Appellate Drafting – How to Write a More Helpful Submission to the Court

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Ten Tips from Inside the Courts

1. GET TO THE POINT – IN A FOCUSED, CONCISE MANNER

A. Written brief must aim for maximum effectiveness – may be only shot (i.e., no oral argument)

1) Minn. R. Civ. App. P. 134.01 (appellate court has discretion to determine oral argument is unnecessary because dispositive issue has been authoritatively settled or the decisional process would not be significantly aided by the briefs)

2) Minn. Ct. App. Spec. R. Pract. (if any party is appearing without counsel)

3) Fed. R. App. P. 34 (panel of judges may deny argument because appeal is frivolous, because written briefs adequately present the case, or because the question has been authoritatively settled)

B. Keep in mind these perspectives:

1) Appellate judge has interest in advocate performing two-fold task of ***informing*** and ***persuading***

2) Judge needs help, and wants help, moving along from the question presented to the answer to that question

3) To do that, remember to provide a clear but concise threshold:

a. Of what do you complain?
b. How did it come about?
c. What do you want the court to do about it?
d. Why?

C. Whatever you do, do it clearly and concisely:

"[S]imple arguments are winning arguments; convoluted arguments are sleeping pills on paper."
Alex Kozinski, "The Wrong Stuff," 1992 BYU L. Rev. 325 (1992)

D. HOWEVER, repetition aids persuasion. So, just like trial, you should develop a theme and carry it throughout the brief in the various sections.

1) The theme captures the essence of a case and brings the issues to life
2) Theme aids writer in staying on point during writing process
3) Be careful not to:
   a. bore the reader with identical repetitions of the same words, but rather do it indirectly so that the reader does not even recognize the reinforcement;
   b. repeat it so many times (i.e., redundancy) and with long, convoluted, compound sentences that include legalese, clichés, passive tense, etc., that the repetition causes the judge to pay extra attention to your brief – NEGATIVE attention, that is.

The theme you choose is repeated not just in the substantive text of the argument. As you will see throughout the outline below, the reader will get (OR SHOULD GET) reinforcement of the theme through virtually every section of the brief. This type of repetition will actually assist in clarifying and simplifying for the judge the critical issue or issues in the case and why the judge should rule in your favor, instead of giving the judge a boring brief that he rushes through and sets aside with little memory of it until the night before oral argument.

2. SET UP THE BRIEF DOCUMENT EARLY ON

A. Set up a shell document

1) Start with a template.
   a. Don't cut and paste from a different brief. Why? End up with wrong file numbers, wrong party names, old conclusions, etc.
   b. Don't have one? Start with the Microsoft Word document in Minn. R. Civ. App. P. Form 128 and create your own template from there: http://www.mncourts.gov/SupremeCourt/Court-Rules/Forms-Appendix-for-the-Rules-of-Civil-Appellate-Pr.aspx

2) Fill in the template early on with what you already have and know: e.g., caption, names of attorneys, issues (as you believe they will be) and arguments (taken from from trial court memoranda)

B. Identify your Addendum/Appendix items

1) Current Rules
   a. Minnesota -- In Mnnesota state appellate courts, there is no longer an appendix. Minn. R. Civ. App. P. 130.01, subd. 1 ("No party may submit an appendix to its brief."). And now, more than a year after the rule went into effect, there is no more grace.

   NOTE: At this point, a petition for review filed with an "appendix" will be rejected, which could be FATAL! A PFR erroneously filed with the label

"appendix" instead of "addendum" will not only be rejected, it will not be considered filed on the original date with a deficiency notice and an opportunity to fix the error. So if one files a PFR with an "appendix" on the last day – wherein the PFR is or will be rejected – and the attorney does not learn of the error in time to file a correct PFR with an "addendum" on that same last day, there is no exception or discretion allowing one to file late.

Now, the underlying record is available to the appellate court in electronic form in its entirety. Minn. R. Civ. App. P. 130.01, subd. 1. With that in mind, Minnesota has replaced the Appendix with an Addendum.

There are few items required in the Addendum, as it is no longer intended to document the entire procedural history of the case.

130.02 Addendum

(a) Contents. Appellant must prepare an addendum and file it with the opening brief or petition. The addendum must include:

(1) a copy of any order, judgment, findings, or trial court memorandum in the action directly relating to or affecting the issues on appeal;

(2) any agreed statement of the record; and

(3) if the constitutionality of a statute is challenged, proof of compliance with Rule 144.

(b) Length. The addendum must not exceed 50 pages excluding the orders and judgments or other materials required by section (a) of this rule or included pursuant to Rule 128.04. The addendum must be incorporated into the back of the brief, unless it includes a long trial court

decision, in which event it may be bound separately.

(c) Respondent's Addendum. The respondent's brief or response to a petition may include an addendum not to exceed 50 pages, which must be incorporated into the back of the brief. If the addendum filed by the appellant omits any material required by section (a) of this rule or pursuant to Rule 128.04, the respondent may include it in the respondent's addendum in addition to the 50 pages otherwise allowed.

