

WRITING A KICK-ASS BRIEF

(MAY 2019)

Andrew Cohen

CPCS/CAFL Director of
Appellate Panel

What We'll Discuss

- Compliance with Rules and with non-Rule-based requirements
 - Best practices in format/structure of brief
 - Best practices in writing each part of brief
 - Your mentor's role in process
-

COVER PAGE

- Content required by Rule 20(b)
- Formatting
- Review it with your mentor *before* filing

IMPOUNDED

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

DOCKET NO. 2015-P-0858

Adoption of Sheila E.

On Appeal from Certain Judgments, Orders and Decrees of the
Barnstable (Orleans) Juvenile Court

**BRIEF OF APPELLANT-MOTHER,
LAILA E.**

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IMPOUNDED

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

DOCKET NO. 2016-P-0000

ADOPTION OF B. CHILDREN

ON APPEAL FROM CERTAIN JUDGMENTS, ORDERS AND DECREES
OF THE MIDDLESEX COUNTY JUVENILE COURT

BRIEF OF APPELLANT-MOTHER

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Bad Table

Pages should be aligned

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Please
proofread

alignment!

(A)

(B)

(A) = Header should be one sentence.

(B) = subheaders should be full sentences.

" should be indented to show that they fall within under header.
" should not have an "i" without an "ii" - either add an "ii" or eliminate the "i."

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ISSUES PRESENTED 1

- Whether the department failed to make reasonable efforts to reunify Father and Child. (Weak)
- Whether the department failed to make reasonable efforts to reunify Father with his son where it failed to schedule visitation between them, failed to provide Father with parenting classes, and failed to inform him of his son's special mental health needs. (Better)

ISSUES PRESENTED 2

The department is required, under §§ 1 and 29C of G.L. c. 119, to make reasonable efforts to reunify parents and children and to provide timely services to this end. Here, the department failed to schedule visitation between Father and his son, never provided Father with parenting classes, and never informed him of his son's mental health needs. Did the department fail to make reasonable efforts to reunify Father with his son? (Best)

INTRODUCTIONS

- Not forbidden by the Rules
 - Always use one unless case is hopeless loser
 - 1-3 paragraphs
 - What is the case about and why should you win
 - Put it before (or in first section of) the Statement of Case so it can color how the judges read the procedural history and facts.
-

STATEMENT OF THE CASE/ PROCEDURAL HISTORY

- Limit it to key people, dates, and hearings/ events.
 - Omit extraneous information (name of court investigator, dates of irrelevant hearings, etc.).
 - Make sure it contains record references.
-

FACTS 1 (REQUIRED STUFF)

- Record reference after each fact (or at end of sentence if only one fact in sentence). Rule 16(e).
- Include all facts used in Argument (no new facts in Argument)
- Include worst facts if trial court relied on them (no playing “hide the ball”)

FACTS 2 (TELLING A STORY)

- Make it clear why all these facts matter – explain up front what story you are going to tell
- Story not limited to Findings; you can use any evidence not discredited by the judge
- Use neutral headers to break story up
- Not same story as told by judge in Findings (unless appellee; but even then, be more interesting)
- Not longer than Argument

FACTS 3 (Story-Telling Techniques)

- Chronological? (Just don't start when Mom was born, unless that's really important.)
- Issue-by-issue?
- Thriller (starting at moment of highest drama)?
- Point in case where parent-client looked best?

FACTS 4 (STORY-TELLING TECHNIQUES)

- Pair bad facts with good facts:

Although Mother stopped seeing her psychiatrist three months before trial, she always took her medications and regularly attended her therapy appointments.

- “Hide” bad facts in the middle of paragraphs, and hide those paragraphs in the middle of the Facts section (primacy and recency)

FACTS 5 (STORY-TELLING TECHNIQUES)

- Summarize related bad events.

For example, instead of giving many pages of details about three 51As against the client, try:

Between March 3 and April 1, 2014, three reports were filed against Mother alleging neglect of Kim. (RA. 23, 34, 56).

Don't emphasize the negative with details.

Facts 6 (Story-Telling Techniques)

- Summarize when describing a bad event.

For example, instead of giving pages of details about a screaming fight between the client and her boyfriend, try:

In March 2016, Mother and her boyfriend were overheard yelling at each other. (Tr. 23; RA. 77; F. 48). Although no one was harmed, the boyfriend was arrested. (Tr. 25; RA. 78; F. 48).

Don't paint a picture of the bad event!

FACTS 7 (STORY-TELLING TECHNIQUES)

- Use detail when describing a good event.

For example, instead of stating:

On July 8, 2015, Father visited with the Child. The visit went well. He visited with the Child three more times in 2015, and those visits also went well.

Give detail. *How* did they “go well”? Were there hugs and kisses at the start of the visits? At the end? Did the kids cry at the end and beg for Father to stay? High fives? Paint a *picture*.

FACTS 8 (STORY-TELLING TECHNIQUES)

- Don't clutter your story with long lists of service plan tasks that are repeated in subsequent service plans. If you must mention all the tasks, use bullet points and short forms for the tasks:

In the June 2016 service plan, DCF asked Mother to:

- Attend therapy
- Take all of her prescription medications
- Visit her children regularly, and
- Keep Father out of the home. (RA. 243).

