuasive Presentation section of this chapter for guidance in organizing and preparing a persuasive argument.

8. Conclusion

The **conclusion** section of a trial brief requests the specific relief desired. Depending on the complexity of the brief, it may be a single sentence stating the requested relief or a summary of the entire argument.

For Example *Single sentence:* “For the foregoing reasons, the defendant requests that the motion to dismiss be granted.”

A single sentence conclusion is appropriate when the trial brief is a simple, one- or two-issue brief, and the argument section concludes with a summary of the analysis. When the trial brief is longer and more complicated, the conclusion may include an overall summary of the law presented in the argument section and end with a request for relief. This type of conclusion is similar to the conclusion section of an office memo discussed in the Conclusion section of Chapter 13. Note that the conclusion should summarize the argument section and should reflect the persuasive nature of the argument.

IV. APPELLATE COURT BRIEFS

An individual who disagrees with the decision of a trial or lower court may appeal the decision to a court of appeals. The individual who appeals is called the *appellant*, and the individual who opposes the appeal is called the *appellee*. On appeal, the appellant argues that the lower court made an error, the error affected the outcome of the case, and the appellant is entitled to relief. The appellee argues that the lower court did not commit an error that entitles the appellant to relief.

Appellate court briefs are the written legal analysis and arguments submitted to the appellate court by the parties on appeal. The format and style of the appellate

appellate court brief

An external memorandum of law submitted to a court of appeals. It presents the legal analysis, authority, and argument in support of a position that the lower court’s decision or ruling was either correct or incorrect. It is often referred to as an appellate brief.

brief is strictly governed by appellate court rules, and these rules *must* be consulted when preparing an appellate brief.

The preparation of an appellate brief is a complex undertaking, and a detailed discussion of this subject is beyond the scope of this chapter. Entire texts are available at the local law library that address the detailed considerations involved in preparing an appellate brief, and you should refer to those texts when assigned the task of preparing an appellate brief.

A paralegal is not usually required to draft appellate briefs. A paralegal, however, may be called upon to assist in the preparation of the brief and, therefore, should be familiar with its components. This section presents a summary of the format and basic components of an appellate brief.

An appellate brief, like a trial brief, is designed to advocate a legal position and to persuade the court to adopt the position argued in the brief. Therefore, you should draft the brief in a persuasive manner. The discussion of the persuasive nature of court briefs, presented in the Dissimilarities: Court Briefs and Office Memoranda section of this chapter, applies to the preparation of appellate briefs: an appellate brief should be crafted in a persuasive manner.

An appellate brief, like a trial brief, is similar to an office memo in many respects. For example, a writing process should be used when preparing both briefs. Therefore, in addition to this chapter, refer to Chapters 10, 12, and 13 when performing an appellate brief assignment.

A. Audience

A trial court brief is submitted to a single judge, the trial judge assigned to the case. The audience for the appellate brief is usually a panel of three or more judges. In addition, each judge's law clerk usually reads the brief; on many occasions the law clerk is the first to read the brief. Although you are writing to a wider audience, the same basic considerations are involved in the preparation of trial court and appellate court briefs. Appellate court judges, like trial court judges, are usually busy with substantial case loads and appreciate an appellate brief that is a well-organized and concise presentation of the law.

B. Constraints

The major constraints on appellate briefs are imposed by the court's rules. The appellate court rules differ from trial court rules in that they are usually much more detailed than trial court rules: the appellate court rules may establish the sections that must be included, the format of the sections, the type of paper, the citation form, a maximum length for the briefs and a requirement that permission of the court be obtained before the length can be exceeded, and so on. Always consult the appellate court rules when preparing an appellate brief.

C. Format/Content

The format of an appellate brief varies from jurisdiction to jurisdiction.

Generally, the basic appellate court brief includes some or all of the components presented in Exhibit 14–7.

The following subsections briefly discuss each of the components of the appellate brief. Refer to the appellate brief presented in Appendix B for an example of the components.

An appellate court brief includes the following components

Cover Page/Title Page
 Table of Contents/Index
 Table of Authorities
 Opinions Below/Related Appeals
 Jurisdictional Statement
 Question(s) Presented—Issue(s)
 Statement of the Case/Statement of Facts
 Summary of Argument
 Argument
 Conclusion

Exhibit 14–7

*Components of a Basic
 Appellate Court Brief*

1. Cover Page/Title Page

The court rules govern the format of the cover page, often called the title page. The cover page usually includes the

- name of the appellate court.
- number assigned to the appeal.
- parties' names and appellate status (appellant and appellee or petitioner and respondent).
- name of the lower court from which the appeal is taken.
- names and addresses of the attorney(s) submitting the brief.

