CHAPTER 9
Brief Writing

This chapter addresses the rules governing the filing of briefs with the appellate courts and provides suggestions for crafting an effective brief.

Consult the appropriate rules before starting to format your appellate brief, and review the "Brief Checklist" in Chapter 12, § 12.35, *infra*.

The rules are found in the Kansas Court Rules Annotated, an annual publication of the Kansas Supreme Court. Check the rules online to determine whether there have been any recent amendments. http://www.kscourts.org/rules/New_Rules_and_Amendments.

§ 9.1 Time Schedule for Briefs–Rule 6.01

Computation of Time

K.S.A. 60-206(a) and (d) address how to compute time for the purpose of determining a brief due date. For a more detailed discussion of time computation, see § 7.9, *supra*.

> **PRACTICE NOTE:** When a brief due date is counted from a prior service date, the appellate clerk's office will add the three-day mail time if service has been perfected under K.S.A. 60-206(d).

Appellant's Brief

If no transcripts were ordered or if all transcripts ordered were filed with the clerk of the district court before docketing, an appellant's brief is due within 40 days of the date of docketing. Rule 6.01(b)(1)(A).

If a transcript was ordered but was not filed prior to docketing, an appellant's brief is due within 30 days of service of the certificate of filing of the requested transcript. Rule 6.01(b)(1)(B).

If the record on appeal includes a statement of proceedings under Rule 3.04 or an agreed statement under Rule 3.05, an appellant's brief is due within 30 days after the filing of the statement with the district court. Rule 6.01(b)(1)(C).

Appellee's Brief or Appellee/Cross-Appellant's Brief

The brief of an appellee or an appellee/cross-appellant is due within 30 days after service of the appellant's brief. Rule 6.01(b)(2).

Cross-Appellee's Brief

The brief of a cross-appellee is due within 21 days after service of the cross-appellant's brief. Rule 6.01(b)(3).

Appellee/Cross-Appellee's Brief

The brief of an appellee/cross-appellee is due within 21 days after service of the appellee/cross-appellant's brief. Rule 6.01(b)(4).

Reply Brief

A reply brief is due within 14 days after service of the brief to which the reply is made. Rule 6.01(b)(5).

Rule 6.05 explains when a reply brief may be submitted and what a reply brief must contain.

> **PRACTICE NOTE:** A reply brief that is bound with a cross-appellee brief would be due 21 days after service of the appellee/cross-appellant's brief.

Extensions of Time

K.S.A. 60-206(b) addresses the extension, by the court, of the time to file a brief. See also Rule 5.02 and § 7.30, *supra*.

§ 9.2 Content of Appellant's Brief–Rule 6.02

An appellant's brief *must* contain:

- A table of contents that includes page references to each division and subdivision in the brief and the authorities relied upon. Rule 6.02(a)(1).

- A brief statement of the nature of the case and the nature of the judgment or order from which the appeal is taken. Rule 6.02(a)(2).
- A brief statement of the issues to be decided on appeal. Rule 6.02(a)(3).

  PRACTICE NOTE: Rule 6.02(a)(3) specifies that this statement must be brief and without elaboration. Because the court will read the statement of the issues before reading the facts of the case, an elaborate issue statement may confuse, rather than clarify. Moreover, the court has only two options when faced with a lengthy issue statement: to read it or to skip it. If it chooses the former, a lengthy issue statement will likely render some of the following argument redundant. If it chooses the latter, the lengthy issue statement has only wasted precious space.

- A concise but complete statement, without argument, of the facts that are material to determining the issues to be decided in the appeal. The facts must be keyed to the record on appeal by volume and page number. For example, (R. I, 23). The court may presume that any factual statement made without such a reference has no support in the record on appeal. Rule 6.02(a)(4). See *In re Care & Treatment of Hay*, 263 Kan. 822, 835, 953 P.2d 666 (1998).

  PRACTICE NOTE: Under Rule 3.02, the clerk of the district court furnishes a copy of the table of contents of the record on appeal to each party. That table of contents shows the volume and page number of each document in the record; all parties should cite to it. Contact the district court clerk if you are writing a brief and have not received a copy of the table of contents.

  This section must include *all* of the material facts and *only* the material facts. Avoid statements such as, "Further facts will be developed as necessary." Also avoid setting up an issue that will not be raised. For instance, if the brief will not include an argument that the district court erred in denying a motion to suppress, including facts about the motion

and the hearing on the motion in the statement of facts serves only as a distraction. Finally, include – but minimize – negative critical facts. Rambo and Pflaum, *Legal Writing by Design* § 21.6, p. 371 (2001).