(d) Other Addenda. Any addendum required other than with a formal brief shall also comply with the requirements of this rule.

(e) Non-Duplication. A party may not include in an addendum any material included in any other party's previously filed addendum.

The addendum must include any trial court order, judgment, findings or memorandum that directly relates to or affects the issues on appeal – often a single order and/or judgment out of many in a case. If, however, the case is being considered on further review by the supreme court, the court of appeals decision should also be included.

b. Federal -- The corresponding federal rule is significantly different from the Minnesota rule in that it allows a party to include in the appendix any part of the record to which the party wishes the court's attention directed. Fed. R. App. P. 30(a). This could include exhibits and transcript excerpts. *See, e.g., id.* at 30(e). It is important to note, however, that the various circuits may have additional requirements in the local rules. *See, e.g.*, 8th Cir. R. 8 (requiring appellant to include addendum to brief containing copy of trial court's opinion).

2) Decide which documents are material to your appeal, and key to your theme, need to be included.

The acid test should be: "Will the judge reading this brief want or need to have this material readily at hand?" Do this evaluation early. It will help you focus. You will have the documents ready. You won't be scrambling to gather a clean copy together at the last minute.

In Minnesota, the underlying decision contained within the addendum is not included in the limit of 50 pages. What can one include?

a. Important material drawn from the record. But it must actually be part of the record. *See* Minn. R. Civ. App. P. 110.01. If opposing counsel includes materials not part of the record, you should move to strike. An attorney can be disciplined for such improprieties. *See In re Clark*, 848 N.W.2d 236 (Minn. 2014) (order). Courts and clerks sometimes fail to file documents. Other problems can happen resulting in a trial court record that is insufficient or inaccurate. The advocate can move to correct or modify the record pursuant to Minn. R. Civ. App. P. 110.05. It is better for the parties and the court for the correction to occur as early in the appeal as possible – establishing yet another reason to work on the appendix or addendum early in the appeal process.

b. Statutes and rules that the judges should have handy.

c. Unpublished opinions. *See* Minn. Stat. § 480A.08.

d. Proof of compliance with Minn. R. Civ. App. P. 144 in constitutional challenges. *See* Minn. R. Civ. App. P. 130.02(a).

e. DO NOT INCLUDE: memos submitted by the parties to trial court; or when in the Supreme Court, the briefs submitted to the Court of Appeals. *See Employers' Mut. Cos. v. Nordstrom*, 495 N.W.2d 855, 859 n.1 (Minn. 1993).

Respondent can include an addendum of up to 50 pages if Appellant failed to include required documents or if Respondent wants to submit relevant parts of the record. However, Respondent cannot include in Respondent's addendum documents that duplicate what is in Appellant's addendum. Minn. R. Civ. App. P. 130.02(e).

3. CHOOSE YOUR ISSUES WITH CARE.

A. Use common sense and experience: what issue will likely be dispositive? Start with this one issue. Around this, you develop your theme.

B. With a dispassionate and detached mind, pick a second issue that might be dispositive. Consider a third issue.

C. If you get to four issues, you may have too many. Consider the following:

"One of the first tests of a discriminating advocate is to select the question, or questions, that he will present…Legal contentions, like the currency, depreciate through over-issue. The mind of an appellate judge is habitually receptive to the suggestion that a lower court committed an error. But receptiveness declines as the number of assigned errors increases. Multiplicity hints at lack of confidence in any one."

Robert H. Jackson, "Advocacy Before the Supreme Court: Suggestions for Effective Case Presentation" in *Advocacy and the King's English*, 216 (G. Rossman ed. 1960).

"If an appellant can't win on the strength of the strongest claim or claims, he stands little chance of winning a reversal on the basis of weaker claims.… The court needs to know just where the heart of the matter lies; distracting attention from the most important issues can hardly help an appellant's cause."

Myron H. Bright, "Appellate Briefwriting: Some 'Golden' Rules," 17 Creighton L. Rev. 1069, 1071 (1983-84).

D. It is your job, as the advocate, to be able to evaluate the potential arguments and actually reject those that will not benefit your case, or at least recognize the limited treatment that should be allocated to it in a brief.

4. RESEARCH AND WRITE A STANDARD OF REVIEW THAT FITS YOUR CASE.

A. What is the "Standard of Review'' (SOR)?

"The standard of review defines the manner in which each issue is reviewed..." *The Minnesota Court of Appeals Standards of Review*, introduction (updated August 2014), available at: http://www.mncourts.gov/mncourtsgov/media/Appellate/Court%20of%20Appeals/Standards_of_Review_2014.pdf

B. Why do you need an SOR? Because it is required.

1) Minnesota: "The argument may be preceded by a summary introduction and ***shall include*** the contentions of the party with respect to the issues presented, ***the applicable standard of appellate review for each issue***, the analyses, and the citations to the authorities." Minn. R. Civ. App. P. 128.02, subd.1(d) (emphasis added).