2. Table of Contents/Index

Sometimes referred to as an index, the table of contents lists the major sections of the brief and the page number of each section. The table of contents provides the reader with a reference tool for the location of specific information within the brief. The table includes the point headings and subheadings. The point headings, when included in the table of contents, serve to provide the reader with an overview of the legal arguments and allow the reader to locate the discussion of the arguments easily in the brief.

3. Table of Authorities

The table of authorities lists all the law cited in the brief. The authorities are listed by category, such as constitutional law, statutory law, regulations, case law, and so on. The table includes the full citation of each authority and the page number or numbers on which it appears.

4. Opinions Below/Related Appeals

The brief *may* include a section that references any prior opinions on the case or related appeals.

For Example *From a Supreme Court brief: "The opinion of the Court of Appeals is reported at 580 F.2d 501. The order of the District Court is not reported."*

jurisdiction

The court's authority to hear and resolve specific disputes. Jurisdiction is usually composed of *personal jurisdiction* (authority over persons) and *subject matter jurisdiction* (authority over the types of cases a court may hear and decide).

5. Jurisdictional Statement

The brief usually includes a separate section that introduces, in a short statement, the subject matter **jurisdiction** of the appellate court.

For Example "This court has jurisdiction under 42 U.S.C. 1983."

Some appellate rules do not require a jurisdictional statement. Some appellate rules require, in addition to the jurisdictional statement, a history of the case and how the matter came before the court.

For Example "The judgment of the trial court was entered on October 5, 2007. The notice of appeal was filed on October 26, 2007. The jurisdiction of the court is invoked under 42 U.S.C. 1983."

6. Question(s) Presented: Issue(s)

This section may also be referred to as legal issues or assignment of error. The section lists the legal issues the party requests the court to consider. List the issues in the order in which they are addressed in the argument section, and write them in a persuasive manner as discussed earlier in this chapter in the Issues: Persuasive Presentation section.

7. Statement of the Case/Statement of Facts

The statement of the case section, often referred to as the statement of facts, is generally similar to the statement of facts section of the trial brief, and the same considerations apply when preparing both.

The statement of the case in an appellate brief, however, differs from the statement of facts in a trial brief in that the statement of the case should also include a summary of the prior proceedings (what happened in the lower court) and appropriate references to the record. In the following example, "Tr." refers to the pages in the transcript of the trial record, and "Doc." refers to documents included in the record on appeal.

For Example After the presentation of the key and background facts of the case, the information concerning the prior proceedings might read:

"At the motion to suppress hearing, held on December 12, 2006, the trial court denied the motion to suppress (Tr. at 37). At the hearing, Officer Smith, the officer conducting the search, testified . . . (Tr. at 33). The trial court stated that there were sufficient exigent circumstances present at the scene to support the unannounced entry by the officers (Tr. at 38)."

“Trial was held on January 15, 2007 (Tr. at 201). On January 18, 2007, the jury found the defendant guilty of possession of an ounce of cocaine (Tr. at 291). On January 28, 2007, the defendant filed a notice of appeal (Doc. 44). On March 7, 2007, the defendant was sentenced to a term of imprisonment of five years (Doc. 49).”

8. Summary of Argument

This section may be optional under the appellate court rule. Rule 28 of the Federal Rules of Appellate Procedure states that the argument *may* be preceded by a summary. The content of an argument summary is discussed in the Trial Court Briefs: Argument subsection of this chapter.

9. Argument

Point Headings. The considerations involved in preparing point headings are the same for appellate and trial court briefs. Refer to the discussion of point headings in the Trial Court Briefs: Argument subsection of this chapter when preparing point headings for appellate briefs.

Body. The argument section of an appellate brief is similar to the argument section of a trial brief. The format is the same as in a trial brief. Refer to the Trial Court Briefs: Argument subsection of this chapter when preparing the argument section of an appellate brief. Remember to present the argument section of an appellate brief in a persuasive manner as discussed in the Argument: Persuasive Presentation subsection of this chapter. Review that subsection when preparing the argument.

10. Conclusion

Prepare the conclusion section of an appellate brief in the same way as the conclusion of a trial brief. The content, structure, and considerations involved are the same for both. Refer to the Trial Court Briefs: Conclusion subsection of this chapter when preparing the conclusion.

V. Key Points Checklist: *Preparing a Court Brief*

- Always* check the court rules. The rules of the court often govern the format, length, and other elements of court briefs. The appellate court rules extensively govern most aspects of appellate briefs.
- Trial and appellate briefs are similar to office memoranda in many fundamental respects. Refer to Chapters 10, 12, and 13 when preparing them.
- B. Comments* The writing fundamentals presented in Chapter 11 apply to all legal writing and should be kept in mind when preparing court briefs.
- Remember to craft the brief persuasively. Court briefs are designed to persuade the reader to adopt the position taken or recommended in the analysis. They are not supposed to present a purely objective analysis.
- De-emphasize the position taken by the opposition. Part of the persuasive nature of a court brief is to downplay and discredit the opponent's position. This is

accomplished through the use of passive voice, long sentences, the placement of the opposing argument in the middle of the analysis, and so on.

