



THE SCRIVENER: MODERN LEGAL WRITING

The Reference Brief

by K.K. DuVivier

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Just as teenage boys are eating machines, judges are reading machines. Judges on Colorado's Court of Appeals estimate that they read more than 27,000 pages of briefs in a year.¹ Consequently, these judges must read quickly and rarely have the luxury of reading something a second time. So, how can your brief stand out and earn a few more minutes of that judge's precious attention? Work to make your brief the "reference brief," the one the court will use as a frame of reference in crafting its opinion.

Judges read briefs looking for guidance from the parties about the correct law and the proper resolution of a case. Although it would be nice to assume that all of the briefs provide this guidance, many do not. Some briefs are unclear and contain obvious format and substantive errors. Consequently, in sifting through the submissions for a case, the judges and their clerks often lean more heavily on one party's brief over another as a starting point for their analysis.

The Qualities of a Reference Brief

What are some of the qualities of a reference brief? First, reliability: your tone and the accuracy of both the content and the form will reinforce that the court can count on you.² Second, the court wants candor in presenting both the facts and the law. Include all of the legally relevant facts: those favorable to your client's case and those unfavorable. If you try to hide information, you will lose credibility with the court. Furthermore, you can expect opposing counsel to present the information in a far less favorable light than you would. The court expects advocacy, so you can use persuasive techniques to minimize any negative impact.

Example from the State's brief in response to an opening brief in which the Defendant's action is only referred to as the "crime": "The 'crime' to which Defendant refers in the opening brief is murder: Defendant hacked the victim twenty

times with a kitchen knife until he collapsed, gurgling in pools of his blood."

Example of the Defendant's opening brief, being candid about the crime, but casting it in a more favorable light through juxtaposition and word choice: "After years of threats by Smith that he would kill her, Ms. Jones panicked when the much larger Smith pinned her in a corner of her kitchen. She still held the paring knife she was using to prepare her baby's dinner and lashed in Smith's direction until he backed off and fell, allowing her to grab the child and flee to the neighbors' home to call police. When the officers arrived, they advised Ms. Jones that Smith had died."

Third, other qualities the court seeks in a reference brief are structure and clarity. By focusing on your Table of Contents, you may be able to win the court over to your brief for reference even before the readers reach the Statement of Facts. Many writers dismiss the Table of Contents as simply a mechanical thing, a reiteration of the point headings. Instead, the Table of Contents can serve a much more useful function for readers of a brief.

If the point headings are well written, the Table of Contents can be a handy summary of the brief. The point headings should spell out key legal terms and facts to provide a short narrative outline of the argument for readers. Also, the Table of Contents should break the argument into section divisions and subdivisions to give readers a clear picture of the relationship of arguments and an obvious framework for understanding them better.

In addition, some lawyers use another technique to make their Table of Contents an appealing reference for the court:

DO YOU HAVE QUESTIONS ABOUT LEGAL WRITING?

K.K. DuVivier will be happy to address them through the *Scrivener* column. Send your questions to: kkduvivier@law.du.edu or call her at (303) 871-6281.



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they spell out in full the Questions Presented for Review. In this way, the readers can have all of the key information about the case on one page. Below is an abbreviated sample of a reference brief Table of Contents.³

Sample Table of Contents

Questions Presented for Review i

I. Does the 1974 amendment to the Freedom of Information Act, 5 U.S.C. § 552(a)(4)(E), permitting a court to award attorney fees to substantially prevailing complainants, permit fee awards to *pro se* litigants who are attorneys?

2. If so, does a court abuse its discretion by denying an award of attorney fees to a plaintiff who substantially prevails in a Freedom of Information Act suit when the defendant government agencies had no reasonable basis in law for withholding a majority of the documents eventually released, and the information revealed by the suit exposes illegal government activities that the plaintiff intends to disseminate to the public? ii

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I. An attorney *pro se* litigant is eligible to receive an award of attorney fees and litigation costs under the Freedom of Information Act ("FOIA") if he or she substantially prevails in a FOIA suit 5

A. The language of the 1974 FOIA amendment is plain that attorney *pro se* litigants need not literally incur attorney fees in order to be eligible for an award of fees 5

B. An award of fees to attorney *pro se* litigants promotes Congress's goal of facilitating private enforcement of the FOIA by removing economic barriers to litigation confronting potential litigants 6

II. The court below abused its discretion by denying attorney fees to Mr. Frank when he substantially prevailed in his FOIA suit 8

A. Because the public substantially benefited from Mr. Frank's FOIA suit and the government unreasonably withheld its records, the court below abused its discretion by denying Mr. Frank's request for attorney fees 11

B. Mr. Frank requested a reasonable fee award from the court to compensate him for the time he spent working on this FOIA suit 13

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Conclusion

In all the stacks of papers through which judges must sift, you want your brief to fall with the wheat, not the chaff. If you strive to make your brief a handy reference tool for the court, yours may earn some additional positive attention. This exposure may give you a better opportunity to more fully convince the court of the merits of your argument.⁴

NOTES

1. This estimate is based on an average of thirty pages per brief for each of the 100 cases that each judge must author, in addition to the remaining 200 cases each judge, along with two other members of a three-judge panel, must decide. The figure does not count the pages of opinions the judges read, including those from the federal courts and the Colorado Supreme Court, in addition to their own and those of other judges on the Court of Appeals. Information from Colorado Court of Appeals Judge James S. Casebolt from a program presented at the University of Denver College of Law on Judges' Day, April 8, 2004.

2. See DuVivier, "Reputation," 33 *The Colorado Lawyer* 53 (May 2004).

3. This sample is based in part on Shapo, Walter, and Fajans, *Writing and Analysis in the Law* 428, 4th ed. (New York, NY: Foundation Press, 1999).

4. My thanks to colleagues Anne Gill, Greg Kerwin, Walter Sargent, Andrew Heher, Diane Dodge, and Paul Kruege, who participated in a discussion of some of these ideas for reference briefs at the meeting of the Colorado Bar Association Appellate Practice Subcommittee in April 2004. Anyone who would like to attend one of the Subcommittee meetings should contact K.K. DuVivier, Chair of the Subcommittee (see contact information on the title page of this column). ■

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