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## Appellate Briefs

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## I. Introduction

### A. Scope of the Chapter

**§9.1** This chapter explains and expands on MCR 7.212—the baseline brief-writing rule for the Michigan appellate courts. It governs briefing in both appeals of right and by leave in the Michigan Court of Appeals as well as applications for leave to that court. MCR 7.205(B)(1), (C)(1). The rules for appeals in the Michigan Supreme Court and the circuit court refer the reader back to MCR 7.212. MCR 7.105(B)(1)(c), (C)(1), .111, .305, .312. You cannot handle an appeal without understanding this rule.

The appellate brief is each party’s best and most important opportunity to win on appeal. Most appeals are largely decided by the time the judges finish reading the briefs. In cases where there is no oral argument, the briefs are an advocate’s only opportunity to address the appellate court. Consequently, your most important task as an appellate advocate is to write briefs that concisely assist the court in ruling for your client.

This chapter discusses the technical aspects of appellate brief writing and strategic issues to consider when drafting the brief. Failing to follow the technical rules can result in having your brief rejected by the court, losing the privilege to participate in oral argument, and squandering your credibility with the court. Most of these errors can be avoided by reading the court rules and using the sample checklists provided here and by the Michigan Court of Appeals. Because issues of strategy are more interesting and subject to fewer hard-and-fast rules, this chapter also offers a number of strategic considerations by way of practice tips.

Two overarching principles should inform your brief writing. First, always remember that your task is to help the judicial reader rule in your client’s favor. As U.S. Supreme Court Justice Antonin Scalia and author Bryan Garner explain,

“[t]he overarching objective of a brief is to make the court’s job easier.” *Making Your Case: The Art of Persuading Judges* 59 (2008). This requires vigilant attention to your reader. In the court of appeals, your brief will be read by a research attorney who provides a memorandum summarizing the case (and sometimes a draft opinion) for the judges on the panel. Next, your brief may be read by the judges’ clerks. Finally, your brief will be read by the three judges randomly assigned to decide your appeal. Although each of these readers has varying levels of experience, they are legal generalists. Consequently, in the words of one chief justice of the Michigan Supreme Court, “[t]he best advocates will . . . provide adequate contextual background on the technical aspects of the relevant facts and law to assist their readers in understanding the specific issues that their case[s] implicate[.]” Robert P. Young, Jr., Remarks at the Cooley Law Review Distinguished Brief Awards (July 11, 2012), in 29 *TM Cooley L Rev* 85, 91–92 (2012).

The second overarching principle is that appellate briefs should be succinct. This flows from knowing your audience. The Michigan Court of Appeals resolves more than 6,000 cases per year. 2012 Michigan Supreme Court Annual Report, at 7. Each month, each judge is confronted with a mountain of briefs and supporting materials, not to mention motions and applications for leave to appeal. Judges have little time to devote to each case. How can you help your judicial reader? Keep your brief concise by limiting the issues, presenting only the pertinent facts, avoiding lengthy string cites, and making your arguments succinctly. For more advice on good written advocacy, see *Making Your Case: The Art of Persuading Judges* by Justice Scalia and Bryan Garner; chapter 7 of Mayer Brown LLP’s *Federal Appellate Practice* (2008); and Judge Ruggeiro J. Aldisert’s *Winning on Appeal: Better Briefs & Oral Argument* (2d ed 2003).

## B. Initial Considerations

### 1. In General

§9.2 The best way to write a lengthy, unhelpful appellate brief is to sit down a day or two before the brief is due and start writing. A good appellate brief requires mastery of the record, mastery of the applicable law, and thoughtful reflection on what issues and arguments will resonate with the court. Some of the most important time you can spend during the brief-writing process is the time spent before you start writing. With that in mind, consider the following before writing your appellate brief.

### 2. Identify and Study the Record

§9.3 In each appeal, the Michigan Court of Appeals reviews the decision of a lower court for error based on the record before it. For that reason, an appellate court generally will not consider issues not raised in or ruled on by the lower court. See *Napier v Jacobs*, 429 Mich 222, 232–235, 414 NW2d 862 (1987). Its review is also limited to the record before the trial court at the time the trial court made its decision. Cf. *Butler v Ramco-Gerbenson, Inc*, 214 Mich App 521, 526 n4, 542 NW2d 912 (1995).

**Practice Tip:**

- Sometimes it is necessary to reframe the facts on appeal. This can be required when, for example, the trial court granted summary disposition based on a theory not advanced by a party. The appellate record includes all of the filings made before the decision being appealed. You may find useful evidence that was not attached to the dispositive motion briefing elsewhere in the trial court record.