- The required components of trial and appellate court briefs may vary from jurisdiction to jurisdiction. Some of the components discussed in this chapter may not be required or necessary, such as a table of contents, table of authorities, and argument summary. This is often the case when the analysis is brief.

VI. Application

This section illustrates the guidelines and principles discussed in this chapter by applying them to the hypothetical presented at the beginning of the chapter. The paralegal, Pam Hayes, approaches this assignment through the use of an expanded outline as discussed in Chapter 10. She also follows the guidelines and principles discussed in Chapters 12 and 13 to the extent they apply to the preparation of a trial brief. What follows is a presentation of the trial brief prepared by Ms. Hayes and comments on the brief.

In regard to the assignment, Ms. Hayes found the following New Washington law on point.

Statutory Law. Chapter 70 of the New Washington Statutes, the Ski Safety Act, governs ski resorts and the sport of skiing. New Washington Statutes Annotated (NWSA) section 70-11-7A provides, “The ski area operator shall have the duty to mark conspicuously with the appropriate symbol or sign those slopes, trails, or areas that are closed or that present an unusual obstacle or hazard.” Furthermore, NWSA section 70-11-8B provides, “A person who takes part in the sport of skiing accepts as a matter of law the dangers inherent in that sport, and each skier expressly assumes the risk and legal responsibility for any injury to a person or property which results from . . . surface or subsurface snow or ice conditions . . .”

Case Law. In *Karen v. High Mountain Pass*, 55 N. Wash. 462, 866 N.E. 995 (Ct. App. 1994), a skier broke his leg after failing to negotiate a series of moguls that were present in the middle of a sharp turn of a ski run. The moguls were unavoidable. The trial court granted the resort’s motion to dismiss for failure to state a claim. On appeal, the court of appeals stated that skiers are responsible for snow and ice hazards, and moguls, even though unavoidable, are snow hazards easily observable and routinely present on most ski runs. The court went on to state that under the statute, the skier assumes the risk of snow and ice hazards that are easily observable and routinely encountered on ski runs, and resorts have no duty to warn of such hazards under NWSA section 70-11-7A.

In *Aster v. White Mountain Resort*, 55 N. Wash. 756, 866 N.E. 421 (Ct. App. 1994), a skier was skiing a newly opened intermediate run. Several fairly large rocks had not been removed from the run. Normally the rocks would be removed before the run was opened. The rocks were covered by approximately two and one-half feet of new snow and were not visible. The resort did not post a warning that the large rocks were present on the run. Mr. Aster hit a rock with the tip of his ski, lost control, and injured his knee and back. The trial court, in granting the resort’s motion to dismiss for failure to state a claim, held that the hazard was a snow hazard for which the skier was responsible under NWSA section 70-11-8B. On appeal, the court of appeals noted that the snow condition was an unavoidable latent hazard. The

court ruled that under NWSA section 70-11-7A, a resort has a duty to warn of hazardous snow conditions if they are unavoidable and latent. The court stated, “The statute will not be interpreted to reach an absurd result, and requiring a skier to be responsible for unavoidable latent hazards would lead to an absurd result. Skiers are only responsible for those unavoidable snow or ice conditions that are not latent or unobservable.”

Myron v. Cox Inc., 40 N. Wash. 210, 740 N.E. 309 (1989), sets the standard for the granting of a rule 12(b)(6) motion to dismiss. The court stated, “A Rule 12(b)(6) motion to dismiss is properly granted only if it appears that there is no provable set of facts that entitles the plaintiff to relief.”

A. Trial Court Brief

The following is the trial brief prepared by Ms. Hayes.

LINCOLN COUNTY DISTRICT COURT
STATE OF NEW WASHINGTON
NO. CIV. 08-601
NICK SHINE
Plaintiff,
vs.
BLUE SKY SKI RESORT
Defendant.

BRIEF IN OPPOSITION TO MOTION TO DISMISS

PRELIMINARY STATEMENT

On December 5, 2007, Nick Shine, the plaintiff, was injured while skiing on a ski run at Blue Sky Ski Resort. He was injured skiing on an ice hazard that the resort admits was not marked with any type of warning sign. Mr. Shine filed a complaint against the resort for negligence in failing to warn of the hazard. The resort has filed a Rule 12(b)(6) motion to dismiss for failure to state a claim, alleging that they do not have a duty to warn of ice hazards. This memorandum is submitted in opposition to that motion.

