

CPCS CRIMINAL APPELLATE BRIEF WRITING WORKSHOP

March 30, 2017

DRAFTING HEADINGS AND TABLES OF CONTENTS

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The table of contents to a brief and the headings that comprise it are extremely important parts of the brief, because they provide the Judges with information they need in order to understand an argument, and a judge must understand your argument before she can be persuaded by it. Readers assimilate information best when they are introduced to information in general terms before they read the details, and when they are provided with a focus for the information so that they can understand its significance as they read it. The table of contents and headings provide this information. To understand an argument, the judge also needs to understand its overall structure and how it is organized. A table of contents, which is composed in the form of an outline, make the overall structure explicit. Readers assimilate information best when it is presented to them in well-defined sections. The outline form of the table of contents divides the argument into these discrete sections, which are defined by the headings and subheadings. Because of this, the table of contents and headings are not extraneous, but essential.

This kind of information is referred to as “meta-information.” which is information about information. Meta-information makes explicit the organization and significance of the information to which it refers. In a brief, the table of contents and headings constitute this meta-information. Because meta-information is so important to a reader’s understanding, it is invariably the first thing that the judges read when they open up a brief. Hence the table of contents leaves the judges with their first impression of the case. Because first impressions are very powerful, the brief writer wants the judge’s first impression of the case to be favorable. So the table of contents and headings must not only orient the judge, provide a focus, and demonstrate the significance of the information in the argument, they must also *persuade*. In order to be effective, the brief writer must draft the headings and organize the table of contents in order to accomplish these goals.

Below is a discussion of how to draft headings so that they both orient and persuade the reader. The first section concerns drafting to persuade. The second section concerns writing techniques to use in drafting.

Persuasive headings: Conclusion and premise

In order to persuade a judge, he must be presented with *facts*. Headings that constitute mere statements of law do not have a persuasive quality because they do not provide the judge with

grounds for deciding the issue. To be persuasive a heading should follow a logical structure known as “conclusion and premise.” The conclusion is a proposition the writer wants the reader to accept as true. It is followed by one or more premises, which are statements that the reader can be expected to accept as true. The information should be organized so that if the reader accepts the premises, she must accept the conclusion. This is a powerful technique for persuasion because this is the way people think in order to make decisions.

Indeed, we use the conclusion / premise form every day: “You should buy that car (conclusion) because it is a good deal and in good mechanical shape (premises).” Similarly, in legal argument the premise must consist of facts. “The search warrant was not supported by probable cause because the confidential informant had never been to the premises before and had no history of providing accurate information.” Grammatically, a heading constructed in the conclusion / premise formation will be bisected by the term “because.” The term “because” tells the reader that she has just read the conclusion and is now going to be given the premises that support the conclusion. In other words, “because.” indicates that what follows constitutes facts that show why the proposition at the beginning of the sentence is true.

In logic and in legal argument the premises themselves become conclusions that must be supported by more detailed premises. In the example above, the premise “it is a good deal,” becomes a conclusion supported by the premise “because it is below market value.” But that premise will not be persuasive unless and until it is supported by facts: “the asking price is \$3000 and the market price is \$7000” If the reader accepts those facts, they will reach the conclusion that the car is below market value, and so is a good deal, the ultimate conclusion you want him to reach.

The search and seizure example is more challenging, because the conclusion consists of “negative facts,” in other words, things that *did not* happen. To support a negative fact conclusion, the writer should study the case law for facts that would *defeat* her argument, and then show that those facts were absent in her case. For example. In the search and seizure example, the premise supporting “the confidential informant had never been to the premises before,” could be “no police officer had ever seen him go into or come out of the apartment and no witness had told the police that he had been in the apartment.” (Because the Commonwealth has the burden of proof in so many areas of criminal law, it is often necessary to provide premises that support conclusion based on negative facts.)