Federal: "The appellant's brief ***must contain*** … the argument, which must contain … for each issue, a concise statement of the applicable standard of review…." Fed. R. Civ. App. P. 28(a)(8)(B) (emphasis added).

2) "Rule 128.02, subdivision 1(d), is amended to require that a brief address the applicable standard of appellate review. The standard of review is crucial to the analysis of every issue by the appellate court A useful compendium of the standards of review for particular issues is Minnesota Court of Appeals, Standards of Review ([updated] Aug. 20[14]), available for review or download at [http://www.mncourts.gov/mncourtsgov/media/Appellate/Court%20of%20Appeals/Standards_of_Review_2014.pdf]. The rule does not dictate how the standard of review be set forth-whether in a separate section or at the beginning of the argument for an issue- although in most cases it is best handled at the beginning of the argument for each issue. The applicable standard of review must be addressed for each issue in an argument." Advisory Committee Comment-2009 Amendments.

3) "The standard of review ... delineates the boundaries of appellate argument, and often determines the outcome on appeal. Accordingly, the Minnesota Court of Appeals conscientiously identifies and applies a specific standard of review to each issue before the court." *The MN COA SOR* at intro.

C. Where do you find an SOR?

1) some appellate decisions (federal appeals court and Minnesota Supreme Court decisions are not always reliable; Minnesota Court of Appeals decisions are pretty reliable in having a well-stated SOR)

2) Minnesota SORs: the *MN COA SOR*, http://www.mncourts.gov/mncourtsgov/media/Appellate/Court%20of%20Appeals/Standards_of_Review_2014.pdf

3) Federal SORs: Steven Alan Childress & Martha S. Davis, *Federal Standards of Review* (4th ed. LexisNexis) (2-volume set)

D. How do you know which SOR to use?

1) Minnesota: "This outline is intended as a tool for finding and applying various standards of review. Although this manual contains many standards of review, the cases set forth herein are not meant to provide the definitive standard of review for every appeal. Further research may be necessary, depending on the facts and issues on appeal." *The MN COA SOR* at intro.

2) Considerations in which one to use:

a. Is it from the highest level of appellate court in the jurisdiction?
b. Is it recent?
c. Is it specific and/or from a case raising the same type of issue you have?
d. Is it from a case that was decided in the manner you want?
e. Does it have particularly useful phrasing?

E. What do you do with the SOR?

"The most persuasive appellate briefs explicitly state the applicable standard of review at the beginning of each issue and then apply it." *Id*. But, you can explain why application of the standard of review is not dispositive in your case. For example: "The standard of review is sufficiency of the evidence. In this case, there would have been no evidence to support the verdict if the district court had not erred in admitting hearsay statements." Then, incorporate the language of the standard of review in your conclusions at the end of the individual arguments and in the conclusion section of the brief.

For an example of a Standard of Review, *see* Appendix A, Excerpt of Appellants'Brief, *U.S. v. Bame et al.*, 8th Circuit File No. 12-3417, Eric J. Magnuson, Attorney for Appellant.

5. TELL A STORY IN YOUR STATEMENT OF THE FACTS.

A. Once you have identified your issues, think about how the facts set the stage for the conflict that occurred. Pick a theme for your appeal – can you explain it in a single sentence? (It will not necessarily be the same "theme" that you had at trial. After all, your audience is different, and your issues are different.)

B. With your theme in mind, you are ready to tell the story of what happened in your case. It just happens to be labeled a "Statement of Facts."

C. Do not dwell on the clinical, technical components when drafting the story – that can be adjusted later.

D. If you don't have a theme, if you don't tell a story, if you dwell on the technical when drafting the statement of facts, you will start with a technical and boring recitation of facts and you will end with a technical and boring recitation of the facts. You are most likely to fall into either of these not-very-persuasive methods:

1) Simply summarize a transcript or entire record, in the order the proceedings occur. This may not make sense as witnesses do not necessarily testify in logical order, in chronological order, all at once – and documents and exhibits may be discussed at various times before being admitted or may be admitted pursuant to stipulation simply in bulk at the end.

2) Describe everything exactly in chronological order. This may result in inclusion of unnecessary, irrelevant facts because they are identified and written down as the writer goes through the record.

The real risk here is that the truly important facts are not emphasized enough, and truly unimportant facts are given too much space (when perhaps they should not even be included). Such a statement of facts may fail in being clear as well as in being concise. It may fail in effectively informing and persuading, where the important facts are lost in the kerfuffle.

E. Consider not fully writing the statement of facts until the legal arguments are done. You will establish what is most critical to the Statement of Facts as you write the legal arguments. By the time you are done writing the legal arguments, you have the important parts of the story. Move them around, decide the best way to tell the story – this is the outline of the story. Then flesh out the outline of the story to develop your theme. Finally, put in and check all of the technical stuff, including the references to the record. When the technical and boring components of the Statement of Facts are the last step of the process, they don't define the effectiveness of the Statement of Facts. You do.