QUESTION PRESENTED

Under the New Washington Ski Safety Act, sections 70-11-1 *et seq.*, can a negligence claim be stated when a skier is injured on an unmarked ice hazard that is unavoidable and unobservable by the skier as a result of the sun glare?

STATEMENT OF THE CASE

On December 5, 2007, Mr. Shine, an expert skier, was skiing on an intermediate ski run at Blue Sky Ski Resort. Midway through the run there is a slightly uphill turn to the south. When Mr. Shine encountered the turn, the sun was directly in his eyes, and the glare prevented him from seeing that the trail was entirely covered with ice. As a result of the glare, he was unable to avoid the dangerous ice hazard. He immediately hit the ice and lost control. As a result, he slid into a tree and broke his left arm and leg. No signs warning of the ice hazard were present.

On April 6, 2008, Mr. Shine filed a negligence complaint against Blue Sky Ski Resort for the resort’s negligent failure to warn of the unavoidable ice hazard. On April 20, 2008, the resort filed a motion to dismiss under Rule 12(b)(6), alleging that they do not have a duty to warn of ice hazards, and therefore, as a matter of law, a claim for negligence cannot be stated.

ARGUMENT

MR. SHINE'S ARGUMENT THAT THE ICE HAZARD IS UNAVOIDABLE AND LATENT IS A SET OF FACTS THAT, IF PROVEN, WOULD ESTABLISH THE DEFENDANT'S DUTY TO WARN AND, THEREFORE, A CLAIM CAN BE STATED AS TO DUTY.

This matter is before the court on a Rule 12(b)(6) motion to dismiss for failure to state a claim. In the case of *Myron v. Cox, Inc.*, 40 N. Wash. 210, 215, 740 N.E. 309, 314 (1989), the New Washington Supreme Court established the standard for the granting of a 12(b)(6) motion. The court stated, "A Rule 12(b)(6) motion to dismiss is properly granted only if it appears that there is no provable set of facts that entitle the plaintiff to relief." Blue Sky Ski Resort's motion specifically alleges that a claim cannot be stated in this case in regard to duty. To survive this motion, Mr. Shine must demonstrate that there is a provable set of facts that would establish the duty of Blue Sky to warn of the ice hazard in this case.

The Ski Safety Act establishes the duties of ski resorts and skiers. Section 70-11-7A sets out the duties of the resort; it provides, "The ski area operator shall have the duty to mark conspicuously with the appropriate symbol or sign those slopes, trails, or areas that are closed or that present an unusual obstacle or hazard." Section 70-11-8B sets out the duties and responsibilities of the skier:

A person who takes part in the sport of skiing accepts as a matter of law the dangers inherent in that sport, and each skier expressly assumes the risk and legal responsibility for any injury to a person or property which results from . . . surface or subsurface snow or ice conditions

The act does not define the terms "hazard" or "snow and ice conditions." The statute also does not provide guidance as to which duty applies in a fact situation such as the one presented in this case. New Washington case law, however, does provide guidance.

The controlling case is *Aster v. White Mountain Resort*, 55 N. Wash. 756, 866 N.E. 421 (Ct. App. 1994). In the *Aster* case, Mr. Aster was skiing on a newly opened run from which several fairly large rocks had not been removed. Normally the rocks would be removed before the run was opened. The rocks were covered by approximately two and one-half feet of new snow and were not visible. The resort did not post a warning that the large rocks were present on the run. Mr. Aster hit a rock with the tip of his ski, lost control, and was injured. The court ruled that under NWSA section 70-11-7A, a resort has a duty to warn of hazardous snow conditions if they are unavoidable and latent. The court stated, "The statute will not be interpreted to reach an absurd result, and requiring a skier to be responsible for unavoidable latent hazards would lead to an absurd result. Skiers are only responsible for those unavoidable snow or ice conditions that are not latent or unobservable." *Id.* at 759.

Mr. Shine's complaint, like the complaint in the *Aster* case, states that the ice condition encountered was an unavoidable latent hazard. Under *Aster*, the resort has the duty under section 70-11-7A to warn of such hazards. Under the rule adopted in *Aster*, Mr. Shine's complaint does present a provable set of facts that establishes a claim as to duty and entitles him to relief. Therefore, the motion to dismiss should be denied.

It is contended by Blue Sky that they do not have a duty to warn of the ice hazard, and in support of this contention, they rely on *Karen v. High Mountain Pass*, 55 N. Wash. 462, 866 N.E. 995 (Ct. App. 1994). In this case, a skier broke his leg after failing to negotiate a series of moguls that were present in the middle of a sharp turn of a ski run. The moguls were obvious to the skier but unavoidable. The trial court granted the resort's motion to dismiss for failure to state a claim. On appeal, the court of appeals, in upholding the trial court, held that under the statute, the skier assumes the risk of snow and ice hazards that are easily observable and routinely present on ski runs.