- The arguments and authorities relied on, separated by issue if applicable. Each issue *must begin* with a citation to the appropriate standard of review. Each issue *must begin* with a pinpoint reference to the location in the record on appeal where the issue was raised and ruled on or, if the issue was not raised below, an explanation why the issue is properly before the court. Rule 6.01(a)(5). "Issues not raised before the district court generally cannot be raised on appeal. Exceptions may be granted if: (1) the newly asserted theory involves only a question of law arising on proved or admitted facts and is finally determinative of the case; (2) consideration of the theory is necessary to serve the ends of justice or to prevent denial of fundamental rights; or (3) the district court's judgment may be upheld on appeal despite its reliance on the wrong ground." *State v. Foster*, 290 Kan. 696, 702, 233 P.3d 265 (2010). The appellant must identify *which* of these exceptions applies *and why* it is applicable. *State v. J.D.H.*, 48 Kan. App. 2d 454, 459, 294 P.3d 343 (2013).

  PRACTICE NOTE: When it comes to authorities, choose quality over quantity. String cites are almost always unnecessary. Berry, *Effective Appellate Advocacy: Brief Writing and Oral Argument*, p. 122 (4th ed. 2009).

An appellant's brief *may* contain:

- An appendix – without comment – consisting of limited extracts from the record on appeal that are critical to the issues to be decided. The appendix is for the court's convenience and is not a substitute for the record itself. It is inappropriate to attach as an appendix any item that is not a part of the record on appeal. See *Haddock v. State*, 282 Kan. 475, Syl. ¶ 21, 146 P.3d 187 (2006) ("An appendix to an appellate brief is not a substitute for the record on appeal, and material so attached will not be considered by this court.") The brief may make reference to the appendix,

but must also include the required reference to the volume and page number of the record on appeal. Rule 6.02(b).

§ 9.3 Content of Appellee's Brief–Rule 6.03

An appellee's brief *must* contain:

- A table of contents that includes page references to each division and subdivision and the authorities relied upon. Rule 6.03(a)(1).
- A statement either concurring in the appellant's statement of the issues involved or stating the issues the appellee considers necessary to disposition of the appeal. Rule 6.03(a)(2).
- A statement, without argument, of the facts *or* a statement concurring with the appellant's statement of facts, including corrections or additions if necessary. The facts must be keyed to the record on appeal by volume and page number. The court may presume that any factual statement made without such a reference has no support in the record on appeal. Rule 6.02(a)(4); Rule 6.03(a)(3).
- The arguments and authorities relied on, separated by issue if applicable. Each issue *must begin* with a citation to the appropriate standard of review. Appellee must either concur with the appellant's suggested standard of review or cite authority to the contrary. Rule 6.03(a)(4).

If the appellee is also a cross-appellant, the brief must also contain:

- A separate section for the cross-appeal, including content similar to the content required for an appellant's brief under Rule 6.02. This section should avoid duplicating statements, arguments, or authorities contained elsewhere in appellee's brief. To avoid such duplication, the appellee may make references to the appropriate portions of its brief. Rule 6.03(a)(5).

An appellee's brief *may* contain:

- An appendix – without comment – consisting of limited extracts from the record on appeal that are critical to the issues to be decided. The appendix is for the court's convenience and is not a substitute for the record itself. It is inappropriate to attach as an appendix any item that is not a part of the record on appeal. The brief may make reference to the appendix but must also include the required reference to the volume and page number of the record on appeal. Rule 6.02(b); Rule 6.03(b).

§ 9.4 Content of Cross-Appellee's Brief–Rule 6.04

A cross-appellee's brief *must* contain:

- Content similar to the content required for an appellee's brief under Rule 6.03. The brief should avoid duplicating statements, arguments, or authorities contained in the brief of the appellant or cross-appellant. To avoid such duplication, the cross-appellee may make references to the appropriate portions of the opposing brief. Rule 6.04.

§ 9.5 Reply Brief–Rule 6.05

Rule 6.05 permits the filing of a reply brief *only when made necessary by new material* contained in the brief of the appellee or the cross-appellee.

