



Appellate Practice September Section Meeting

Meeting Called By: Jason Anderson, Chair

Meeting Location	Date	Time	Topic
The Safety of Your Home	Monday, September 13, 2021	12:00 PM to 1:15 PM	How to Write, Edit, and Review Persuasive Briefs - Seven Guidelines From One Judge and Two Lawyers

We are continuing 100% remote access meetings. Please follow the Webcast instructions listed below to access the meeting.

1.00 Law & Legal CLE Credit – #1179352

For all KCBA sections, credit submittal to the State Bar occurs within 30 days of the program

AGENDA

12:00 PM Introduction

12:10 PM Presentation: 'How to Write, Edit, and Review Persuasive Briefs - Seven Guidelines From One Judge and Two Lawyers', by Leonard Feldman, Seattle University School of Law and Peterson Wampold Rosato Feldman Luna and Jill Bowman, Stoel Rives LLP

In 2008, Leonard Feldman co-authored an article entitled "How to Write, Edit, And Review Persuasive Briefs: Seven Guidelines From One Judge And Two Lawyers" with Washington Court of Appeals Judge Stephen Dwyer and Seattle attorney Ryan McBride. Leonard and Jill will discuss these seven guidelines and provide their perspective on effective and persuasive appellate brief-writing, including tips for both beginning and experienced practitioners and how to write briefs for (increasing) review on electronic devices.

1:15 PM Adjourn

SPEAKER BIOGRAPHY

Leonard Feldman, Seattle University School of Law and Peterson Wampold Rosato Feldman Luna –

Leonard Feldman is a Professor from Practice at Seattle University School of Law, where he currently teaches torts and federal courts, and Senior Counsel at Peterson Wampold Rosato Feldman Luna, where he assists on state and federal appeals. Leonard attended the University of Washington, where he graduated summa cum laude in Psychology, and Harvard Law School, where he was twice awarded the Sears Prize (given to the top two students on the basis of grades) and graduated magna cum laude in 1991. He then worked as a judicial law clerk for Ninth Circuit Judge Jerome Farris. Since completing his Ninth Circuit clerkship, Leonard has specialized in appellate practice before the Ninth Circuit and the Washington appellate courts. He also was counsel of record and argued in the United States Supreme Court in *City and County of San Francisco v. Sheehan*, Case No. 13-1412 (2015), and *County of Los Angeles v. Mendez*, Case No. 16-369 (2017). Leonard is a member of and was previously Chair of the King County Bar Association's Appellate Section, is a member of the Washington Appellate Lawyers Association, and is currently a District Coordinator for the Ninth Circuit Pro Bono Program and a member of the Ninth Circuit's mentor program. In 2006, Leonard received the Washington Bar Association's Pro Bono Award for his work in appeals that raise important civil rights issues. He is also a frequent writer and speaker on topics relating to appellate practice. Among other articles, he has co-authored three articles with Washington Court of Appeals Judge Stephen Dwyer regarding appellate brief writing, oral argument, and discretionary review.

Jill Bowman, Stoel Rives LLP – Jill Bowman is a partner at Stoel Rives LLP, where she regularly handles state and federal appeals and consults with trial colleagues on appellate issues. Jill attended Whitman College and, after graduating with a degree in biology, shocked her friends and family by deciding to go to law school. She attended the University of Washington School of Law, where she was a member of the Moot Court Honor Board and Order of Barristers. After graduating in 1981, she joined the Seattle law firm of Jones, Grey & Bayley, which later merged with the firm now known as Stoel Rives LLP. She worked with Leonard on the *Sheehan* case described in his bio, and is a member of the King County Bar Association's Appellate Practice Section. She has served on the Editorial Board for the second and third editions of the ABA publication, *A Practitioner's Guide to Class Actions*, and contributed the Washington state law chapter for that publication.

WEBCAST: This Section Meeting will be broadcast via Zoom (*not Adobe Connect*).

To access the meeting, click the following link -

<https://us02web.zoom.us/meeting/register/tZUsf-6sqT4rH9UzaqqjaCiTCzzRVmpRaNvR>

You will be required to enter your WSBA # (or n/a) upon entering the meeting.

LISTSERV: Did you know your section has a discussion listserv? Members can use it to post messages and ask questions to other section members. Any Appellate Practice Section member may post a message to the discussion forum. To post, send your message to: appellatelaw@lists.kcba.org.

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HOW DO I EARN CREDIT FOR SELF-STUDY OR AUDIO/VISUAL (A/V) COURSES?