6. WRITE THE ARGUMENT IN A CLEAR OUTLINE FORM USING DETAILED SUBHEADINGS.

A. You need to use frequent headings and sub-headings. Why?

1) They break up the page, adding "white space" that is crucial to the eye of the reader in terms of preventing the "skip-over" eye.

2) They outline the thrust of the writer's argument.

3) They assist the reader in understanding the lawyer's contentions when scanning the brief.

4) They can involve the reader emotionally within the page and make the reader want to read the inner content.

5) Once drawn in emotionally, the reader is disposed to accept the writer's point of view.

* NOTE: You can do sub-headings in the Statement of Facts

For an example of sub-headings in a Statement of Facts section, *see* Appendix B, Excerpt of Respondent's Brief, *In re:* _____, Board of Immigration Appeals File No. A 094-071-___, Nelson L. Peralta and Lisa Lodin Peralta, Attorneys for Appellant.

B. Remember the theme and repetition? If thoughtfully inserted, the sub-headings serve the purpose of reinforcement – in two different sections in the brief…

1) the Table of Contents
2) throughout the argument

C. What can be the result?

1) Can make an already forceful argument far more compelling
2) Can life mediocre brief into a persuasive one

D. You should be able to see an actual outline in the Table of Contents

7. TAKE ADVANTAGE OF THE SUMMARY OF THE ARGUMENT (OR ADD ONE).

A. Some courts require a summary of the argument and direct where it goes in the brief. *See, e.g.*, Fed. R. Civ. App. P. 28(a)(8).

B. When not required (such as in the Minnesota appellate courts), you should include one anyway – but location is optional. A common and appropriate location is before the standard of review.

C. The summary typically omits direct quotations or citations.

D. This is another opportunity for repetition of the theme.

For an example of a Summary of Argument, *see* Appendix C, *U.S. v. Travis Michael Cullen*, 8th Circuit File No. 04-4206, Excerpt of Appellant's Brief and Addendum, Lisa Lodin Peralta, Attorney for Appellant

8. THE CONCLUSION: MAKE A SPECIFIC REQUEST FOR RELIEF

A. The conclusion is not an afterthought – or at least, it shouldn't be. It is the last thing written and often little time is spent on it. However, many appellate judges read the conclusion first to help get a sense for each side's arguments.

B. The conclusion should not just contain a simple request to rule in the party's favor. This is an example of what not to do: "For all of the foregoing reasons, Appellant respectfully requests this Court reverse the decision of the district court."

C. A conclusion should read like a synopsis of the case. It should quickly summarize all issues and key facts for the judge. It should be persuasive and pointed. If the judge reads the conclusion first, then it frames how the judge views the issues.

D. State your specific request for relief. In many cases, the relief depends on how different issues are resolved and must be stated in the alternative. You can't assume that the judge is going to be able to figure that out on his own, so you need to be very clear – in the conclusion – what relief, or alternative relief, you seek. For an example of an excellent conclusion: *see* Appendix D , Excerpt of Brief of Appellant, *Webb Golden Valley, LLC v. State of Minnesota, et al.*, Minnesota Supreme Court File No. A13-2044, Eric J. Magnuson, Attorney for Appellant (among others).

9. TO REPLY OR NOT TO REPLY… THAT IS THE QUESTION.

A. There is a limitation to the scope in Minn. R. Civ. App. P. 128.02:

> **Subd. 3. Reply Brief.** The appellant may file a brief in reply to the brief of the respondent. The reply brief must be confined to new matter raised in the brief of the respondent.

B. There are common types of "matters" raised by the respondent to which you might consider replying:

1) Replying to respondent's recitation of the facts
   - Are there flagrant mischaracterizations of the record? For an example of reply arguments in such a circumstance, *see* Appendix E, Excerpt of Reply Brief of Plaintiff-Appellant, *Givaudan Fragrances Corp. v. Krivda et al.*, Third Circuit File No. 14-1590, Eric J. Magnuson, Attorney for Plaintiff-Appellant (among others)
     Example:

   - addition of material that is outside the record? You may need to consider a motion to strike the additional material as well as the portions of the brief that reference that material.

2) Replying to respondent's responsive legal arguments and authorities

- but did you already do that? A "winning" appellant's brief will anticipate and address the respondent's arguments in the initial brief. For an example of arguments in an initial appellant's brief doing so
- however, it may be prudent to respond to cases cited by the respondent. For an example of reply arguments in such a circumstance, *see* Appendix F, Excerpt of Appellants' Reply Brief, *Gieseke v. IDCA et al.*, Minnesota Supreme Court, File No. A12-0713, Lisa Lodin Peralta, Attorney for Appellant (among others).