If a reply brief is appropriate, it *must* include a specific reference to the new material being rebutted and be combined with the cross-appellee's brief in a separate section if filed by a cross-appellee. Rule 6.05.

A reply brief *may not* include any statements, arguments, or authorities already included in a preceding brief, except by reference. Rule 6.05.

> **PRACTICE NOTE:** The party filing the reply brief may not use the reply brief to raise additional issues. *State v. McCullough*, 293 Kan. 970, 984-85, 270 P. 3d 1142 (2012).

§ 9.6 Brief of *Amicus Curiae*–Rule 6.06

A brief of an *amicus curiae* may only be filed when the party filing the brief serves an application to file the brief on all parties and files it with the clerk of the appellate courts *and* the appellate court enters an order granting that application. Rule 6.06(a).

> **PRACTICE NOTE:** The application to file an *amicus* brief should state substantial reasons supporting the request and be filed as early in the appellate process as possible.

The brief must be filed at least 30 days before oral argument and served on all parties. Rule 6.06(b). A party may respond to the brief within 21 days of the filing of the brief. Rule 6.06(c).

An *amicus curiae* is not entitled to oral argument. Rule 6.06(d).

§ 9.7 Format for Briefs--Rule 6.07

A brief that does not conform substantially with the provisions of Rule 6.07 will not be accepted for filing. Rule 6.07(g). See § 12.36, *infra*, for a sample brief.

The brief must be printed on 8½" by 11" white bond paper. Rule 6.07(a)(1). The brief must be reproduced by a process that yields a clear black image on white paper. The paper must be opaque and unglazed. Only one side of the paper may be used. Rule 6.07(a)(5).

The color of the brief cover must correspond to the party filing the brief:

- Appellant — yellow.
- Appellee, appellee/cross-appellant, or appellee/cross-appellee — blue.
- Cross-appellee or cross-appellee/reply — yellow.
- Intervenor or *amicus curiae* — green.
- Reply — grey. Rule 6.07(b)(1).

The cover of the brief must include:

- The appellate court docket number.

- The words "IN THE COURT OF APPEALS OF THE STATE OF KANSAS" or "IN THE SUPREME COURT OF THE STATE OF KANSAS," whichever is appropriate.
- The caption of the case as it appeared in the district court, except that a party must be identified not only as a plaintiff or defendant but also as an appellant or appellee.
- The title of the document, *e.g.*, "Brief of Appellant" or "Brief of Appellee," etc.
- The words "Appeal from the District Court of _____ County, Honorable _____ _____, Judge, District Court Case No. _____".
- The name, address, telephone number, fax number, e-mail address, and attorney registration number of *one* attorney for each party on whose behalf the brief is submitted. An attorney may be shown as being of a named firm. Additional attorneys joining in the brief *must not be shown* on the cover but may be added at the conclusion of the brief.
- The words "oral argument" on the lower right portion of the brief cover, followed by the desired amount of time, if additional time for oral argument is requested in the Supreme Court under Rule 7.01(e) or in the Court of Appeals under Rule 7.02(f). Rule 6.07(b)(2).

The brief must not exceed the following page limits, excluding the cover, table of contents, appendix, and certificate of service, unless the court orders otherwise:

- Brief of an appellant — 50 pages.
- Brief of an appellee — 50 pages.
- Brief of an appellee and cross-appellant — 60 pages.
- Brief of an appellee and cross-appellee — 60 pages.
- Brief of a cross-appellee — 25 pages.
- Reply brief — 15 pages.
- Brief of an *amicus curiae* — 15 pages. Rule 6.07(d).

Any motion to exceed these page limitations must be submitted *before* submission of the brief and must include a specific total page request. The court may rule on the motion without waiting for a response from any other party. Rule 6.07(e). The appellate court hearing a matter may order briefs to be abbreviated in content or format. Rule 6.07(f).

The text must be in black type or print in a conventional-style font at least 12-point. Rule 6.07(a)(1) and (a)(2).

Text must be double-spaced except block quotations and footnotes, which may be single-spaced. The text must not exceed six inches by nine inches, excluding page numbers. Rule 6.07(a)(2).

The margins must be at least 1 ½ inches on the left, and at least 1 inch on the top, bottom and right. Rule 6.07(a)(3).