Blue Sky's reliance on *Karen* is misplaced. The case is clearly distinguishable. The snow condition in *Karen*, though unavoidable, was clearly observable, and moguls are

routinely present on ski runs. Skiers are aware that they will encounter moguls and know they must be able to navigate them. Ice conditions also may be encountered on ski runs. The ice condition Mr. Shine encountered, however, was not a routine ice condition. It was unobservable, unavoidable, and extremely dangerous owing to the glare of the sun. The *Karen* case involves observable, routine snow hazards. The present case involves unobservable ice hazards that are not routinely encountered. *Karen* is obviously not on point and is not controlling in this case.

The hazard Mr. Shine encountered was identical in nature to the hazard in the *Aster* case: the ice condition was an unavoidable, latent hazard. Under the holding in *Aster*, the resort has a duty under section 70-11-7A to warn of this type of hazard. Mr. Shine's complaint argues that the hazard is an unavoidable and latent hazard. The complaint presents a provable set of facts in regard to duty upon which relief can be granted, and, therefore, a claim for duty can be stated and the motion to dismiss should be denied.

CONCLUSION

Blue Sky Ski Resort's motion to dismiss for failure to state a claim should be denied. Mr. Shine's argument that the ice condition constitutes a latent hazard is a provable set of facts that entitles him to relief.

B. Comments

1. Note that the preceding example of a trial brief does not have a table of contents or a table of authorities. When a trial brief is short or involves a single issue and few authorities, these tables may not be required. Be sure to check the local court rule.
2. The preliminary statement presented at the beginning of the brief is often called an introduction.
3. A summary of the argument section is not included in this brief. A summary of the argument is usually included in an appellate brief, but not always in a trial brief. It is useful in a trial brief, and may be necessary, when there are several issues or the analysis is complex, but it is not necessary when the analysis involves a single issue or is not complex.
4. Note the persuasive tone of the brief.
 - The statement of the case introduces the facts with language that favors the client: *dangerous hazard, he immediately lost control*.
 - The statement of the case and argument sections state the client's position in short, clear sentences using active voice. The opponent's position is presented in a long sentence using the passive voice: "It is contended by Blue Sky that they do not have a duty to warn of the ice hazard . . ."
 - The argument section downplays the opposition's position. It is placed in the middle of the argument and is immediately discounted after it is presented.
 - The conclusion is very short. In a brief that is short or does not involve a complex analysis, an abbreviated conclusion is appropriate.

Quick References

active voice	000	conclusion	000
appellate court briefs	000	court rules	000
argument	000	ethics	000

jurisdiction	000	statement of facts/case	000
passive voice	000	table of authorities	000
persuasive presentation	000	table of contents	000
point headings	000	trial court briefs	000
preliminary statement	000	word choice	000
sentence length	000		

Summary

The preparation of documents involving legal analysis that are designed to be submitted to a court is the focus of this chapter. Such a document, usually called a court brief, is often formally referred to as a “memorandum of law” or a “memorandum of points and authorities.” The chapter presents an overview of the major considerations, key points, and guidelines involved in the preparation of court briefs that may prove helpful to the paralegal.

At the trial court level, these documents are trial court briefs submitted in support of a legal position advocated by an attorney. They are usually submitted in conjunction with a motion that requests some action or relief by the trial court. At the appellate court level, the documents submitted to an appellate court that involve legal analysis are the appellate court briefs.

Office legal memoranda and court briefs are similar in many respects. When preparing both office memoranda and court briefs, it is helpful to use a writing process such as that suggested in Chapter 10. Office memoranda and court briefs follow a similar format: presentation of the issue, facts, analysis, and conclusion.

The major difference between an office memo and a court brief is the orientation of the presentation. An office memo is designed to inform and is written in an objective manner. A court brief is designed to advocate a position and persuade the court; therefore, the issue(s), facts, and legal argument are crafted in a persuasive manner designed to convince the court to adopt the position advocated. The Dissimilarities: Court Briefs and Office Memoranda section of this chapter discusses the techniques for drafting a persuasive court brief.

A trial court brief is a memorandum of law submitted by an attorney to a trial court. In the memorandum, the attorney introduces the legal authority and analysis that supports a position advocated by the attorney. An appellate court brief is the written legal argument submitted to a court of appeals. In the appellate brief, an attorney presents the legal authority and analysis in support or opposition to an argument that a lower court committed reversible error.