3) Replying to new legal arguments raised by respondent for first time
- For an example of reply arguments in such a circumstance, *see* Appendix G, Excerpt of Appellant's Reply Brief, *State of Minnesota vs. Alan David Baum*, Minnesota Court of Appeals, File No. A14-1707, Lisa Lodin Peralta, Attorney for Appellant.

10. **DON'T IRRITATE THE JUDGES, WHICH YOU WILL UNDOUBTEDLY DO IF YOU:**
- put in lots of dates: clunky, seemingly significant, but yet almost always irrelevant
- refer to parties as "appellant" and "respondent"/ "appellee": confusing, and can detract from the import of the argument if the reader has to pause with any frequency and attempt to recollect which person or party is which; *see* Fed. R. Civ. App. P. 28(d) ("counsel should minimize use of the terms 'appellant' and 'appellee.' To make briefs clear, counsel should use the parties' actual names or the designations used in the lower court or agency proceeding, or such descriptive terms as 'the employee'…")
- use lots of footnotes – if it is important, it should go in the text; if it is not important, take it out; footnotes slow down and distract the reader, which is the last thing the writer wants
- ignore length limits in the rules by:
  - moving for an extension of the length limit already set by the rules;
  - cheating on the length limit; *see, e.g.*, *Pi-Net International Inc. et al. v. JPMorgan Chase & Co.*, No. 14-1495 (Fed. Cir. Apr. 20, 2015) (dismissing appeal where appellant used strange formatting and contortions to decrease the word count – e.g., one case citation welded 14 words into one by squeezing together each separate word:
    Thornerv.SonyComputerEntm'tAmLLC669F3d1362,1365(Fed.Cir.2012))
    * According to Judge Kozinski, such cheating "has two wonderful advantages: first, it lets you cram in more words, and when judges see a lot of words they immediately think: LOSER, LOSER. You might as well write it in big bold letters on the cover of your brief. But there is also a second advantage: It tells the judges that the law 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."
- make ad hominem attacks – against opposing counsel, or the district court judge

- directly quote the district court decision for four pages in the middle of the ***argument*** section (seriously, it is in the opposing party's brief of one of Lisa's cases currently pending in the MN COA – wouldn't you love to have been the assistant who had to type that in!)
  - or, for that matter, include long, block quotes of any matter – be it testimony, text from cases or statutes, or the like
- use many and long string citations
- write sentences so long that a judge would have to read the sentence twice to understand it
- consistently use compound sentences
- write in passive voice

If you follow these ten tips, you can improve your chances of writing a not just a persuasive brief, but a winning brief.

Resources and Bibliography:

AMERICAN ACADEMY OF APPELLATE LAWYERS, Bibliography of Appellate Practice, *Books, Manuals, and Articles*, available at http://www.appellateacademy.org/publications/bibliography.pdf

- Luther T. Munford, Appealing to a Deluged Court, The Practical Litigator (May 1994)
- Mark Herrmann & Katherine B. Jenks, Great Briefs and Winning Briefs, 19 LITIG. (Summer 1993)
- John C. Godbold, Twenty Pages and Twenty Minutes, 15 No. 3 Litig. 3 (1994).
- Alex Kozinski, The Wrong Stuff, 1992 BYU L. Rev 325 (1992)
- Marshall Houts, Walter Rogosheske, Diane B. Bratvold, Eric J. Magnuson, "Art of Advocacy: Appeals" (2014 Matthew Bender)
- Robert H. Jackson, "Advocacy Before the Supreme Court: Suggestions for Effective Case Presentation" in *Advocacy and the King's English* (G. Rossman ed. 1960)
- Myron H. Bright, "Appellate Briefwriting: Some 'Golden' Rules," 17 Creighton L. Rev. 1069 (1983-84)
- Steven Alan Childress & Martha S. Davis, *Federal Standards of Review* (4th ed. LexisNexis) (2-volume set)
- *The Minnesota Court of Appeals Standards of Review* (updated August 2014), http://www.mncourts.gov/mncourtsgov/media/Appellate/Court%20of%20Appeals/Standards_of_Review_2014.pdf

APPENDIX A: *U.S. v. Bame et al.*, 8th Cir. File No. 12-3417, Excerpt of Brief of Respondent

This Court applies a de novo standard of review to summary judgment orders. *Specht v. City of Sioux Falls,* 639 F.3d 814, 819 (8th Cir. 2011). Summary judgment is appropriate only where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

While the Court reviews equitable decisions of the district court for abuse of discretion,[3] there is no discretion to apply the law incorrectly. *Home Owners' Loan Corp. v. Huffman*, 134 F.2d 314, 317 (8th Cir. 1943) (describing "an abuse of discretion" as including "failure to apply the appropriate equitable and legal principles to the established or conceded facts and circumstances") (citation omitted). Hence legal decisions, even in an equitable context, are reviewed de novo. *See Donaldson Co. v. Burroughs Diesel, Inc.*, 581 F.3d 726, 731 (8th Cir. 2009) (application of equitable doctrine presented mixed questions of law and fact, which are reviewed de novo). *See also Actors' Equity Ass'n v. Am. Dinner Theatre Inst.*, 802 F.2d 1038, 1042 (8th Cir. 1986) ("The legal principles that the court relies on 'to inform its discretion, however, are subject to de novo review.'") (quoting *Lewis v. Anderson*, 692 F.2d 1267, 1269 (9th Cir. 1982)).