For pre-recorded A/V (self-study) programs, although the sponsor should apply for accreditation, **lawyers need to report the credits earned for taking the course.**

To add an approved course to your roster, follow the procedures below:

- ❖ Go to the "mywsba" website at www.mywsba.org/.
- ❖ Log in.
- ❖ Click on the "Access MCLE" link in the "MCLE Info" box on your home profile page.
- ❖ Click on "Add Activity." Search to find the approved course in our system. (See search suggestions on the screen.)

Adding a Recorded Course

Select Recorded Course from the Add New Activity screen.

You can search by Activity ID (**information is included on the first page of the materials that you receive with the recording**) or by specific Activity Details. For the Activity Details search, you can use keywords for the title, sponsor name and date.

After entering your search criteria and selecting Search at the bottom of the screen, a list of possible activities will be provided.

You can select the correct one by clicking the Activity ID. This will take you to the specific activity. Enter the date(s) on which you began and ending viewing this recorded activity.

Then claim the correct credits for which you attended this activity in the Credits Claimed fields and click the Submit button at the bottom of the page.

You will receive a confirmation message at the top of your screen stating, "The activity has been added to your roster."

How to Write, Edit, and Review Persuasive Briefs: Seven Guidelines from One Judge and Two Lawyers

Presented by Leonard Feldman and Jill Bowman

September 13, 2021



Recommended Reading

- “How to Write, Edit, and Review Persuasive Briefs: Seven Guidelines from One Judge and Two Lawyers,” 31 Seattle Univ. L. Rev. 417 (Spring 2008)
- “Effective Oral Argument: Six Pitches, Five Do’s, and Five Don’ts From One Judge and Two Lawyers,” 33 Seattle Univ. L. Rev. 347 (Winter 2009)

1. Begin Your Brief with a Compelling Recitation of the Relevant Facts



BORING

On January 5, 2005, ABC Co. sent a written purchase order to DEF Co. for 100 widgets at an advertised price of \$1 per widget. When it received same on January 7, DEF put 50 widgets in regular mail addressed to ABC with an invoice for fifty dollars. On that same day, ABC sent a purchase order to XYZ Co. for 100 widgets at an advertised price of \$.50 per widget. On January 9, ABC received DEF's widgets and invoice. The next day, ABC returned DEF's widgets.

1. Begin Your Brief with a Compelling Recitation of the Relevant Facts *(cont.)*

ARGUMENTATIVE

On January 5, 2005, ABC Co., acting in the utmost good faith, sent a conditional purchase order to DEF Co. that required DEF to send ABC precisely 100 widgets according to the strict terms and conditions of ABC's purchase order, or not at all. DEF specifically refused to accept ABC's purchase offer. Instead, DEF made an express counteroffer. It did so in two ways: one, it varied the quantity term by sending ABC less widgets than it wanted (50 instead of 100); and two, by making acceptance of the widgets subject to a vastly different (and commercially unreasonable) set of terms and conditions pre-printed on DEF's written invoice form. Left with no choice, ABC was forced to cover itself by purchasing alternative widgets from XYZ Co. under acceptable terms.



1. Begin Your Brief with a Compelling Recitation of the Relevant Facts *(cont.)*

BALANCED

ABC Co. needed 100 more widgets to satisfy customer demand. At the time, the best price on the market was \$1 per widget from DEF Co. So, on January 5, 2005, ABC sent DEF a written purchase order. The PO specifically called for 100 widgets and set forth ABC's standard terms and conditions. Although there was no way for ABC to have known it at the time, DEF could not fill the order. But rather than inform ABC of that fact, on January 7th, DEF simply went ahead and put 50 widgets in the mail to ABC. More than that, DEF included an invoice with the incomplete shipment that included certain terms that were different than those on ABC's PO (although the price term was the same). Meanwhile, and not having heard from DEF regarding its order, ABC placed a separate order with XYZ Co. for 100 widgets at a better price, which XYZ promptly filled. When ABC finally received the 50 widgets from DEF on January 9th, it had no need for them given its contract with XYZ, and they were immediately returned to DEF.