**3. Master the Law**

§9.4 Mastery of the law includes actually reading the applicable statutes and regulations and identifying appellate decisions addressing the issue. As you review the law, consider how the position you want the appellate court to take best fits within or expands on the current law. An argument couched to seem consistent with existing law is almost always preferable to an argument requiring the court to break new ground.

**4. Identify Your Best Issues**

§9.5 After reviewing the record and mastering the caselaw, but before writing, you should spend some time identifying your best issues. Try to limit the number of issues presented to no more than three. In any given appeal, there can be any number of possible issues. Nothing in the court rules limits the number of issues you raise on appeal. But the more issues you raise, the more likely the court is to conclude that your case is weak. As the Sixth Circuit has said, “When a party comes to us with nine grounds for reversing the district court, that usually means there are none.” *Fifth Third Mortg Co v Chicago Title Ins Co*, 692 F3d 507, 509 (6th Cir 2012). Given the limited time the court has to devote to each case and the low overall reversal rate, your client and your judicial audience are best served if you present only your best arguments.

Consider the following factors when choosing which issues to raise on appeal:

- If you win on the issue, does your client win the case?
- What is the value of the issue to your client?
- What standard of review is applicable to the issue?
- How strong is your client’s argument on that issue?
- What harm resulted from the trial court’s error on the issue?
- Did the trial court make new law when it ruled on the issue?
- Are there damaging facts or issues that you can avoid by narrowing the issues on appeal?

**C. Illustrative Hypothetical**

§9.6 Consider the following hypothetical case. Jane White sues her former employer, Red Corporation, for discrimination. Red moves for summary disposition because White filed her complaint one day after the statute of limitations expired. The trial court denied the motion because it believed a longer statute of limitations applied, and the case went to trial. At trial, White is allowed to

introduce negative statements another employee made to her about Red Corporation. The jury finds for White under Michigan law and awards \$1 million in punitive damages even though there is no statutory basis for doing so. Red Corporation makes a motion for new trial, but the motion is denied.

On appeal, Red Corporation's lawyers could appeal the denial of summary disposition, the hearsay ruling at trial, the jury's verdict (through an appeal of the motion for a new trial), and the award of punitive damages. Nothing prevents Red Corporation from filing a lengthy brief addressing all of the issues. But the appellant is better off raising only the following issues: (1) denial of summary disposition on statute-of-limitations grounds—this issue could resolve the entire case in favor of Red Corporation; and (2) the award of punitive damages as a legal matter because it has a significant value to Red Corporation even though a reversal as to that issue will not result in a complete victory. The hearsay issue is subject to an abuse-of-discretion standard of review and could be considered harmless error. The appeal of the new-trial motion faces a difficult standard of review and will require the appellate court to overturn the work of the jury—something a court is loath to do. Red Corporation should tailor its appeal to the two issues on which it is most likely to prevail. By avoiding any issues that directly relate to trial, Red Corporation also minimizes the effect of the adverse jury verdict on the appeal.

## II. Fundamentals

### A. Filing and Service

§9.7 Briefs may be filed in person at any of the clerk's offices, by mail, or electronically. IOP 7.201(B)(3)-1. The clerk's offices are located in Detroit, Troy, Grand Rapids, and Lansing. MCR 7.201(B)(2). The offices will not accept documents by mail or personal delivery after 5:00 p.m. IOP 7.201(B)(3)-1. But the court's e-filing system accepts electronically filed documents until 11:59 p.m. each business day. AO 2014-23.

One copy of your brief must also be served on opposing counsel, and you must file a proof of service. MCR 7.212(A)(1)(b). See form 4.4 for a sample proof of service. If you electronically file and serve the brief, the e-filing system generates the proof of service.

All attorneys interested in electronic filing in the court of appeals or the supreme court must use the TrueFiling system, which replaced the court of appeals' previous Odyssey File & Serve system as of January 30, 2015. AO 2014-23 sets out the basic requirements and notes the likelihood that "e-filing will eventually become mandatory in both courts."

### B. Timing

§9.8 The time for filing the appellant's brief varies based on the type of order being appealed. In a child custody case or interlocutory criminal appeal, the brief must be filed within 28 days after the claim of appeal is filed, the order granting leave is certified, the transcript is filed with the trial court, or a settled statement of facts and certifying order is filed with the trial court or tribunal, whichever is later. MCR 7.212(A)(1)(a)(i); IOP 7.212(A)(1)-1. MCR