APPENDIX B: *In re:* _____, Board of Immigration Appeals File No. A 094-071-___, Excerpts of brief of Respondent (subheadings from Statement of Facts)

A. Respondent makes lawful entries in 2002 and again on October 6, 2006.
B. Removal proceedings commence in 2009.
C. The removal hearings are characterized by confusion over procedure.
D. The reliability of the TECS records is called into question.
E. The Immigration Judge order DHS to explain how the information on the TECS record is derived.
F. Respondent has to prove he did not depart on January 21, 2005.
G. Respondent produces evidence that he had never departed the United States following his October 6, 2004 lawful entry.

H. Immigration Judge rules Respondent departed on January 21, 2005.
I. Proceedings continue for nearly three more years, and additional witnesses testify that Respondent had not departed on January 21, 2005.
J. The IJ sustains the charge of removability.

APPENDIX C: *U.S. v. Travis Michael Cullen*, 8th Circuit File No. 04-4206, Excerpt of Appellant's Brief and Addendum

SUMMARY OF THE ARGUMENTS

Mr. Cullen's sentence violates of the Sixth Amendment as interpreted by *United States v. Booker* because it is based on facts that Mr. Cullen did not admit to in his plea. Despite Mr. Cullen's objection to the enhancement at the time of sentencing, the court treated the agreement that the sentencing enhancement applied as the equivalent of an acknowledgement of the factual basis for the enhancement. There is no evidence in the record to support the sentencing court's enhancement. Mr. Cullen is entitled to remand for resentencing.

The district court also committed procedural error when it, understandably, treated the Sentencing Guidelines as mandatory at the time of Mr. Cullen's sentence. This is a violation of the remedial opinion in *Booker* that is specifically applicable to Mr. Cullen since his case was pending on direct appeal when *Booker* was decided. On this basis, too, Mr. Cullen is entitled to a remand.

APPENDIX D: *Webb Golden Valley, LLC v. State of Minnesota, et al.*, Minnesota Supreme Court File No. A13-2044, Excerpt of Brief of Appellant

CONCLUSION

Webb brought this action challenging only the authority of MnDOT to transfer the subject property without first offering it for sale to the prior owners or the public. The district court recognized that the statutory requirements for sale applied in this case, but ruled as a matter of law that Webb did not have standing to invoke the statute as to two of the three parcels in dispute. That decision was clearly wrong. As an adjoining landowner and member of the public for whose benefit the statute was enacted, Webb clearly had standing to demand that MnDOT comply with the statutory mandate.

The district court also erred when it required Webb to post a multi-million dollar bond as a condition of continuing its claim as to the remaining parcel. Webb's lawsuit was directed only at the authority of MnDOT, and did not challenge in any way the right, power or authority of the HRA to act once it acquired the disputed land. The district court's decision inappropriately expanded the scope of bonding statute.

Finally, the district court inappropriately denied Webb the opportunity to litigate the

factual issues surrounding the amount of the bond. Despite the fact that the legislature has specifically declared that increased tax base is not, standing alone, a public purpose, the district court used claimed lost tax revenues as the sole measure of damages for determining the amount of the bond. This too was error.

The judgment of the district court should be reversed, and the case should be remanded to the district court for further proceedings.

APPENDIX E: *Givaudan Fragrances Corp. v. Krivda et al.*, Third Circuit File No. 14-1590, Excerpt of Reply Brief of Plaintiff-Appellant

A. THE DISTRICT COURT IMPROPERLY GRANTED SUMMARY JUDGMENT

1. Appellees Inaccurately Portray the Discovery Issues Below

From the inception of the litigation, Givaudan tried to obtain from Mane information about Mane's fragrance formulas so that it could try to determine how the information that Krivda accessed and printed was used. Mane fought that effort at every step. Its fitful production, the breaches of its claimed quarantine, changes in formula names, and other actions explain, in part, why it was so difficult for Givaudan to match its formula information to Mane's formulas. (*See* Appellant's Opening Brief (App. Br.) 10).

Having prevailed in a jury trial, Appellees argue that the record must be viewed in a light most favorable to the verdict. (Mane Br. 3; Krivda Br. 55). While that might be true with regard to the evidence that formed the basis for the jury's verdict, as to the pre-trial rulings of the district court and its decisions regarding the scope of evidence that Givaudan could present to the jury, all parties must fairly and accurately state the proceedings, without embellishment or distortion. Appellees do not honor that obligation.

