CHAPTER 5: WRITING AN APPELLATE BRIEF

A. Introduction

In most appeals, an initial brief, an answer brief, and a reply brief will be filed, in that order. The appellant, who filed the notice of appeal, will file the initial brief first. Then the other party, the appellee, will respond with an answer brief. Finally, the appellant can respond to the answer brief by filing a reply brief. In the case of extraordinary writs, a petition is filed as the brief. Extraordinary writ petitions are discussed in Chapter 10 of this Handbook.

Before writing an appellate brief, a party should review the appellate record to understand the history and facts of the case, research the law, and decide what arguments to make and issues to raise. The appellant will want to argue why the lower tribunal's decision or judgment should be reversed (why the lower court "erred"). And the appellee will want to argue why the decision was correct and should be upheld, or "affirmed."

Again, the initial brief is filed first by the appellant. The appellee does not file an answer brief until after the initial brief, because the answer brief will respond to the arguments in the initial brief. The reply brief is then filed by the appellant after, and in response to, the answer brief. Both the initial brief and the answer brief will contain a section called the statement of the case and facts. In this section, the briefs discuss the history and facts of the case. There must be no argument in the facts section. The initial and answer briefs will also contain argument sections. There will be a summary of the argument section, which is a short preview of the argument, and also a separate and longer argument section where the party will fully discuss all points on appeal. Initial and answer briefs should also state the standard of review. The reply brief will only need an argument section, since it just responds to the answer brief (and cannot add any new arguments). All appellate briefs should contain citations to the appellate record for any facts discussed, whether

in the facts section or the argument. All briefs should also contain citations to legal authority (statutes and case law) in the argument section.

As mentioned above, before a party writes an appellate brief, he or she should consider and study several things. For example, the party writing the appellate brief reads the record on appeal prepared by the clerk of the lower tribunal that entered the order or judgment appealed. This record will include the important pleadings filed in the case and should also include transcripts of any important hearings that were held that relate to the issues raised in the appeal.

The party writing the appellate brief also researches what law applies to the party's case and to the issues raised in the appeal. This may include statutes, case law, rules, or other sources of law. The party writing the appellate brief goes to a law library or does legal research on the computer to look for cases or statutes, preferably ones from the State of Florida, that support his or her argument. Then the party writing the appellate brief gathers together any statutes and case law that support the argument he or she is going to make in the appellate brief. This is because the Florida Rules of Appellate Procedure require the appellate party to specifically refer, or "cite," to those cases or statutes in the appellate brief to support his or her argument. Citations to legal authorities in the brief should follow the format for citations found in Florida Rule of Appellate Procedure 9.800.

B. Formatting for All Briefs

Florida Rule of Appellate Procedure 9.210 requires that all briefs have a specific format. Briefs must generally be printed or typed on opaque, white, unglossed paper. The paper size should be 8.5 by 11 inches. The paper should have margins of at least one inch on all sides. The lettering should be black. If a brief is typed on a computer, it must be double-spaced and use Times New Roman 14-point font, or Courier New 12-point font. Any headings or footnotes must

be the same font and size as the rest of the brief. Although typed briefs must be double spaced, headings, indented quotations, and footnotes can be single spaced.

The brief should have a cover sheet stating: the name of the appellate court; the case number the appellate court has assigned to the case, or a space to enter that number if it is a new case that does not have a number; the name or "style" of the case (i.e., John Smith v. Jane Doe); the name of the lower tribunal that entered the order or opinion on appeal; the name of the brief (i.e., initial brief of appellant John Doe); and the name and address of the person filing the brief.

Briefs filed in paper format should **not** be stapled or bound (except by paper clip or rubber band). This is a recent requirement that assists the clerks of court, who now have to scan paper briefs into the computer.

