LEGAL WRITING FOR MOTIONS & JURY INSTRUCTIONS

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You just can’t start a topic off like this without emphasizing the need to be familiar with your state’s rules as it relates to form, substance and procedure.

For example, in Washington we have General Rule (GR) 14 at the trial court level which mandates that only 8 ½ x 11 size paper be used with a top margin on the first page a minimum of three inches (all subsequent pages with a minimum of one inch top margin), and the bottom and side margins with a minimum of one inch. This same rule sets forth the appropriate manner of citations which generally is *The Bluebook*, followed by *The Chicago Manual of Style* or *Webster’s Third New International Dictionary of the English Language*. For appellate purposes in Washington, format is dictated by Rules on Appeal (RAP) 10.3 & 10.4 which also requires 8 ½ by 11 size paper but mandates margins of at least two inches on the left and 1 ½

inches on the right, top and bottom of each page, double spaced, with a minimum 12 point font in Times New Roman, Courier, CG Times, Arial, or in type written fonts pica or elite. Briefs are not to exceed 50 pages in opening briefs and 25 pages in reply. While on its face this might not seem that important, in my county pleadings not meeting the proper format requirements will be rejected by the court with costs imposed for basically wasting the court’s time. Of course, then there are the format requirements for the United States Supreme Court under Rule 33 which demands 6 ½ by 9

½ booklets in Roman 11 point or larger type with 2-point or more leading between lines within the text field, including footnotes, not to exceed 4 ⅛ by 7 ⅛ inches. If you don’t follow the U.S. Supreme Court’s rules you cannot even get your foot in the door to be seen or heard.

The essence of brief writing is relaying the theme of your case in writing. The theme of a case must necessarily be developed by the use of pleadings to determine the opposition’s strengths and weaknesses. So, a brief is the culmination of what steps you take to force the prosecution to show their hand prior to the motion or trial.

In my office we have set up a procedure for automatically reacting to responses from the prosecutor in an attempt to force them to divulge more information than just supplying you with police reports. I have included these pleadings with this presentation. Basically, it starts off with a notice of appearance which demands everything but the kitchen sink including a list of witnesses with summary of their testimony, identification of experts and summary of their testimony as well as objecting to the use of certificates in lieu of live testimony (ala *Melendez-Diaz v. Massachusetts*). Once the prosecutor responds by just sending the police reports we automatically file a specific demand to be able to confront all witnesses, a separate document invoking the specific criminal rule which allows for the use of certificates in lieu of live testimony (unless objected to in writing), and a demand for a bill of particulars. These separate requests avoid the trial court, and potentially the appellate court, from suggesting that the defense has hidden the ball from the court and prosecutor in a multi-page and multi-subject matter pleading to rule that an issue had not been properly preserved by the defense. See *State*

*v. Frankenfield*, 2002 WL 1283630 (Wash.App. Div. 1) [Where Frankenfield's counsel filed a document entitled 'Notice of Appearance; Waiver of Arraignment; Demand for Jury Trial; Discovery and Bill of Particulars; and Omnibus Application'. Near the end of this nine page

document it stated the objection which was ruled to be insufficient notice.] At the same time we usually file a generic declaration in support of motions and our notice of motions. Within our notice of motions we again reaffirm the need for identification of experts with a summary of testimony, note potential motions in limine for the trial court and again object to the use of certificates in lieu of live testimony. Depending on the case we might also file second demands for discovery and motions to compel the identification of expert witnesses with summaries of testimony and treatises relied upon for opinions. After flushing out who the prosecution witnesses are and specifically how they may testify, we sometimes file a supplemental declaration in support of motions “honing in” on issues and stepping away from the shotgun approach which had been initially taken. Now that the tone has been set, the actual brief writing comes into play.

Over the years I have had the ill-fated displeasure of writing, co-authoring and arguing motions that involved lengthy briefs that have exceeded hundreds of pages and been filed with the use of three ringed binders. It has now become very obvious that no judge wants to read anything over about 12 pages in length as it relates to any issue. With this in mind, I have recently changed my style to file individual briefs dealing with individual

issues so as to better keep the attention of the judge and allow them the opportunity to review one smaller document at a time and analyze it without the worry of having to reading an entire novel in one sitting. In the example case that has been enclosed with these materials, some briefing may violate the “12 page rule”, but most try to adhere to the rule (the example pleadings are actual pleadings from a recent case). I also now take the same approach for motions in limine, which also seems to be appreciated by the bench. In addition to being short, the judge is easily able to find the appropriate brief for the issue currently being discussed.

Over the years I have also changed the style in which issues are presented in my briefs. I used to be “more verbose”, but now try to “cut to the chase”.

My current style has been referred to by one of my colleagues as “direct and without the fluff”. Of course there is always the exception to the fluff and 12 page rules when you need to educate a judge about historical perspectives or discuss a new and novel issue. This “cut to the chase” style assumes that the judge has a good basic understanding of the law (sometimes a bad assumption) and I am personally of the opinion that most judges appreciate the “cut to the chase”. This style includes a lot of block quotes in support my positions to show the case law I am using actually says what I suggest

and that it is just not my interpretation of what a case might say. I recently have noted that attorneys, such as our esteemed John Henry Hingson III, also use quite a few block quotes in their briefing. But also be careful not to use a quote out of context.