Trial and appellate court briefs are similar in many respects. A major difference is that appellate court briefs are usually more formal: the style and format are more strictly governed by the appellate court rules. Both trial and appellate court briefs, however, are governed to some degree by court rules, and these rules must be carefully reviewed when preparing a court brief.

A legal assistant’s role in preparing a court brief usually involves conducting legal research and analysis and preparing a rough draft. The final document requires the attorney’s signature and is usually prepared by the attorney assigned to the case.

Internet Resources

By searching on “trial court briefs” or “appellate court briefs,” you will find a wide range of Web sites (thousands) that refer to trial and appellate court briefs. The following is a summary of the categories of sites that may prove helpful when working on court briefs:

- Sites of federal and state trial and appellate courts. Some of these sites include the court rules and guides and offer practice tips for preparing briefs.
- Sites that provide the trial or appellate court briefs filed in specific cases, such as the O. J. Simpson case or the Florida presidential election cases.
- Sites that advertise assistance in the preparation of trial and appellate court briefs.
- Sites for schools whose curriculum includes trial and appellate advocacy.
- Sites that provide links to appellate court Web sites, court rules, opinions, and resources.

To avoid the frustration of finding too many sites, narrow your search to a specific type of trial or appellate court brief.

Exercises

Additional assignments are located on the Online Companion and the Student CD-ROM accompanying the text.

ASSIGNMENT 1

Describe how to draft each of the following components of a brief in a persuasive manner. Include the considerations involving organization, word choice, sentence structure, and so on.

- A. Issue
- B. Fact Statement
- C. Point Heading
- D. Argument

ASSIGNMENT 2

Describe in detail the components and format of a trial and appellate court brief.

ASSIGNMENT 3

Restate the following question component of the issue in a persuasive manner.

- A. “...should the evidence be suppressed when...?” In the case, the police failed to obtain a search warrant prior to searching a vehicle.

- B. “...did the court err when ...?” In the case, the trial court admitted hearsay evidence.
- C. “Under the statute of frauds..., is an oral contract valid when...?” Rewrite this portion of the issue using language that focuses on a desired result.
- D. “Under the sale of goods statutes, ...is a statute enforceable when...?” Rewrite this portion of the issue using language that focuses on a desired result.

ASSIGNMENT 4

Restate persuasively each of the following issues. Each issue should be redrafted twice—from the perspective of each of the opposing sides.

- A. Under the provisions of the exclusionary rule, should evidence be suppressed when law enforcement officers executed a search warrant by unannounced entry because they saw the defendant run into the apartment upon their arrival at the scene?

- B. Did the district court improperly exercise its discretion when it admitted into evidence photographs of the murder victim?
- C. In light of the provisions of the hearsay rule, did the trial court improperly admit into evidence the defendant's statements to his neighbor that he would kill his wife?
- D. Does the privileged communications statute allow the admission into evidence of the defendant's threats of physical harm to his spouse?

ASSIGNMENT 5

Restate the following point headings in a more persuasive manner.

- A. THE EVIDENCE WAS INCORRECTLY SUPPRESSED BY THE TRIAL COURT BECAUSE THERE WERE SUFFICIENT EXIGENT CIRCUMSTANCES AT THE SCENE.
- B. THE DENIAL OF THE DEFENDANT'S MOTION FOR MIS-TRIAL WAS NOT ERROR BY THE TRIAL COURT BECAUSE THE PROSECUTOR'S COMMENT ON THE DEFENDANT'S PRIOR CONVICTION WAS ADMISSIBLE.
- C. THE TRIAL COURT'S ALLOWANCE OF THE PEREMPTORY CHALLENGE WAS PROPER. THE CHALLENGE WAS NOT RACIALLY MOTIVATED.
- D. THE COURT SHOULD NOT GRANT THE DEFENDANT'S MOTION TO DISMISS

ASSIGNMENT 6

Restate the following rule of law presentations in a more persuasive manner.

- A. In determining whether an individual has constructive possession, the court decides whether the defendant had knowledge and control of the drugs.
- B. Under the first part of the test, it must be shown that the defendant had knowledge of the presence of the drugs.

- C. The court has stated that an arrest has taken place when a reasonable person would not feel free to leave.

ASSIGNMENT 7

The assignment is to prepare a trial court brief. The assignment contains the memo from the supervisory attorney that includes all the available facts of the case. Complete the brief based on these facts. When preparing the heading, use your name for the "To" line, and put "Supervisory Attorney" after the "From."

Following the assignment is a reference to the applicable enacted and case law. The first time you cite an opinion, use the citation format you are given for the opinion in the assignment.

For Example *Melia v. Dillon Companies, Inc.*, 18 Kan. App. 2d 5,846 P.2d G57 (1993).

