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## Litigation Practice Tip - October 2021

### Staying Safe with Sample Briefs

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**Staying safe with sample briefs: you might not have to reinvent the wheel, but be careful with that used tire.**

Used correctly, sample briefs can be an invaluable tool for a legal writer, especially a beginning one. We all start off learning by imitating, and sample briefs can demystify the often-daunting task of writing, particularly when tackling a new type of brief for the first time. But sample briefs can do as much harm as good if used the wrong way. Too often, attorneys who are overeager to save time rigidly copy the structure of a sample brief or mimic its surface content without considering the reasons behind the original author's choices. Effective use of sample briefs involves *adapting*, not simple copying. This means identifying when you can follow the sample's model and when the differences in your case require departures from it both large and small. **Below, I offer three key pointers to avoid the pitfalls of sample briefs and make the best use of them.**

#### **1. Take time to understand the function of each part of the sample brief.**

A good sample can help you understand the most effective way to structure your brief. As you read each section and subsection of the sample, ask how each part advances the goals of the brief and compare those goals to your goals in the brief you plan to write.

Then assess whether your brief needs a piece to play a similar role. For example, a sample brief in support of a motion for attorneys' fees may have a long subsection describing the many hours the plaintiff's counsel spent conducting discovery. The thing to take away from this is not that your attorneys' fees brief necessarily needs a subsection on discovery – if discovery was a small part of your case, it probably doesn't. But your brief *does* need something to play a similar function: describing the tasks that the attorneys spent the most time on in sufficient detail to show the judge that the number of hours in your fee request is reasonable.

#### **2. Do not treat the sample as an outline; make your own instead.**

With a sample brief addressing a similar issue in hand, it's tempting to use it as a pre-made outline, copying the section headings and headnotes into a new document, tweaking them slightly, then diving straight into writing. I recommend avoiding this approach, especially if you are a beginning legal writer. While you might get away with it for a very formulaic motion, it makes it too easy to fall into the trap of copying without adapting. More importantly, the process of thinking through the points and facts to include as you outline your own brief helps you develop a solid understanding of the arguments in your case.

Trying to save time by using someone else's document as your outline can short-circuit this important process. After you take a first pass at an outline, you can turn back to the sample to help you refine yours and check if you've overlooked anything. But creating your own outline first will help you pin down the essentials of your argument and develop as writer.

#### **3. If you copy and paste from a sample, dedicate plenty of time to editing and**

### reviewing the applicable law.

Once you have a good outline, judiciously copying and pasting can aid in drafting your brief, but it's essential to set aside adequate time to edit the text you borrow. If you copy and paste any of your brief's legal analysis, plan on spending twice as much time editing as you normally would. Without careful editing, you are almost certain to inadvertently mix up facts and names between the two cases and include extraneous points that fit in the original brief but are unnecessary and confusing in yours. Keep in mind too that even the best writers sometimes include sentences that are unclear or arguments that don't work. If part of a sample does not seem persuasive to you, it is also unlikely to sway a judge, so always use your independent judgment when copying and pasting. I've found that it's most effective to avoid pasting large chunks of text and instead paste one paragraph or point in a legal argument at a time, editing as you go. Working in bite-size pieces allows you to ensure that each element of the argument you're borrowing fits in your brief and make the changes necessary to adapt it to the facts of your case.

It's also critical to devote sufficient time to review the relevant authorities when you copy and paste. Make sure you read all the cases cited in the text you are borrowing, check whether they have been overruled or distinguished, and do at least a little research of your own to see if there are any new relevant cases, important ones the original author overlooked, or authorities more germane to your case. Fully understanding the authorities you're relying on is essential when adapting a sample brief.



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