C. Contents of the Initial Brief and Answer Brief.

The initial brief is the first brief. It is filed by the appellant who filed the appeal. The appellant's initial brief is due within 70 days after filing the notice of appeal. An appellant who needs extra time to file the initial brief should file a motion for an extension of time in the appellate court before the deadline for the brief. Motion practice is discussed in Chapter 4 of this Handbook. The initial brief should set out the facts and history of the case in the statement of case and facts section. It should also present legal arguments explaining each reason the appellant believes the decision of the lower tribunal was wrong (i.e., erroneous) and why it should be reversed. The initial brief cannot be longer than 50 pages, not counting the pages used for the Table of Contents, Table of Citations, Certificate of Service, Certificate of Font Compliance and the signature block for the brief's author. A party can ask the court for permission to file brief longer than 50 pages, but such motions are rarely granted. And briefs are usually much shorter, often 20 to 30 pages or less.

The answer brief is the next brief. It is filed by the appellee within 20 days after the initial brief, again unless a motion for an extension of time is filed before the deadline. The answer brief responds to the arguments in the initial brief. It will argue why the lower tribunal's decision was correct and should be affirmed. Like the initial brief, the answer brief generally cannot be longer than 50 pages. Unlike the initial brief, the answer brief is not required to have a statement of the case and facts section, but it usually should have one to explain the case from the appellee's perspective. Although the appellee will argue in the answer brief that the appellant's arguments in the initial brief are incorrect, both sides must argue their positions respectfully and without name-calling or insults.

The initial brief and the answer brief will each have the following sections:

1. Table of Contents
2. Table of Authorities
3. Statement of the Case and Facts
4. Summary of the Argument
5. Standard of Review
6. Argument
7. Conclusion
8. Certificate of Service
9. Certificate of Font Compliance

1. Table of Contents

The table of contents lists the sections and issue headings in the brief, with the corresponding page numbers of where in the brief those sections and headings are. For example, a table of contents for an initial brief might look something like this in an appeal of a final judgment entered after a jury trial:

Table of Contents

2. Table of Authorities

The table of authorities (also called the table of citations) is similar to the table of contents. It is a list of the legal authorities (cases, statutes, and rules) referred to or "cited" in the brief to support the party's arguments, along with all of the page numbers where those authorities were cited in the brief. Cases are listed in alphabetical order. Statutes are listed in numerical order. Legal authorities are cited in the format required by Rule 9.800 of the Florida Rules of Appellate Procedure.

For example, a table of authorities in an appellate brief might look like this:

Table of Authorities

Smith v. Smith, 222 So. 2d 222 (Fla. 2d DCA 1999)	12, 15-16
§ 412.30, Fla. Stat. (2015)	11, 13, 18, 22
§ 720.000, Fla. Stat. (2015)	15

3. Statement of the Case and the Facts

Before writing the brief, the party will have reviewed the record on appeal that was prepared by the clerk of the trial court (or other lower tribunal) that entered the order or judgment being appealed. The statement of the case and facts explains to the appellate court, based only on the documents and evidence that are in the record, what the history and facts of the case are, and what occurred in the lower tribunal. This part of the brief is for facts only, **not** argument.

The appellate party may **not** discuss in the brief any fact or circumstance that is not in the appellate record, such as events occurring after the order or opinion on appeal was entered, or documents or evidence he or she did not present to or file in the lower tribunal. In any appellate brief, every sentence containing a fact must be followed by a citation referring to the page number of the record on appeal where that fact can be found or supported. Usually, the appellate party would refer to a page of the record in parentheses or brackets with an "R." followed by the volume and page number. Two common formats for citing the record volume and page numbers are, for example: (R. Vol. 1, pp. 1-8; R. Vol. 4, p.815), or [RI.1-8; RIV.815]. If there is a trial transcript in the record that has separate page numbers, the appellate party may refer to it as "T." followed by the page number. Citations in the statement of case and facts section of a brief might look something like this:

> This case arises from an automobile accident. [RI.12-18]. Plaintiff, Mr. Roberts, filed a lawsuit against Defendant, Ms. Wynn, alleging she was negligent in causing the accident and that he was injured as a result. [RI.12-18]. Defendant denied she was negligent or that the accident caused Plaintiff's alleged injuries. [RI.34-36; RII.205].