This leads into another area of brief writing. It is important to make sure that even in a published opinion which cites cases for a proposition, that the cases actually stand for that proposition and are not used out of context by a court of record. I learned to challenge this inappropriate use of a position from a case cited by an appellate court from a long ago now deceased law partner, Peter Berzins. These types of challenges can, and have, been effective in both the trial court and appellate courts. It can be laborious, but can also be fruitful. The bottom line is to not take anything at face value.

With the advent of computer research, this type of checks and balances is much easier than in the past. Recently in Washington, a then highly ethical prosecutor from Kitsap County, Jeffrey Jahns, (now a judge) researched the back round of older cases from our state which supported a pattern jury instruction that prosecutors did not like which dealt with the use of the term “appreciable degree” where it defined DUI and stated: “if the person's ability to drive a motor vehicle is lessened in any appreciable degree”. His research

for the Washington Supreme Court Committee on Jury Instructions determined that our state case law was relying upon even older California case law which stood for the proposition that:

A person is under the influence of or affected by the use of intoxicating liquor when as a result of consuming intoxicating liquor the person’s physical or mental abilities are impaired to such a degree that the person no longer has the ability to drive a motor vehicle with the caution characteristic of a sober person of ordinary prudence under the same or similar circumstances.

Needless to say, prosecutors were not happy with his proposed new pattern jury instruction and stopped the committee from even forwarding this definition to our Supreme Court for consideration. It was only because of his diligent research of the cases that supposedly stood for one proposition that he found how they actually meant something else.

Motions to reconsider can be helpful but should be used sparingly and only when obvious errors of law have occurred. A prime example of a ruling where a motion to reconsider should be considered is from a recent case of mine where the judge stated:

In short, the state of the evidence is that I have an officer of unknown experience in estimating speed, using equipment that I can’t find accurate, so is the stop legal? And as I’ve indicated I’m finding that

it is because all that’s needed to show is that the officer had a reasonable suspicion that the Defendant was speeding prior to initiating a traffic stop and I believe he did.

If you have a “gut feeling” that the motion to reconsider will not change the judge’s mind, the motion gives the judge the opportunity to create a better record against your position and stifle your ability to appeal. If, on the other hand, you know that your client is not going to appeal, sometimes a motion to reconsider is a helpful “venting tool” for you to show the judge how upset you are with their ruling and how wrong they were. This latter approach sometimes can be helpful for you the next time you appear before that judge

---- but sometimes it can also backfire and hurt you the next time. Be careful. I have included with these materials a motion to reconsider that I recently used in an administrative license suspension proceeding, knowing that my client did not want to appeal and the motion was strictly being used as a “venting tool”. The hearing officer had ruled:

State v. Kinzy, 171 Wn. 2d 373 states in part at page 387, “many citizens look to the police to assist them in a variety of circumstances, including delivering emergency messages, giving directions, searching for lost children, assisting stranded motorists, and rendering first aid. Considering the public’s interest in having police perform community caretaking functions, police officers must e able to approach citizens and permissively inquire…”

In the opinion of this Hearing Officer the color of authority presented by the activation of emergency lights is greatly diminished when the vehicle and driver to be contacted already occupy the shoulder of the roadway.

This particular hearing officer is not the friendliest of individuals (both personally and professionally), and in the motion I took great caution to refer to his lack of legal intelligence in the third person, as if an appellate brief.

Some examples include:

Contrary to Hearing Officer Douglas Myhre’s opinion, the law in the State of Washington and throughout the United States is clear that a seizure is just that, a seizure, without differentiation as it relates to diminished seizures and nondiminished seizures when police emergency lights are used.

# . . .

The problem with the above analysis by Hearing Officer Douglas Myhre is that the above quote from State v. Kinzy is associated with an analysis when there is no seizure, not even a “diminished seizure” as improperly alluded to by Hearing Officer Douglas Myhre.

This motion to reconsider also attempted to show how the hearing officer may have improperly quoted a case and how the cases within that quote did not stand for the proposition for which the appellate court seemed to suggest. To my surprise he reversed himself. Rumor has it that he found it would be

more work to write something trying to justify his initial ruling than to just cave in.

Jury instructions is an area where we need to be more creative. As I alluded to earlier, even pattern jury instructions that have been in place for years and reviewed by committees can be challenged. Recently it was brought to my attention by a colleague that the Washington Pattern Jury Instruction dealing with direct and circumstantial evidence might improperly be a comment on the evidence. Our pattern instruction reads in part:

The law makes no distinction between the weight to be given to either direct or circumstantial evidence. One is not necessarily more or less valuable than the other.

Contrary to the above, a jury is also told:

You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness.

This has raised my interest and I am now looking further into this with him.