This conclusion / premise form, where a premise becomes a conclusion that must be supported by a new premise and so forth, is reflected in the headings, subheadings, and sub-subheadings that make up a table of contents and, indeed, the structure of the brief itself. Identifying these steps is an important part of composing an argument, which will then be reflected in the headings and subheadings of the table of contents.

This is a good place to point out that table of contents and its headings can only be as good as the argument they point to. If the argument is disorganized, illogical, or incomplete, so will be the table of contents. One way to avoid this is to work from an outline, so that your argument is logical and well organized. The outline and its topics will eventually become the table of contents and its headings.

Using subheadings

Subheadings are a very important part of a table of contents. The more detailed the table of contents is, the more meta information the judge will have to orient her and provide the necessary focus, and the more information the writer can provide in order to make the table of contents persuasive. An argument that consists of only a single main heading does not provide the judge with enough meta-information. Some writers try to solve this problem by loading up the main heading with information. But, in order for meta-information to be effective, the reader must be able to absorb it quickly and easily. If the Judge gets bogged down in reading the heading, it will not help her understand the detailed information to follow. Similarly, a heading that contains too little of the necessary information is also unhelpful. Headings that are too concise, as for example, "The judge erred in denying the motion to suppress", do not provide the reader with enough information to understand the detailed information to follow. Likewise, long detailed headings that contain extensive statements of law and facts are also unhelpful because they are so difficult to understand, particularly when presented in the form of incomprehensible run-on sentences.¹ In other words, the information shouldn't be too little, and shouldn't be too much.

One very effective way to approach composing the headings to avoid these problems is to place the conclusion in the main heading and the premises in the subheadings. Because it is often difficult if not impossible to include all the necessary information in the main heading and still keep the main heading short, detailed premises that support the general proposition contained in main heading can be placed in the subheading. Using subheadings, and sub-subheadings if necessary, allows you to distribute the premises to the particular sections to which they apply, and so keep the headings to a length that is easy to understand.

Here are some examples that illustrate these principles.

¹Such headings, however, when broken down to grammatical sentences, can work well as introductions when placed at the beginning of the argument.

Commonwealth v. Lupericio Paiva

THE JUDGE VIOLATED THE DEFENDANT'S CONSTITUTIONAL RIGHT TO PRESENT A COMPLETE DEFENSE BY EXCLUDING EVIDENCE THAT THE DEFENDANT'S SISTER OBSERVED THE DEFENDANT'S DRUG DEPENDENT BEHAVIOR.

- A. The defendant had the right to introduce evidence of his drug dependency because it was relevant to his defense that he possessed the drugs for his own personal use and not for distribution.
- B. The judge erred in excluding the sister's testimony on grounds that she was not an expert because lay witnesses may testify to a physical condition they have observed and the sister observed defendant using drugs, intoxicated, and in withdrawal, behavior consistent with drug dependency.
- C. The exclusion of his sister's testimony was prejudicial and not harmless because the Commonwealth offered neither direct observations of distribution nor seized items that supported an inference of distribution.

Note that the heading and subheadings when combined could be reformatted into a single paragraph that could be read as an introductory paragraph to the argument. This is a good test to see how complete and cogent an outline is.

Commonwealth v. Eduardo Cardoza *(The issue raised in the original case is modified in this example.)*

THE JUDGE ERRED BY EXCLUDING DNA EVIDENCE OF A HAIR FOUND IN THE RAPE VICTIM'S PUBIC AREA THAT BELONGED NEITHER TO THE VICTIM NOR THE DEFENDANT BECAUSE THE EVIDENCE WAS RELEVANT TO THE DEFENSE WAS MISIDENTIFICATION.

- A. The exclusion violated the defendant's Constitutional right to present a complete defense because the government's DNA testing of the hair tended to prove that another person committed the crime.
- B. The Rape Shield Statute does not bar introduction of the foreign public hair because the evidence was not offered as evidence of the victim's sexual history, but to prove that the defendant had been misidentified.

- C. The judge's ruling was not harmless because there was no corroborating evidence to support the victim's single eyewitness identification and the victim was intoxicated at the time of the incident.