> **PRACTICE NOTE:** Cheating on font size, margins, and spacing in order to comply with the page limits "'tells the judges that the lawyer is the type of sleazeball who is willing to cheat on a small procedural rule and therefore probably will lie about the record or forget to cite controlling authority.'" Rambo and Pflaum, *Legal Writing by Design* § 20.3, p. 344 (2001) (quoting Judge Alex Kozinski, *The Wrong Stuff*, 1992 B.Y.U. L. Rev. 325 at 327).

Footnotes should be avoided. If they are *absolutely necessary*, each footnote *must* begin on the same page as the text to which it relates. Rule 6.07(a)(4).

Binding

- If a brief exceeds 15 pages, at least 10 of the required 16 copies must be assembled with full-length spiral binders on the left side.
- The remaining copies (and briefs not exceeding 15 pages) may be fastened together by staples or brads. Rule 6.07(c).

Filing of E-brief on CD-ROM

- Parties and *amici curiae* may and are encouraged to submit briefs on a CD-ROM disk (an e-brief) in addition to

submitting the requisite number of printed briefs required by Rule 6.09.

- An e-brief must comply with the current technical specifications available from the clerk of the appellate courts or posted at www.kscourts.org. An e-brief must be identical in content and format — including page numbering — to the printed version, except that an e-brief also may provide electronic links (hyperlinks) to the complete text of any authority cited in the brief and to any document or other material included in the record on appeal.
- An e-brief must be accompanied by a statement that verifies the absence of computer viruses and describes the software used to ensure that the e-brief is virus-free.
- If an e-brief is filed under this subsection, not fewer than 5 CD-ROM disks of the brief must be filed, with proof of service of at least one disk on each party to the appeal.
- An e-brief, if filed, must accompany printed copies of the brief. Rule 6.07(h).

§ 9.8 Reference within Brief–Rule 6.08

Unless the context particularly requires a distinction between parties as appellant or appellee, refer to the parties in the body of a brief by their status in the district court, *e.g.*, plaintiff, defendant, etc., or by name. Rule 6.08.

> **PRACTICE NOTE:** Referring to a client by name can help humanize him or her. Be consistent. It is acceptable to refer to a party by full name the first time and by last name thereafter, but do not switch back and forth.

Citation of a court decision must be by the official citation followed by any generally recognized reporter system citation. Rule 6.08.

> **PRACTICE NOTE:** Include a pin cite to a specific page or pages. Rule 7.04(g) allows the citation of unpublished opinions in specific circumstances but requires attachment of a printed copy of the opinion.

§ 9.9 Service of Brief and Additional Authority–Rule 6.09

The party filing the brief must:

- Include a certificate of service as the last page of the brief.
- Serve two copies of the brief on all adverse parties united in interest.
- File 16 copies - simultaneously with service – with the clerk of the appellate courts. Rule 6.09(a).

Additional Authority

A party may file a letter advising the court of additional persuasive or controlling authority that has come to the party's attention since filing its last brief. The party must file the letter at least 14 days before oral argument or before the first day of the docket on which a no-argument case is set unless (1) the authority is published or filed less than 14 days before oral argument or less than 14 days before the first day of the docket on which a no-argument case is set, in which case the party must promptly advise the court, by letter, of the citation, or (2) the authority was published or filed after oral argument or after the first day of the docket on which a no-argument case was set but before the court issues a decision. Rule 6.09(b)(1).

The body of the letter must not exceed 350 words. The letter may not be split into multiple filings to avoid the word limitation. The letter *must* contain a reference to the page(s) of the brief the letter supplements *or* a point argued orally to which the citation pertains. The letter *may* contain a brief statement concerning application of the citation. 6.09(b)(1)(C).

The party filing the letter must serve all adverse parties united in interest with a copy *and* file the letter and sixteen copies, with proof of service, with the clerk of the appellate courts. Rule 6.09(b)(2).

A party may respond to a letter notifying the court of additional authority. The party must file the response with the clerk of the appellate courts within 7 days after service of the letter; limit the letter to the reference, brief statement, and 350-word limit under Rule 6.09(b)(1)(C); *and* serve the response on all adverse parties united in interest. Rule 6.09(b)(3).

§ 9.10 Brief in Criminal or Postconviction Case–Rule 6.10

In a criminal matter or postconviction case, each party filing a brief must serve the Attorney General of Kansas with a copy of the brief. No officer or agent of the State may file a brief by or on behalf of the State unless the approval of the Attorney General or a member of the Attorney General's staff is endorsed on the brief. Rule 6.10.