Don’t be afraid to request limiting instructions. In the pleadings that accompany this, the prosecutor stated that they were offering the testimony of the arresting officer as that of a lay witness and not as that of any type of

expert. I was concerned that a jury might give the cop’s testimony more weight just because he was a cop who wore a uniform and might consider him an expert anyway. So I posed the following limiting instruction:

Evidence has been introduced in this case through the testimony of Luke Plambeck. You must not consider this testimony or evidence as being presented by an expert witness who has special training, education or experience in a particular science, profession or calling.

The prosecutor wasn’t happy, but the judge understood. Rather than give my instruction, the judge altered the expert witness instruction to name the only person (toxicologist) that the jury should consider as an expert. I didn’t get the instruction that I had offered but the end result was probably even better than what I had suggested.

I was also concerned about how the jury would consider the beer cans that were found in my client’s car, so I offered three instructions, one of which read:

The law recognizes that it is unlawful for a person to drive a motor vehicle with open containers of alcoholic beverages and yet that person not be under the influence of intoxicating liquor.

The judge seemed prepared to use one of them, but at the last minute the beer cans were not offered as evidence because the prosecutor was

concerned about how *Arizona v. Gant* might be a basis for appeal if my client was convicted.

Be creative with breath test jury instructions by looking to your administrative codes and protocols. With the prior set of administrative code provisions in Washington we were submitting jury instructions such as:

Evidence in the form of a breath test document has been introduced in this case. You are instructed that to ensure accuracy, precision and confidence in such test, the prosecution must prove that the digital reference thermometer was properly certified as being traceable to standards maintained by the National Institute of Standards and Technology (NIST).

# . . .

The prosecution must prove beyond a reasonable doubt, that the breath test administered to the defendant was accurate and reliable; that the breath test instrument was functioning accurately and reliably; and that the maintenance procedures used on that instrument were reliable.

# . . .

You are instructed that the prosecution has the burden of proving beyond a reasonable doubt that the BAC DataMaster reading obtained in this case

was an accurate and correct measurement of the defendant's breath alcohol content. In this regard, you are entitled to consider all evidence presented by the prosecution or the defendant including expert witnesses and lay witnesses, in determining whether or not the prosecution has met its burden.

# . . .

Evidence in the form of a breath test document has been introduced in this case. You are instructed that to ensure accuracy, precision and reliability in such test, the prosecution must prove that the external standard simulator solution was prepared, tested and verified in a manner as directed by the State Toxicologist.

Don’t forget to define what it is that the prosecutor must prove by the statute. Our breath test documents used to only have the number written on it as opposed to now saying “ALL RESULTS IN g/210L”. *Godar v. State*, 643 N.E.2d 12 (1994).

“Alcohol concentration” means [grams of alcohol per 210 liters of a person’s breath] [or] [grams of alcohol per 100 milliliters of a person’s blood].

Failure to include the “accurate and reliable” language in the “to convict” jury instruction creates an irrebuttable presumption specifically rejected by *Seattle v. Gellein*, 112 Wn.2d 58, 62-63, 768 P.2d 470 (1989). In *Seattle v. Gellein*,

the jury was instructed to convict *Gellein* of DUI if it was proven beyond a reasonable doubt that *Gellein* drove a motor vehicle in the city of Seattle and at the time “had 0.10 percent or more by weight of alcohol in his blood as shown by chemical analysis of his breath.” The Court reversed the conviction, holding that this instruction created an unconstitutional irrebuttalable presumption, saying:

The second principle is a holding of State v. Franco, 96 Wn.2d 816, 828, 639 P.2d 1320 (1982): "[T]he

State always has the burden of proving beyond a reasonable doubt to the jury that the 0.10 percent [Breathalyzer] reading was a correct one." Thus, the State (or in Gellein's case, the City of Seattle) must not only prove 0.10 percent or more by weight of alcohol in defendant's blood, it must also prove beyond a reasonable doubt that the reading is accurate.

For those states that still need to prove the alcohol level at the time of driving, hopefully you are submitting jury instructions along the lines of the following:

In the absence of evidence relating defendant's breath alcohol levels to the time of driving, you are not to infer an unlawful breath level solely from the results of a subsequent breath alcohol test.

# . . .

You are instructed that the result of a breath alcohol test is being admitted for the limited purpose of showing that, at the time of the test, defendant had alcohol in his/her breath. Such evidence may not by itself be used to establish a percentage of breath alcohol at any other time.

Consider limiting the use of field sobriety tests and observations of your client consistent with the ruling in *Commonwealth v. Kemble*, 605 A.2d l240 (Pa.Super. l992):

Evidence has been introduced in this case on the subjects of the operation of a motor vehicle and observations made of the defendant by others including law enforcement. These observations include but are not limited to, speech, odors, facial condition, eyes, the ability to perform tasks as directed by law enforcement and other sensory impressions made of the defendant by others including law enforcement. You must not consider this evidence for the purpose of establishing a percentage of breath alcohol at any specific time.

The bottom line is that all evidence will be admissible unless objected to, you will never get anything unless you ask, research is the key, brevity is the answer and fluff doesn’t help.