Mother did none of those things. [*From an appellee brief*]

SUMMARY OF THE ARGUMENT

Mass. R. App. P. 16(a)(4):

- Must include Summary if more than 20 pages of Argument (or 4,500 words if proportional font used)
- Must be in paragraph form
- Must include page references to corresponding Argument
- Must be condensation of Argument, not mere repetition of Argument headers

ARGUMENT 1

- Have pre-drafting moot or meaningful pre-briefing discussion with mentor re what case is really about.
 - Work through with mentor:
 - What was the error (evidentiary, procedural, other)?
 - Was error preserved? If not, can you “preserve” it with post-trial motion?
 - Was error harmful? How? (Don’t brief harmless errors unless you have nothing else to argue).
 - A theory of the appeal.
-

ARGUMENT 2

Argument Headers

- Structure
 - One sentence only (complete sentence; not a fragment)
 - Argumentative, not neutral (neutral is for Facts headers)
 - Should include law *and* facts
 - Ex.: I. The juvenile court violated Father's due process right to be meaningfully heard at trial when it refused to give him a Portuguese interpreter and instead forced him to rely on his daughter – who was not fluent in Portuguese – for in-court translation services.
- Arguments headers and sub-headers, read alone, should give reader a road-map of your Argument

ARGUMENT 3

No big blocks of boilerplate standards to start brief or sections of brief; weave them in. For example:

Finding 229 is the underpinning of the court's determination that post-adoption contact is not in the Child's best interests. In Finding 229, the court found that the Child wet his bed for a week after visits with Mother. But that Finding is clearly erroneous because there is no evidence to support it. See Custody of Eleanor, 414 Mass. 795, 799 (1993). The evidence showed that the Child wet his bed after visits with *Father*, not Mother. (Tr. 233; RA. 401).

ARGUMENT 4

Explain purpose and structure of each section before giving lots of law and facts (so that judges have context).
For example:

The judge had three bases, each amply supported by the record, for finding Father unfit. First, the judge relied on Father's long record of domestic violence. Second, the judge relied on . . .

Then follow that introductory paragraph with three sections about the Father's unfitness, starting with DV. The judges now have a roadmap and context for the facts and law that follow.

ARGUMENT 5

Avoid eye-glaze and skimming:

- Avoid block quotes. If you use one, explain first what the quote is about and why it's important.
 - Avoid string cites. If more than one case mentioned, use parentheticals to explain why each case is important.
 - Avoid long paragraphs.
 - Avoid any paragraphs of lists (use bullet points instead)
-

ARGUMENT 6

Case Law

- Make sure case law is right (i.e., don't rely on App. Ct.'s Hugo, Georgette, or Inez)
- Make sure cases cited are up-to-date law (i.e., don't rely on Vito unless also citing Rico and Ilona; don't rely on Galvin without citing Jamison)
- Make sure citation forms are correct. The judges and law clerks care about the Bluebook.

CONCLUSION 1

- Don't just say, "For the reasons set forth above, . . ."
- Remember primacy and recency; judges will remember the *last* thing they read. So write a short, pithy paragraph about why you should win.
 - Reek with injustice?
 - A short policy reason?
 - Garner: use 2 words not used earlier in brief
- And then, only then, explain the precise relief you want.

CONCLUSION 2

Think through the proper relief and ask for it.

- Affirm termination decree in all respects?
- Affirm unfitness finding but vacate termination decree and remand for new hearing on plan/post-adoption visitation?
- Vacate decree and remand for new trial on all issues?
- Vacate termination decree and remand for trial court to reopen evidence to consider X?
- Vacate termination decree and remand to trial court with instructions to do X, Y, and Z?
- Something unique?

Be specific. Panel needs guidance. And consider a fallback.

PROOFREADING

- Proofread your brief.
 - Error-free cover and table of contents is essential.
 - Double-check margins.
 - Send PDF of entire brief to mentor for sign-off.
 - Make sure that copies to be filed have all pages.
Don't e-file or bind prematurely!
-

FINAL APPROVAL BY MENTOR

- Mentor must approve “final” brief before it’s filed.
 - Build in time for your mentor’s final review; don’t give it to mentor for editing Sunday night when the brief is due on Monday.
-

SEND BRIEF TO CAFL

- Send Word or PDF version of brief (without addenda) to Rita Caso, CAFL Assignment Coordinator, at rcaso@publiccounsel.net
- In email, include your NAC number.
- We log briefs into our database and save them.

RESOURCES FOR BRIEFS

- CPCS/CAFL website

[https://www.publiccounsel.net/cafl/professional/
appellate-practice-tools-and-resources/](https://www.publiccounsel.net/cafl/professional/appellate-practice-tools-and-resources/)

Or just go to www.publiccounsel.net

On banner across top, hover over “Our Organization”

Click on “Children and Family Law Division”

Click on “Appellate Resources”

At bottom of left side, see “Writing Tips & Practice Tools” (and lots of other stuff, too)