First, Appellees misstate the discovery record below. Second, they focus their recitation on only those portions of the record that support their claims, largely ignoring the impact of the district court's erroneous evidentiary rulings on Givaudan's case. This strategic misdirection cannot obscure the prejudice of the district court's actions.

a. Givaudan's discovery was not complete; Mane, not Givaudan, was the subject of motions to compel discovery

Givaudan's opening brief detailed the obstacles it faced in trying to obtain discovery from Mane. (*See* App. Br. 11-14). Mane consistently resisted discovery, and when it did provide information, that information was either altered (App. Br. 10, n.6) or in a form nearly impossible for Givaudan to use. (*Compare, e.g.*, JA7071 and 7185).

Mane asserts that the district court's partial summary judgment was filed at the end of discovery. (Mane Br. 50). Not true - Givaudan had discovery sanctions motions pending against Mane at the time of the decision (JA2034-35, JA2557-58); in fact, the district court expressed surprise regarding the outstanding discovery issues. (JA10756). Not only were Givaudan's motions pending before summary judgment, Givaudan also provided a Rule 56(d) declaration (JA8774-80) which was ignored by the

district court. The magistrate only denied Givaudan's discovery motions after the summary judgment ruling in light of the narrower scope of the case following the order. (JA4106-08, JA4112-26).

b. Givaudan was never sanctioned for discovery

Mane claims wrongly and repeatedly that the Court "sanctioned" Givaudan for violation of its disclosure obligations. (Mane Br. 6, 10 n.6, 50). Mane cites R183 (JA1218). However, that is an order granting in part and denying in part Appellees' *Motions in Limine* (JA962-63 & JA1007-08) at the preliminary injunction stage of the case. The order simply narrowed the number of formulas to be presented at the preliminary injunction hearing. Before the hearing, Givaudan had made 15 formula matches; after the deadline for submission, Givaudan provided 13 additional matches, but the court ruled that those would not be considered at the hearing. Givaudan was never "sanctioned" – as Mane later admits in its brief: "The Court could have, but did not, grant dispositive sanctions . . ." (Mane Br. 32). The district court did not affirm any sanction (Mane Br. 11) – it summarily affirmed the magistrate's ruling on the *in limine* motions. (JA1226-27).

c. Givaudan provided full information concerning its formulas

Mane was able to convince the district court that it was denied a "meaningful opportunity" to inspect the detailed formula information. (JA12). However, every Givaudan formula Krivda printed was produced on a computer database; the magistrate actually criticized *Mane* for its unilateral refusal to review the database that Givaudan had made available. (JA2019; App. Br. 12, 15, 34). Appellees spurned the opportunity to review the full and complete formulas that Givaudan made available until well after the summary judgment briefing was complete. (App. Br. 14).

APPENDIX F: *John Gieseke v. IDCA, Inc.*, Minnesota Supreme Court File No. A12-0713, brief of

II. RESPONDENT'S ARGUMENTS REGARDING WHAT THE ELEMENTS SHOULD BE FOR A TORT OF INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE ARE NOT PERSUASIVE.

…

… Respondent, however, directs us back to the 1986 court of appeals decision in *Midway Manor* and the 1995 court of appeals decision in *Glass Serv. Co*. Presumably, Respondent focuses on *Midway Manor* and *Glass Serv. Co.* at various points in its brief because it considers the types of business interference alleged therein to be analogous to the instant case.

As background: Plaintiff Glass Service Company had sued State Farm for tortious interference with its prospective business relations, alleging State Farm twisted away State Farm insureds who contemplated using Glass Service Company and referred those insureds to other vendors. 530 N.W.2d at 869-70. Defendant State Farm prevailed in the district court by obtaining summary judgment based on justification. *Id.* at 871. And so, as to a requirement that a plaintiff specifically identify third parties with whom the alleged interference occurred, Respondent states that there is nothing in the *Glass Serv. Co.* decision that indicated that the plaintiff had to so specify. Resp. Br. at 11. Once again, not surprising. The defendant had pleaded justification, and moved for summary judgment on that basis, and was granted it by the district court. The main issue on appeal, therefore, was whether the summary

judgment on the basis of justification was providently granted in favor of the defendant. The plaintiff, and therefore the courts, never focused on the elements of plaintiff's cause of action as the justification defense was pleaded and summary judgment was properly granted upon it. 530 N.W.2d at 871-72.