> **PRACTICE NOTE:** The Attorney General's approval is not required for juvenile offender appeals.

§ 9.11 Some Tips for Crafting an Effective Brief

Selecting and Organizing Issues:

Include only the issues most likely to succeed; "[w]eak points dilute strong ones." Berry, *Effective Appellate Advocacy: Brief Writing and Oral Argument*, p. 85 (4th ed. 2009).

Organize the issues in a way that makes sense. For instance, begin with the strongest argument, or arrange the issues in the order in which the errors occurred below if the relative strength of the arguments is similar.

Separating issues into sub-issues and sub sub-issues is a helpful way of organizing the arguments section. For instance, each issue might have four main subheadings: Introduction, Standard of Review and Preservation of the Issue, Analysis, and Conclusion. The "Standard of Review and Preservation of the Issue" subsection might have two subsections: one addressing the appropriate standard of review and one addressing where, in the record on appeal, the issue was raised and ruled on or, in the alternative, why the court should consider it despite the fact that it was not raised below. The "Analysis" section might have several subsections addressing the different parts of a multi-part test or separately addressing (1) why an action constituted error, and (2) why the error requires reversal.

Writing the Statement of Facts:

"The facts must be scrupulously accurate." Berry at p. 109.

It may be helpful to write the Arguments and Authorities section first. Then include any and all facts necessary to support the arguments made in that section in the Statement of Facts.

Organize the facts in a way that makes sense, *i.e.*, chronologically or in the same order as the issues to which they relate.

Use subheadings where necessary, *i.e.*, "The Crime," "Pre-Trial Motions," "Trial," "Sentencing."

> **PRACTICE TIP:** Avoid simply relaying each witness's testimony in the order in which the witnesses appeared. Garner, *The Winning Brief* pp. 365-67 (2nd ed. 2004). Make sure the testimony fits together to tell a story. Highlight inconsistencies between different witnesses' testimony using words like "however" and "although." Highlight corroborating testimony with words like "similarly."

While the statement of facts may not include argument, the tone of this section can lay the groundwork for the argument that follows. For instance, rather than simply stating, "The district court denied the defendant's request to proceed pro se," consider writing, "The district court mocked the defendant's request to proceed pro se and chastised him for 'wasting everyone's time.'" Rambo and Pflaum, *Legal Writing by Design* § 21.6, p. 368 (2001). Within the confines of the rule, this section is an opportunity to soften the ground for, and plant the seeds of, the argument that will follow. Avoid overreaching, however; including statements in the statement of facts section that have no support in the record on appeal erodes the court's credibility in the writer. "We never, either through act or omission, misrepresent the truth." Rambo and Pflaum at 359.

While active voice is generally preferable to passive voice, passive voice may be appropriate where it minimizes a client's misdeeds. For example, rather than writing, "Mr. Jones beheaded Smith," consider writing, "Smith was beheaded." Rambo and Pflaum at 368.

Standard of Review and Preservation of the Issue:

Argue for the most favorable standard of review the law supports, but cite authority to the contrary if it exists.

> **PRACTICE NOTE:** Do not be afraid to argue what the standard of review *ought* to be if it should be changed, but also note what the standard of review currently *is*.

Include reference to where the issue was raised and ruled upon below. If the issue was not raised and ruled upon below, explain why the court should reach the issue anyway.

> **PRACTICE NOTE:** Simply citing the exceptions to the general rule is insufficient; explain which of those exceptions allows the court to reach the issue. *State v. J.D.H.*, 48 Kan. App. 2d 454, 459, 294 P.3d 343 (2013).

Arguments and Authorities:

If an issue requires the application of a multi-step test, apply each step separately.

Support arguments with quality citations *or* with compelling arguments if no existing authority supports the argument. Focus on quality, rather than quantity; "[t]here is little or no reason to string cite." Berry at p. 122.

Do not be afraid to look outside the jurisdiction, especially if there is no Kansas authority on point.

Avoid long block quotes, which a reader is likely to skip.

Avoid using "Id."

Address unfavorable authority.

Anticipate and refute potential counter-arguments. Garner at p. 410.

If writing an appellee or reply brief, examine the initial brief for weaknesses and identify them for the court. Look for errors of fact, errors of law, errors of logic or reasoning, inconsistent arguments, and accidental concessions. Berry at pp. 136-37.

The Conclusion:

Ask the Court for the *specific* relief requested.