

Appellate Tactics for the Modern Practitioner
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Brief Writing: Making Yourself Useful as Well as Ornamental

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Based on a paper by Steve Hayes, Brittani Rollen, former Justice Sue Walker,
Justice Dabney Bassel, and Connie Hall, and
compiling panel discussions involving Justice Brett Busby, Macey Stokes,
Justice David Gunn, Brandy Wingate Voss, and Steve Hayes

With Lots of PowerPoint Slides by
Justice David Gunn

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The Epiphany: A Trilogy

- Having time to write an “A” opinion
- A back seat of briefs
- A never-ending avalanche of cases

What About AI?

You don't want a Luddite to advise you on building a rocket-you don't want me to advise you on AI.

BUT, consider two suggestions:

- Use AI to proof-read your brief, and suggest how to make it clearer (something an 8th grader could understand).
- Use AI to eliminate unnecessary words, and bring your brief within word limits.

Your Appellate Brief Resources

Mostly, remember the TRAPS, especially TRAP 38.

The paper is on Steve's website.

The survey of the justices is on the SBOT Appellate Section website.

Don't forget the courts' respective IOPs and Local Rules

Appellate Court Briefs: Maintain Credibility

- Whatever else you do, be accurate about the record and the authorities!!

Appellate Court Briefs: Uses of Your Brief

The best briefs do these three things:

- They inform the Court.
- They persuade the Court.
- They serve as a resource for the Court as it makes up its mind and writes its opinion.

These things all focus on your audience: *The Court!*

#1 Rule of Appellate Court Briefs: Know Your Audience—*The Court!*

- Experienced Justices/Staff Attorneys who face a never-ending avalanche of cases.
- So:
 - The more copy-able and paste-able the better.
 - Read the Court of Appeals surveys on the Appellate Section's website (2009 and 2015).
 - Fewer issues: Two to Five issues (91%), stated directly
 - Phrase the issues as a positive statement (71%)
 - Table of Contents with pertinent, short headings for a quick overview of the issues (55%)
 - Headings in argument should be short (53%) and should correspond with the issues (69%)
 - Statement of Facts should be purely objective (42%) or persuasive, but not argumentative (56%).

#2 Rule of Appellate Court Briefs: Tell/Repeat Your Story

- Tell your story in these TRAP 38 requirements:
 - Statement of the Case (with a very light touch)
 - Table of Contents-incorporates headings in Facts and Argument
 - Issues
 - Statement of Facts
 - Summary of the Argument
 - Argument

Court of Appeals Briefs: Statement of the Case

STATEMENT OF THE CASE

<i>Nature of the Case</i>	Breach of Contract, trespass, trespass to try title, declaratory judgment, injunction.
<i>Course of the Proceedings</i>	Tri-County Electric Cooperative, Inc. ("Tri-County") sued GTE Southwest Incorporated, db/a Verizon Southwest ("Verizon") for breach of contract, trespass, and trespass to try title, seeking damages, exemplary damages, attorney's fees, injunctive relief, and a declaratory judgment. 2CR389. Verizon asserted a general denial, special denials, and certain affirmative defenses, but asserted no claim for its fees. 1CR420. After a hearing on Tri-County's Motion for Partial Summary Judgment and Verizon's Motion for Summary Judgment, the trial court rendered judgment in favor of Verizon. SuppRR 57-58, 4CR409, 414; 9CR18, 21, 32, 35, 104. Months later, Verizon sought leave to amend its pleadings to seek attorney's fees and to supplement its motion for summary judgment to recover its attorney's fees. 4CR429, 464.
<i>Trial Court</i>	43 rd District Court of Parker County, the Honorable David Cleveland, Senior District Judge, Presiding
<i>Trial Court's Disposition of the Case</i>	The trial court granted leave to Verizon to amend its pleadings and supplement its motion for summary judgment to seek its fees, denied Tri-County's Motion for Partial Summary Judgment, and signed a judgment ordering that Tri-County take nothing, and that Verizon recover judgment against Verizon for its fees in the amount of \$1.1 Million, plus fees on appeal. 9CR47, 48, 49.