And now for *Midway Manor*: Plaintiff Midway Manor nursing home had sued a hospital and its staff for tortious interference with a business relationship when the hospital staff adopted a policy of not affirmatively recommending plaintiff nursing home to hospital patients. 386 N.W.2d at 784-85, 788. The defendants prevailed in the district court by obtaining summary judgment based on discretionary immunity. *Id.* at 788. And so, as to a requirement that a plaintiff specifically identify third parties with whom the alleged interference occurred, Respondent states that there was no discussion in the decision about particular patients. Resp. Br. at 11-12. This case similarly fails to surprise. The defendant had pleaded justification and protection by the discretionary immunity doctrine, and moved for summary judgment on that basis, and was granted it by the district court. The main issue on appeal, therefore, was whether discretionary immunity had been appropriately recognized by the trial court. In this other case addressed by Respondent, again the elements of the plaintiff's cause of action were not a real focus because the case was able to be disposed of based on immunity. 386 N.W.2d at 788.

In the end, the closest Respondent comes to offering any real reasons to this policy-making Court to reject the specifically-identifiable third party element contained in the ABA model instruction and urged by Appellants is this claim: "[i]f the tort were limited to specifically identifiable third parties, many businesses would be left without a remedy, even for intentional, admittedly wrongful interference." Resp. Br. at 12. There are, however, many other methods of challenging unfair competition that hinders an ongoing business arguably loses potential (not specifically identifiable) business, such as: defamation, product disparagement, palming off (trademark infringement), false advertising, misappropriation, stealing trade secrets, and more.

APPENDIX G: *State of Minnesota vs. Alan David Baum*, Minnesota Court of Appeals, File No. A14-1707, Excerpt of Appellant's Reply Brief

I. THE STATE WAIVED THE GOOD-FAITH EXCEPTION.

In the district court, the State sought to justify the warrantless blood draw by raising and relying exclusively on the exigent circumstances exception. In its Respondent's Brief, the State argues that if the exigent circumstances exception is not justified, the exclusionary rule should not be applied to Mr. Baum's blood sample because the state trooper was acting in good faith. Resp. Br. & App. at 17. At no point during the proceedings before the district court did the State ever raise a good-faith exception, whether orally at the omnibus hearing or in any of the written submissions.

Generally, an appellate court will not consider arguments that are made for the first time on appeal. *Johnson v. State*, 673 N.W.2d 144, 147 (Minn. 2004). The Minnesota Supreme Court has repeatedly applied this waiver rule to the State when it has been in the position of a respondent seeking to justify government action that an appealing defendant contends violated his constitutional rights. *See, e.g.*, *State v. Gauster*, 752 N.W.2d 496, 508 (Minn. 2008) (holding state as respondent on appeal waived argument that search of vehicle was justified by probable cause under the automobile exception to the warrant requirement); *Garza v. State*, 632 N.W.2d 633, 637 (Minn. 2001) (holding state as respondent on appeal waived its right to raise issue of standing as defense to challenge to unannounced entry

provision of search warrant by failing to assert it at omnibus hearing in front of trial court). The State has waived the good-faith exception which it raises in its Respondent's Brief to this Court because it failed to raise that argument to the district court during the omnibus proceedings.

II. THE GOOD FAITH EXCEPTION DOES NOT APPLY IN MINNESOTA.

Even if this Court did not apply the general waiver rule against the State on its newly raised good-faith exception argument, it is not the province of this intermediate appellate Court to change the landscape of Minnesota's Fourth Amendment jurisprudence by adopting a good-faith exception.

The good-faith exception of *United States v. Leon* provides that "the exclusionary rule does not apply when the police conduct a search in 'objectively reasonable reliance' on a warrant later held invalid." *Davis v. United States*, 131 S. Ct. 2419, 2427-28 (2011) (quoting *United States v. Leon*, 468 U.S. 897, 922, 104 S. Ct. 3405, 3420 (1984)). In *Davis v. United States*, the United States Supreme Court extended the *Leon* good-faith exception to situations when evidence is obtained during a search conducted in reasonable reliance on binding precedent. 131 S. Ct. at 2429.

On appeal before this Court, the State argues for the first time in this case that – in the event the exigent circumstances exception does not apply – a new good-faith exception based upon *Davis* "should [be] incorporate[d] … into Minnesota case law," Resp. Br. & App. at 17, and excuse the trampling upon of Mr. Baum's constitutional rights.

The Minnesota Supreme Court has "consistently declined to adopt, much less even address, the . . . 'good faith' exception." *State v. Jackson*, 742 N.W.2d 163, 180 n.10 (Minn. 2007). The State in its brief recognizes a *Leon*-specific good-faith exception argument to be a losing one. *See* Resp. Br. at 17 ("The State does not argue that, in these circumstances, the Court should adopt the *Leon* good faith exception to the warrant requirement."). The State fails to recognize, however, the limits of this Court's exercise of authority. This Court, as an intermediate appellate court, will not analyze or adopt the good-faith exception because "[i]t is not the province of this court to adopt a good-faith exception to the exclusionary rule when the state supreme court has not done so." *Minn. State Patrol Troopers Ass'n on Behalf of Pince v. State, Dep't of Pub. Safety*, 437 N.W.2d 670, 672 (Minn. App. 1989). This is true – regardless of the underlying basis of the good-faith exception that is urged.