> At trial, Plaintiff's treating physician, Dr. John, testified Plaintiff was injured as a result of the accident. [T.235-40, 315-19]. Defendant's expert, Dr. Smith, testified that Plaintiff was not injured. [T.441-44, 448-52].

In the statement of the case and the facts section of an appellate brief, the party writing the brief will discuss:

(a) the type of case (civil, criminal, etc.), and nature of the appeal (such as an appeal from a final judgment or non-final order, etc.);

(b) the procedural history of the case in the lower tribunal, such as what documents, pleadings, or motions were filed and when; what arguments and positions the parties raised the lower tribunal; and what happened in the pre-trial and trial proceedings;

(c) the evidence that was presented to the lower tribunal at the trial or hearing, such as written documents and/or the testimony of witnesses; and

(d) the outcome of the trial, hearing, or other proceeding.

The appellate party drafting the brief includes in this section those facts that specifically relate to the issue he or she is arguing. For example, an appellant who is only arguing that the trial court erred in excluding certain evidence at trial probably would not need to discuss facts regarding jury selection in the brief. The statement of the case and the facts is usually presented in chronological order to make it easier for the appellate court to follow and understand.

4. Summary of the Argument

This section provides an overview of the arguments made in the appellate brief. It is much like a "road map" that previews the arguments. The summary of the argument is seldom longer than two pages, and is never longer than five pages. Since the summary of the argument is just a

short preview of the arguments, it generally does not need to have citations to the appellate record or legal authorities.

5. Standard of Review

While the standard of review does not have to be in a separate section, it must be included in the brief. If it is not in a separate section, it should be included in the argument section, at the beginning of each issue. Whether it is in a separate section or in the argument, the standard of review should be stated for each point on appeal. The standard of review is very short, usually just a sentence or two and often no longer than a paragraph. It tells the appellate court whether the issue raised on appeal is a question of fact, law, or both. This is important because the standard of review determines how much weight or "deference" the appellate court will give to, or how strictly it will question, the lower tribunal's rulings and decision.

Appellate courts give the greatest deference to a lower tribunal's findings of fact and discretionary decisions. Findings of fact are generally reviewed for "competent substantial evidence," meaning they will usually be upheld if supported by any competent evidence in the record. Discretionary decisions, such as rulings on evidence, are reviewed for an "abuse of discretion," meaning they will usually be upheld unless the decision was extremely unreasonable.

Appellate courts review pure legal issues, such as the interpretation of a statute, with the least amount of deference. This is called the "de novo" standard of review. Under this standard, appellate courts decide for themselves what the law says and what the decision of law should be, without deferring to the trial court's decision.

6. Argument

The argument section explains the party's legal arguments in the appeal and why the decision of the lower tribunal should either be affirmed or reversed. It discusses the relevant

statutes and case law, how the law applies to the facts in the case, and the party's arguments based on the law as applied to the facts. It explains the legal reasons why the order or judgment of the lower tribunal was either correct or incorrect, and what specific result, or "relief," the party wants in the appeal (i.e., what the party wants the appellate court to do). For example, an appellant may ask the appellate court to reverse the final judgment and return, or "remand," the case to the lower tribunal for a new trial, whereas an appellee may ask the appellate court in the answer brief to affirm the final judgment. The argument should be supported by references to legal cases, statutes, and rules that support that appellate party's argument that the lower tribunal decision was either correct or incorrect.

The argument is divided into specific legal issues. The argument section in the brief starts with an issue heading for each argument or point on appeal. In many cases, an appellant might only raise one or two specific issues. In other cases, the appellant might argue more than one or two issues, if he or she believes the lower tribunal made more errors. Each issue the appellant raises should have a reasonable basis in the facts and in the law. The appellant's issue or issues should be clearly and concisely stated. If the appellant is arguing more than one issue, the appellant usually starts with the strongest point first. Under each issue heading, the appellant discusses the case law, statutes, and rules that deal with the issue for that section.