Court of Appeals Briefs: Table of Contents

A.	Tri-County's Claims and Verizon's Answer.	46
B.	Both parties moved for traditional summary judgments.	46
C.	After rendering a take nothing summary judgment for Verizon, the trial court invited Verizon to seek judgment for attorney's fees for which it had neither pled nor moved for summary judgment.	48
	SUMMARY OF THE ARGUMENT.	50
	ARGUMENT.	54
1.	Standard of Review.	54
2.	The trial court erred in granting a take nothing judgment to Verizon, and in denying Tri-County a partial judgment, on Tri-County's trespass to try title and trespass claims (Issue No. 1).	56
A.	Tri-County terminated the JUAs under Article XX, requiring Verizon to remove all its attachments from Tri-County's poles (Issue No. 1.A).	57
1.	Tri-County exercised its unambiguous right to terminate the JUAs after 25 years, and the trial court erred in ruling otherwise.	58
2.	Once Tri-County terminated the JUAs under Article XX, Verizon had to remove all its attachments from Tri-County's poles.	59
a.	The trial court's take nothing judgment violates	

Court of Appeals Briefs: Issues

Issues – Be Concise & Neutral

- The evidence does not support the jury's finding that Appellant breached the contract (Question 5).

VERSUS

- Shouldn't the jury finding be overturned when
 - a. The appellee is a scoundrel,
 - b. The trial was a farce, and
 - c. The contract obviously reads my way?

Court of Appeals Briefs: Statement of Facts

Appellate Court Briefs: How Visuals Shape Your Story

- Look for ways to provide the Court with visuals-but do not overdo it.
 - Use Visuals
 - Consider Timelines
 - Only put the pertinent parts of documents in the Appendix-*make each component as short as usefully possible*, and hyperlink to the Appendix

Using Visuals: Show v. Tell

In records dated from his accident to this trial in October 2015, Johnson consistently denied feeling any sort of depression, anxiety, or acute distress:

Ex.	Date	Johnson's emotional state
PX-231	Sept. 6, 2012	denied depression, insomnia, anxiety
PX-231	Sept. 29, 2012	"appears to be in no acute distress"
PX-225	Aug. 20, 2013	no depression, nervousness, insomnia, or psychosis
PX-225	Aug. 22, 2013	no depression, nervousness, and insomnia
PX-225	Sept. 5, 2013	no depression, nervousness, and insomnia
PX-223	Sept. 9, 2013	no depression or psychiatric symptoms
PX-225	Sept. 17, 2013	no depression, nervousness, and insomnia
PX-225	Oct. 4, 2013	no depression, nervousness, and insomnia
PX-220	Oct. 25, 2013	denied anxiety, nervousness, depression; "no apparent distress"
PX-225	Dec. 5, 2013	no depression, nervousness, and insomnia
PX-228	Dec. 11, 2013	normal psychiatric and neurological
PX-228	Jan. 8, 2014	normal psychiatric and neurological
PX-229	Apr. 2, 2014	no neuropsychiatry
PX-229	Apr. 14, 2014	no depression
PX-481	Dec. 15, 2014	"no acute distress" and no significant changes in mood, significant depression, severe anxiety, or unusual or severe distress
PX-480	Apr. 7, 2015	denied depression
PX-481	Jun. 10, 2015	no significant changes in mood, significant depression, severe anxiety, or unusual or severe distress
PX-481	Jun. 11, 2015	"no acute distress"

Using Visuals

INTRODUCTION

Early oil exploration in Texas produced a thicket of wells that rivaled the Piney Woods:



This wasted both money and natural resources; perhaps 85 percent of the 27,000 wells in the East Texas oil field before 1950 were unnecessary.⁷

The Legislature responded by empowering the Railroad Commission ("RRC") to adopt spacing, density, and allowable rules to prevent waste, promote conservation, and protect correlative rights.⁸

⁷ See *Wagner & Brown, Ltd. v. Sheppard*, 282 S.W.3d 419, 420 (Tex. 2008) (citing Howard R. Williams, *Conservation of Oil & Gas*, 65 HARV. L. REV. 1155, 1166 (1952)).

⁸ See *Coastal Oil & Gas Corp. v. Garza Energy Trust*, 268 S.W.3d 1, 15 & n.53 (Tex. 2008).

Using Visuals

Because this point could determine the outcome, USI wants to show some of the overwhelming evidence that gutted Levine's credibility. The pictures are worth a million words.

Video showed Levine effortlessly washing his red Corvette—dragging hoses and mats around with no trouble—while he bent, squatted, lifted, and knelt for two straight hours. 8 Supp. RR DX-12 (October 11, 2007 video). A photographic timeline of this event illustrates the jury's right to disbelieve the claims of injury:

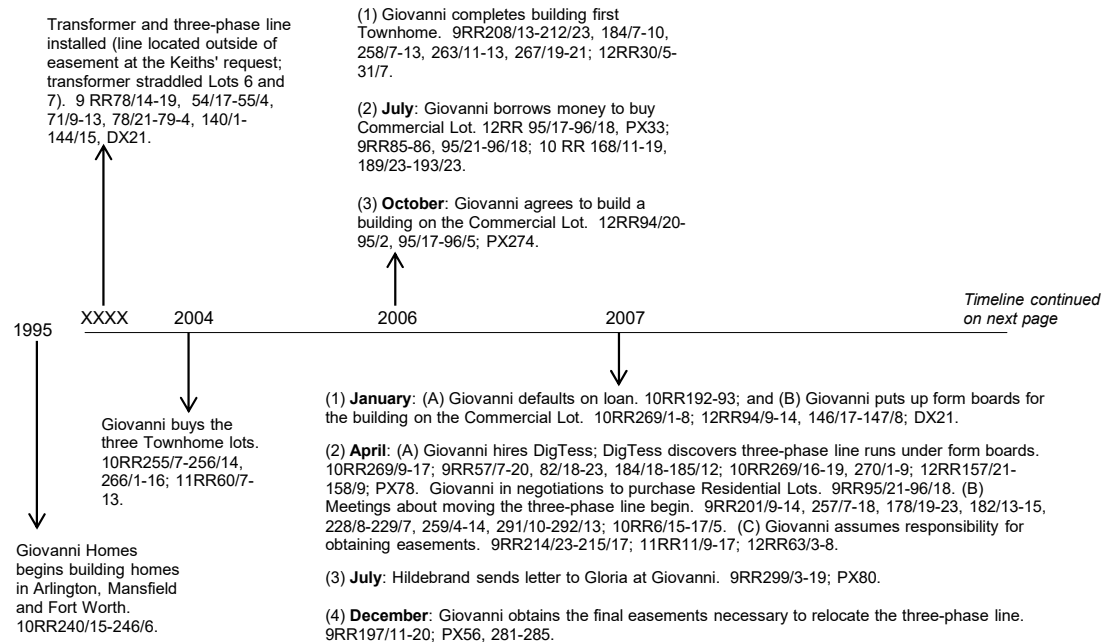
- At 10:39 a.m., Levine is bending....



Using Visuals—Usually in the Appendix

Consider Timelines

Timeline of Key Events: 1995 - 2007



Using Visuals

Only Put Key Parts of Documents in the Appendix

ARTICLE XI
RENTALS

(a) On or aboutJanuary 1st..... of each year the parties acting in cooperation shall, subject to the provisions of Section (b) of this Article, tabulate the total number of joint poles in use as of the preceding day, and the number of poles on which either party as licensee removed all of its attachments during the twelve preceding months, which tabulation shall indicate the number of poles which each party owns on which rentals are to be paid by the other party.

(d) The rentals per pole due from either party as licensee to the other party as owner shall be based on the equitable sharing of the accounts of joint users provided for in Appendix B. Subject to the provisions of Article XII, § 2.10..... per annum shall be paid by the Cooperative for each jointly used pole owned by the

Telephone Company and § 2.10..... per annum shall be paid by the Telephone Company for each jointly used pole owned by the Cooperative. The smaller total sum shall be deducted from the larger and the Cooperative or the Telephone Company, as the case may be, shall pay to the other the difference between such amounts. The rental herein provided for shall be paid within 30 days after the bill has been submitted.

ARTICLE XIII

PERIODICAL ADJUSTMENT OF RENTALS

(a) At any time after 5 years from the date of this Agreement and at intervals of not less than 5 years thereafter, the rentals applicable under this Agreement shall be subject to joint review and adjustment as provided for under Section (b) of this Article upon the written request of either party. In case of adjustment of rentals as herein provided, the new rentals agreed upon shall apply starting with the annual bill next rendered and continuing until again adjusted.

(b) All adjustments of rental shall be in accord with the provisions of Appendix B, and any changes shall take into account the cost factors originally involved in all joint use existing at that time under this Agreement.

ARTICLE XIII

DEFAULTS

(a) If either party shall default in any of its obligations under this Agreement and such default continues thirty (30) days after due notice thereof in writing by the other party, the party not in default may suspend the rights of the party in default in so far as concerns the granting of future joint use and if such default shall continue for a period of ...60..... days after such suspension, the party not in default may forthwith terminate this Agreement as far as concerns the future granting of joint use.

(b) If either party shall make default in the performance of any work it is obligated to do under this Agreement at its sole expense, the other party may elect to do such work, and the party in default shall reimburse the other party for the cost thereof. Failure on the part of the defaulting party to make such payment within ...60..... days upon presentation of bills therefor shall, at the election of the other party, constitute a default under Section (a) of this Article.

Appellate Court Briefs: The Roadmap

- End with a conclusion
- Make your Prayer a roadmap

APPELLEE – The pillars of affirmance

- Preservation
- Standard of review
- Harmless error
- Stare decisis