This is how you should cite this opinion the first time it is used in the memorandum. If you quote the opinion provided in Appendix A, use a blank line to indicate the page number from which the quotation is taken.

For Example *Melia*, 18 Kan. App. 2d 5 at _____, 846 P.2d at _____.

Do not conduct additional research. Complete the assignment using the facts, enacted law, and case law contained in the assignment. For the purposes of the assignment, assume the cases have not been overturned or modified by subsequent court decisions. In most instances, a simple trial court brief such as the one presented in this assignment would not include a table of contents, table of authorities, or preliminary statement. It would be composed

of a question presented, statement of the case/facts, and argument sections. For the purposes this assignment, do not include a table of contents, table of authorities, or preliminary statement section. For the title page, use the format presented in the Trial Brief example in the Application section of this chapter. The court is the District Court and the State is New Mexico.

Memo:

To: (Your name)
 From: Supervisory Attorney
 Re: *White v. Calkin*, Civ. 01-388

Our client, Sage Rent-A-Car Inc., leased a vehicle to Jeffery Calkin. Mr. Calkin failed to stop at a stop sign and collided with Jane White, the plaintiff. Ms. White filed a negligence suit against both Mr. Calkin and Sage Rent-A-Car. In paragraph thirty-six of the complaint, plaintiff claims that Sage is required to carry insurance under the provisions of the Mandatory Financial Responsibility Act and therefore, under the act, has a duty to assume responsibility for this accident. When Sage incorporated, it filed a surety bond with the superintendent of insurance and is self-insured under the act. I do not read the act to extend liability to lessors for the damages that result from the negligent use of vehicles by lessees. Therefore, I plan to file a Rule 1-012B(6) motion to dismiss for failure to state a claim.

Please prepare a rough draft of a brief in support of the motion to dismiss.

Statutory Law:

NMRA 1-012B(6)—The rule provides in part, “the following defenses may at the option of the pleader be made by motion:

(6) failure to state a claim upon which relief can be granted;...”

New Mexico Mandatory Financial Responsibility Act, (MFRA), NMSA 1978 Sections 66-5-201 to 66-5-239.

MFRA, NMSA 1978 Section 66-5-205 (1998):

No owner shall permit the operation of an uninsured motor vehicle, or a motor vehicle for which evidence of financial responsibility as was affirmed to the department is not currently valid, upon the streets or highways of New Mexico unless the vehicle is specifically exempted from the provisions of the Mandatory Financial Responsibility Act...

MFRA, NMSA 1978 Section 66-5-218 (1988):

Evidence of financial responsibility, when required under the Mandatory Financial Responsibility Act, may be given by filing:

- A. evidence of a motor vehicle insurance policy
- B. a surety bond as provided in *Section 66-5-225* NMSA 1978 or
- C. a certificate of deposit of money as provided in *Section 66-5-226* NMSA 1978.

MFRA, NMSA 1978 Section 66-5-207 (1988):

The following motor vehicles are exempt from the Mandatory Financial Responsibility Act:

- E. a motor vehicle approved as self-insured by the superintendent of insurance pursuant to *Section 66-5-207.1* NMSA 1978;...

Case Law:

Las Lumarias of the N.M. Council v. Isengard, 92 N.M. 297, 300-301 (Ct. App. 1978). The following quote from the case is all that is needed for the assignment. “A motion to dismiss a complaint is properly granted only when it appears that the plaintiff cannot recover or be entitled to relief under any state of facts provable under the claim...”

Cordova v. Wolfel, 120 N. M. 557, 903 P.2d 1390 (1995) (see Appendix A).

ASSIGNMENT 8

Perform assignment 7 using the law from your state.

ASSIGNMENT 9

The assignment is to prepare a rough draft of the appellee's brief in opposition to the appellant's appeal of the trial court's denial of the motion to suppress evidence seized from appellant's suitcase. The plaintiff/appellee is the United States; the defendant/appellant is Arnold J. Stewart. The trial court ruled that the suitcase had been abandoned and therefore defendant did not have a reasonable expectation of privacy in the suitcase protected by the Fourth Amendment.

There are numerous cases that deal with the issue of abandonment of personal property, and an appellate brief would usually include references to at least several cases. This assignment is an exercise in preparing a very simple, single-issue appellate brief and is designed to acquaint students with its basic elements. Therefore, when performing this assignment, use only the constitutional and case law presented in the assignment. Do not perform additional research. Assume the cases have not been overturned or modified by subsequent court decisions.

Follow the format presented in the Appellate Court Briefs section of this chapter. The caption is presented below. Prepare a separate statement of the case and statement of the facts. Information necessary for preparing the brief is presented below. Note that the transcript pages (references to the trial court record) and docketing pages are referenced in parentheses.