The appellee's answer brief arguments respond to the argument issues raised in the initial brief. It often has the same or similar issue headings as the initial brief, to help the appellate court know which of appellant's initial brief arguments the appellee's answer brief is responding to. Like the initial brief, the appellee's answer brief should explain how the law applies to the facts and present his or her arguments in support of the outcome he or she wants in the appeal (usually affirmance). The answer brief arguments should also include citations to the legal authorities, cases, and statutes the appellee believes supports his or her position and arguments in the appeal.

7. Conclusion.

In the conclusion, the party tells the court what result or relief he or she wants in the appeal (i.e., what the party is asking the appellate court to do in the case). It is usually only a sentence or two in length, and should not be longer than one page. For example, the conclusion in appellate brief in an appeal from a judgment entered after a trial might look like this:

> Conclusion
>
> The appellant requests this Court to reverse the final judgment entered below with instructions to hold a new trial.

8. Certificate of Service

The brief should contain a certificate of service, in which the party filing the brief with the court affirms that he or she has sent, or "served," a copy of the brief to the opposing party (or their attorney if they have one) on a specific date and states the method of service, such as by mail, delivery, or service by e-mail (if the procedures for e-service are followed). The certificate of service must be signed by the appellate party and should include a signature block containing the appellate party's name, address and telephone number. For example, a certificate of service might look like this:

> I hereby certify that a true and correct copy of the foregoing document was furnished to _____ (name of opposing party), at (address, city, state, zip, and/or e-mail address), by (e-mail) (delivery) (mail) on _____ (date).
>
> JOHN DOE
> 222 N.W. 2nd Street
> City, State 11111
> Telephone: (234) 567-8901
>
> By: _____
> JOHN DOE

It is important for pro se litigants to remember that, generally, a party has to both file the brief with the court, and serve a copy on the opposing party. Pro se parties are generally permitted to serve documents by e-mail if they comply with certain requirements, which are set forth in detail in Florida Rule of Judicial Administration 2.516. In addition, most courts now allow (but do not require) electronic filing by pro se parties. *See* Florida Rule of Judicial Administration 2.525(c)-(d).

The requirements for electronic filing, even when it is available, often vary in different courts. Accordingly, pro se parties interested in electronic filing should consult the website or clerk's office of the particular court to find out if electronic filing is allowed, and, if so, the requirements for electronic filing and service by e-mail. *See also* Florida Rules of Judicial Administration 2.516 and 2.525(c)-(d). Unless electronic filing and service by e-mail is available, a brief must generally be filed by mail or delivery to the court, and served by mail or delivery to the opposing party.

9. Certificate of Font Compliance.

According to Florida Rules of Appellate Procedure 9.210(a)(2), the font of the letters in the brief must be either Times New Roman 14-point font or Courier New 12-point font. In the certificate of compliance, the appellate party states that the font and type size used in the brief complies with this Rule and signs below the statement. A certificate of compliance might look like this:

Certificate of Compliance
I certify that the size and style of type used in this brief is (Times New Roman 14-point Font or Courier New 12-point Font) and complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).
By: _____ JOHN DOE

D. The Reply Brief.

The Florida Rules of Appellate Procedure do not require that the appellant file a reply brief, but an appellant often should file a reply brief to respond to the arguments in the answer brief. The appellant's reply brief, if any, is due 20 days after the answer brief and responds to the answer brief arguments. The reply brief can be no more than 15 pages long, not counting the pages necessary for the Table of Contents, Table of Citations, Certificate of Service, Certificate of Font Compliance, and the signature block for the brief's author.

The reply brief typically includes the following sections:

1. Table of Contents
2. Table of Authorities
3. Reply Argument
4. Conclusion
5. Certificate of Service
6. Certificate of Font Compliance

The reply brief does not raise new arguments. Issues that were not raised first in the initial brief are generally waived. But, if new or different arguments are raised in the answer brief, the reply brief can respond to those argument. The key is that the reply brief responds to the answer brief arguments. It does not just repeat the initial brief, nor does it raise new arguments that were not in either the initial or answer brief. Although the appellant argues in the reply brief that the appellee's answer brief arguments are incorrect, the appellant, like the appellee, must do so respectfully and without name calling or insults.

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