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A PRACTICAL GUIDE TO
**APPELLATE
ADVOCACY**

Third Edition

MARY BETH BEAZLEY



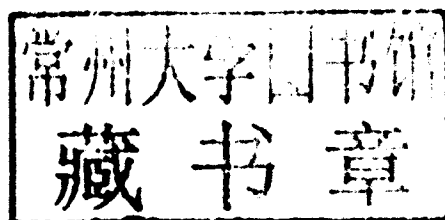
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Third Edition

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To my parents,
who made it possible;
to David,
who made it probable;
and to Betsy and Annie,
who make it all worthwhile

Using the Examples in This Book

This book is meant to guide law students and others who are new to writing briefs. It attempts to make the writing process easier by examining the various decisions a brief-writer must make, and by articulating criteria that will help the writer to make those decisions. The book contains numerous excerpts from student-written briefs that illustrate various aspects of brief-writing. Although following examples too closely can be dangerous, I know that many good writers learn through imitation. Therefore, I offer the following caveats:

1

SOME EXAMPLES ARE “BAD” EXAMPLES

Do not presume that the principle illustrated in each example applies to the brief you are currently writing. First, the examples in the book are not meant to represent the current law on any subject. They come from a variety of student briefs written over several years. Some of the cases cited in the examples are fictional. Second, some of the examples are “bad examples,” that is, they were adapted to show how *not* to do something. Unfortunately, some students, in a hurry to complete a project, will consult a textbook and imitate its examples slavishly, including “bad examples.” To try to avoid this problem, the bad examples are carefully labeled — with the words “bad example” and with a downward arrow — so that you will not mistake a bad example for a good example. Most, if not all, of the bad examples are paired with a good example to show how to address the problem illustrated in the bad example. These are labeled with the words “good example” and an upward arrow.

The examples that are not paired are labeled with the words “example” and an arrow pointing to the example. Virtually all of these examples are good examples, but even these examples must not be followed unquestioningly. Just as the same law applies differently to

different fact situations, the guidelines in this book may apply differently to briefs addressing different issues. For that reason, I have used examples from a variety of cases; no one case aptly illustrates every type of brief-writing problem. The majority of the examples in the text come from student briefs written for four Supreme Court cases: *Minnesota v. Carter*, 524 U.S. 975 (1998); *Knowles v. Iowa*, 525 U.S. 113 (1998); *Miller v. Albright*, 523 U.S. 420 (1998); and *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995) (argued as *Bentsen v. Adolph Coors Co.*). There are also scattered examples from student briefs written for *Ohio v. Robinette*, 519 U.S. 33 (1996); *City of Chicago v. Morales*, 527 U.S. 41 (1999); *Holloway v. United States*, 526 U.S. 1 (1999); and *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000). Many of the motion brief examples are based on a fictional case, *Garrett v. Kirkby*, in which the issue is whether a supervisor can be held individually liable under Title VII as an “employer” as that term is defined in 42 U.S.C. § 2000e(b).

Even the good examples may not be perfect, but they represent good attempts by law students to write effectively. The sample briefs in Appendix C contain marginal notes that point out passages that are particularly effective, as well as passages that might be made even more effective if the writer had made certain decisions differently. Some marginal notes try to explain why certain peculiarities about the case may have led the writer to choose a certain writing or organizational technique. Thus, when you are deciding whether to imitate an example, you should first consider whether the example is effective; second, decide whether your case presents the same types of writing concerns as the case used in the example.

2

NOTE THE TONE AND WRITING STYLE CONVENTIONS IN THE GOOD EXAMPLES

Generally, you should imitate the tone and writing style in the good examples and not in the text itself. Tone and writing style should change to reflect the needs of particular types of documents and of particular audiences, and only the examples are purposely written in the style that is appropriate for brief writing. Your writing teachers may have already told you not to imitate judicial writing styles because the needs of judges and clerks (the audience for a brief) differ from the needs of the readers of judicial decisions. Similarly, you should not model your brief-writing style after the writing style of the *text* in this book. Unlike the good examples in this book, I did not write the *text* material in formal brief style. Although I followed many conventions that also apply to brief-writing, I used a tone and writing style that is more like the one that I use when I write comments on student papers. I use contractions, attempt humor, and include unusual

metaphors, many of which could easily hinder the effectiveness of a brief. Thus, you should use a particular writing technique only when that technique is consistent with the rules and conventions of the court to which you are writing.

Bearing these caveats in mind, the examples should provide an opportunity for you to see how various writing decisions play out in the context of real cases and real (student) briefs. I hope that you find them helpful.

Acknowledgments to the First Edition

I would like to recognize and thank the following people who helped me in many different ways as I worked on this book:

Those of us who teach legal writing are blessed by the existence of a strong corps of supportive colleagues. I am grateful to the founders of the Legal Writing Institute, Anne Enquist, Laurel Currie Oates, and Christopher Rideout, of Seattle University. They were instrumental in the profound changes that have occurred in the teaching of legal writing over the past 20 years; without those changes I would not be teaching legal writing or writing about it. I also thank the colleagues whose work first taught me that there is a doctrine of legal writing that can be analyzed and communicated to others: Elizabeth Fajans, Jill Ramsfield, Mary Barnard Ray, Marjorie Rombauer, Helene Shapo, and Marilyn Walter. At Legal Writing Institute Conferences and, later, at conferences of the Association of Legal Writing Directors, I have been able to learn and grow through the exchange of ideas with colleagues who became friends: Coleen Barger, Linda Edwards, Richard Neumann, Terri LeClercq, Grace Tonner, Christy Nisbett, Sue Liemer, JoAnne Durako, Steve Johansen, Terry Seligmann, Jane Kent Gionfriddo, Ellen Mosen James, Anita Schnee, Steve Jamar, and Jan Levine. I am grateful to Judy Stinson and Samantha Moppett, who field-tested the book with their students, to my first colleagues, Julie Jenkins and Mary Kate Kearney, and to my first teachers of legal writing and how to teach it, Nancy Elizabeth Grandine and Teresa Godwin Phelps.

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I have been teaching legal writing since 1982, and I have learned so much from my students over that time. Students at Ohio State have been field testing versions of this text for the past two years, and versions of the self-graded draft since 1993. I want to thank especially the students at Ohio State who have allowed me to use and adapt their work for the examples in this text: RonNell Jones, Tiffany C. Miller, Peter Nealis, Timothy G. Pepper, Rebecca Woods, Bridget Hayward Kahle, Steven Webb, Michael Duffy, Andrew Kruppa, and Christopher Snyder. I am also grateful to the students whose work gave me insight into appellate advocacy, and who sent me examples of good and bad writing after they entered the practice of law, including Glenda Gelzleichter, John Lowe, Peter Rosato, Kevin Kessinger, Angelique Paul, Kathleen Lyon, Cynthia Roselle, Yvonne Watson, and Sean Harris. I particularly thank Jen Manion, research assistant extraordinaire.

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You will see the name “Kobacker” and “Marvin Kobacker” sprinkled throughout the examples in the text and in Appendix C. The “honor” of being used in these entirely fictional contexts was an auction item at an event benefitting Ohio State’s Public Interest Law Foundation and was purchased as a gift by his son, James Kobacker.

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