When drafting the brief, include the references to the record in the brief. References to the case and statutory law are presented below. When citing the *United States v. Jones* case, use the citation instructions presented in assignment 7.

Facts: On October 15, 2007, Arnold Stewart arrived at the airport one hour and fifteen minutes prior to his scheduled flight (Tr. at 6). He was going to visit a friend in Chicago (Tr. at 7). He was carrying one

suitcase that he intended to carry on the flight (Tr. at 7).

His flight was scheduled to leave from gate 9, but he decided to wait at gate 8 because it wasn't so crowded (Tr. at 8). After a few minutes he decided to get something to eat (Tr. at 8). He approached Larry Holt who was also waiting at gate 8 and asked him if he would watch his suitcase (Tr. at 8). Stewart did not know Mr. Holt (Tr. at 8). Holt asked him how long he would be gone and Stewart replied, "Just a few minutes" (Tr. at 9). Holt said, "Well, OK" (Tr. at 9). Stewart then walked off (Tr. at 9). Across from where they were seated were several coin-operated lockers where Stewart could have placed the suitcase (Tr. 9–10). Stewart went to the food bar (Tr. at 10). There was a long line and he wasn't served for twenty minutes (Tr. at 10). On the way back to his seat he ran into an acquaintance and talked to him for several minutes (Tr. at 10). He didn't return to his seat in the gate area for forty-five minutes (Tr. at 13).

Meanwhile, after twenty minutes, Mr. Holt became concerned (Tr. at 41). He thought, "Where is that guy? I wonder if this suitcase contains a bomb" (Tr. at 41). The more he thought about it, the more concerned he became (Tr. at 41–42). He contacted airport security and expressed his concerns (Tr. at 42). Approximately a minute later Officer Robert Dwyer arrived (Tr. at 42). There was no nametag on the suitcase, no airline claim ticket attached, and no evidence of ownership on the exterior (Tr. at 71). In such situations airport policy is that the suitcase should be immediately inspected, then taken to the security office (Tr. at 72). Officer Dwyer inspected the suitcase and its contents at the scene (Tr. at 72). Upon opening the suitcase, he found a large bag that contained forty smaller bags of a white powdery substance (Tr. at 73). The substance was later identified as heroin (Tr. at 122). The suitcase was taken to the security office and federal officers were called (Tr. at 74).

Approximately forty-five minutes after he left, Stewart returned to his seat (Tr. at 13). Holt informed him that he thought Stewart had abandoned the suitcase so he turned it over to airport security (Tr. at 44). Stewart left the gate area,

went to the ticket counter, and asked for information concerning the next flight (Tr. at 14). The ticket counter is next to the security office (Tr. at 75). Stewart never entered the office to inquire about his suitcase (Tr. at 75). He was arrested when he went to the gate area and attempted to board his flight (Tr. at 91).

Information for Statement of the Case: On November 21, 2007, Arnold J. Stewart was indicted by a federal grand jury sitting in the District of Utah on charges of possession with intent to distribute more than 100 grams of heroin in violation of 21 U.S.C. Sections 841(a)(1) and 841(b)(1)(B) (Doc. at 5). On January 7, 2008, Stewart filed a motion to suppress the physical evidence (Doc. at 18). On February 14, 2008, the motion was denied. The trial court found:

Under the circumstances, for all intents and purposes the suitcase was abandoned.

The defendant did not express a possessory interest in the suitcase at any time after he learned its location.

Having been abandoned, the defendant had no expectation of privacy in it or its contents.

(Tr. at 40–41). On March 6, 2008, defendant entered a conditional guilty plea, reserving his right to appeal the suppression ruling (Doc. at 22). On April 27, 2008, the court sentenced Stewart to imprisonment for sixty months, to be followed by a three-year term of supervised release (Doc. at 55). Stewart filed his notice of appeal on April 29, 2008.

Constitutional and Case Law:

Amendment IV, U.S. Constitution

United States v. Arango, 912 F.2d 441 (10th Cir. 1990).

All you need to know for the purposes of this assignment is that the case stands for the proposition that one who has the right to possession of personal property has the right to exclude others from searching it.

United States v. Jones, 707 F.2d 1169 (10th Cir. 1983).
(See Appendix A.)

Prior Related Appeals:

There are no prior or related appeals in this case.

Caption:

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT
NO. 2007-123

UNITED STATES OF AMERICA

Plaintiff/Appellee,

vs.

ARNOLD J. STEWART,

Defendant/Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

ANSWER BRIEF OF APPELLEE



For additional resources, visit our Web site at www.paralegal.delmar.cengage.com



Additional assignments are located on the Student CD-ROM accompanying the text.