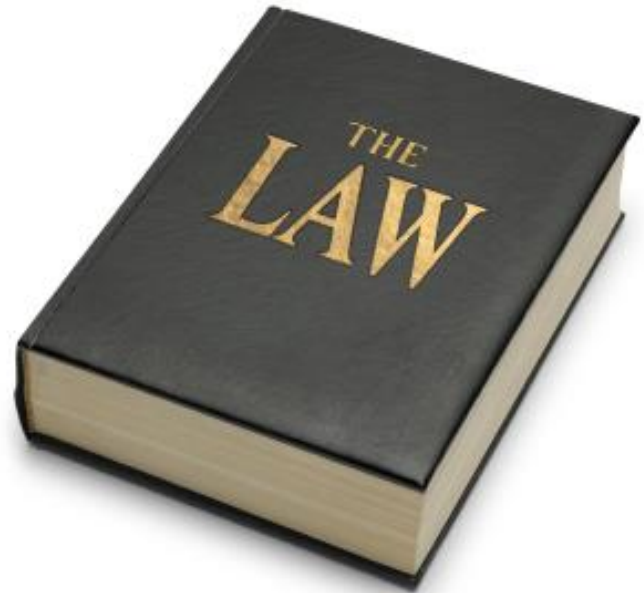


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2. Acknowledge the Applicable Legal Standard and Use It to Your Benefit

- Accurately state the applicable legal standard
- Explain how the legal standard works to your client's advantage
- Reiterate and tie the legal standard to the substantive arguments in your brief



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3. Carefully Pick Your Strongest Arguments

- Strong arguments lose their edge when surrounded by less persuasive arguments
- Consider abandoning or deemphasizing weaker arguments
- The key to effective written advocacy is selectivity, not fertility

An effective way to lose on appeal is to “conveniently bury your winning argument among nine or ten losers.”

Alex Kozinski, The Wrong Stuff, 1992 BYU L. REV. 325, 327 (1992).



4. Present Your Arguments Logically

- Present your facts logically, in a logical order
- Arguments should build on facts and should compel the result you seek
- Break up your “affirmative” and “defensive” arguments
- Ask yourself how the court’s opinion should look
- Read your table of contents!



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A Persuasive Brief Starts with the Table of Contents

I. INTRODUCTION

II. ISSUES PRESENTED

III. FACTUAL BACKGROUND

IV. ARGUMENT

A. Under Lone Star law, The Court Can Properly Grant A Motion In Limine To Exclude Evidence Where It Is Clear That Any Asserted Probative Value Is Substantially Outweighed By The Danger Of Unfair Prejudice.

B. Significant Portions Of Sanborn's Anticipated Testimony Is Both Irrelevant And Unfairly Prejudicial.

1. Evidence That James Served In The Army Is Irrelevant And Unfairly Prejudicial.

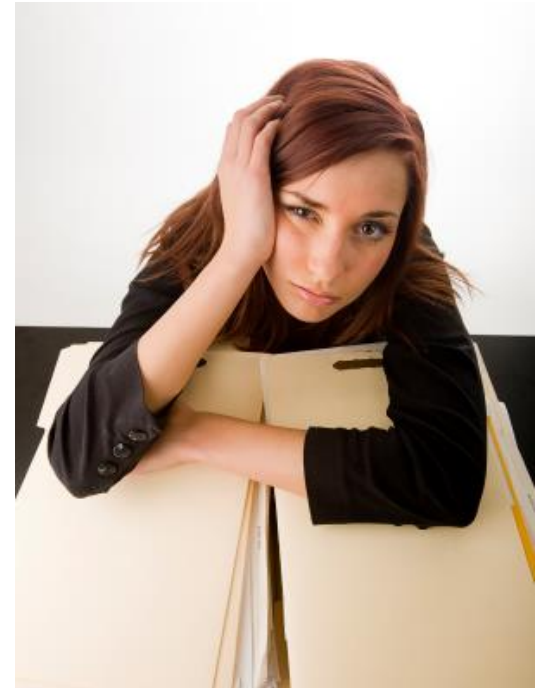
2. Evidence That James Was Drunk Also Is Irrelevant And Unfairly Prejudicial.

3. Etc.

V. CONCLUSION

5. Present Your Arguments Simply and Concisely

- Avoid jargon and legalese
- Look for ways to eliminate any text that is not essential to your argument
- Ask a non-lawyer to read your brief



**“Simple arguments are winning arguments;
convoluted arguments are sleeping pills on paper.”**

Alex Kozinski, *The Wrong Stuff*, 1992 BYU L. REV. 325, 326 (1992).

6. Be Accurate, Fair, and Even-Handed

- Avoid caustic and antagonistic rhetoric
- Don't attack your opponent
- Don't ignore adverse authority
- Don't ignore bad facts



7. Follow the Court's Rules and Sweat the Details

- Follow the court's current rules regarding form and substance
- Proofread, proofread, proofread
- Support all factual assertions with citations to the record
- Ensure that case citations and quotations are accurate
- Keep string-cites and footnotes to a minimum
- Avoid massive block quotes
- Delete excessive adverbs such as “clearly,” “specifically,” and “simply”



8. Tips for Electronic Briefs

- Limit or eliminate footnotes
- Summarize your block quotes
- Consider hyperlinks