NEW YORK STATE BAR ASSOCIATION

EFFECTIVE BRIEF WRITING AND ORAL ADVOCACY

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EFFECTIVE BRIEF WRITING

The brief is the essential component of the appeal. It is submitted for only one reason, to help persuade the court to reach the desired result. Anything about the brief that detracts from that end is counterproductive, and that includes distractions like excess verbiage, poor grammar, incorrect citations, spelling errors and inadequate margins.

If a judge finds that a brief is repetitive, contains irrelevant matter or is burdensome to read, he or she will reject it. Conversely, if the brief engages and holds the interest of the reader by telling an absorbing story and addressing the legal issues in a clear and logical manner, it will be read, however long it is.

Appellate judges are inundated with reading material and often read briefs at home, nights and on weekends. Judges should not be expected to read and re-read cumbersome sentences. They want to grasp the essence of the argument and get on to the next case. The experienced brief writer will present his or her argument as simply, concisely and clearly as possible.

The goal then is to hold the attention of the judge, establish credibility and ultimately persuade the judge that your position is correct.

OUR INSIGHTS AND SUGGESTIONS:

(1) The brief must be fully thought through before the writing begins. If you do not know your objectives and the points that you intend to make to achieve them, it is unlikely that the reader will either.

(2) At the top of the list of effective brief writing is a clear and concise presentation of the contentions. The brief should be no longer than is absolutely necessary to

make your points.

(3) The statement of facts is the most important part of the brief. It is the writer's first opportunity to relate the case to the court. No matter how much substantive law a judge may know, he or she knows nothing about the facts of the case until the appellant's brief is read.

(a) The presentation of the facts must be scrupulously accurate. Counsel should state the facts truthfully, without exaggeration, but in such a way as to permit or suggest the inferences that favor his or her side of the case.

(b) Counsel should avoid overstated or unwarranted conclusions which actually detract from the credibility of the brief.

(c) Unfavorable facts should not be ignored; if they are, rest assured that they will be brought to the court's attention – perhaps more tellingly – by the other side. The unfavorable fact should be put forward in the best possible light.

(d) In most cases, a chronological development of the facts is best; it is usually the easiest to follow and creates a realistic relationship between persons and events. However, the writer should always choose the organizational structure that leads to the most logical, clear presentation of the case.

(e) Subheadings should be used when the facts are lengthy in order to focus the reader's attention more closely. If beneficial to achieve clarity, an exhibit, diagram, chart or table may be reproduced and attached.

(f) Throughout the brief, use the same designation for the same party. This will make it much easier for the reader to follow your story. It is very confusing if one party – at various times within the same brief – is referred to as the plaintiff, the infant plaintiff, the appellant, the injured party, and by name.

(i) It is much clearer to say "the buyer" and "the seller" than "defendant-respondent" or "plaintiff-appellant."

(ii) In matrimonial and family law litigation, reference to the parties as "husband" and "wife" or as "mother" and "father" is often more helpful to a quick understanding of the issues and the parties than "appellant" and "respondent" or "plaintiff" and "defendant."

(iii) It is also usually preferable to refer to the "Town," the "Board," the "Village," the "City," the "Department" and the "Bank," rather than, for example, "respondent-intervenor-appellant."

(iv) Use the term "respondent" rather than the term "appellee."

(g) All factual assertions recited in the statement of facts should be followed by parenthetical record page cites. Where there is an original record and you have provided an appendix, you should always cite to the original record in addition to a page cite to your appendix.

(h) One of the more serious breaches of appellate decorum is to refer to facts or papers that are outside or "dehors" the record. It is a fundamental rule of appellate practice that the rights of the litigants are to be determined

based on what is in the record. Counsel do not help their case by attaching to their briefs items that are outside the record.

(4) The questions presented should be directly related to the point headings that follow in the argument portion of the brief. The point headings should be affirmative statements in answer to each question presented. Every part of the brief should be viewed as part of an integrated argument, making and re-emphasizing your points.

(5) The legal argument portion of the brief should be divided into separate points, each with its own heading.

(a) There is no need to repeat the statement of facts in the body of the legal argument.

(b) Ordinarily, the strongest point should be argued first and the remaining points made in diminishing order of strength. However, ease of comprehension is of equal importance and dictates that arguments be advanced in logical progression of thought.

(c) Do not overburden the court with a multitude of insubstantial points. If you have two strong arguments followed by a number of frivolous points, the judge may forget your best arguments by the time he or she arrives at the last point.

(d) Your objective should be to move the reader, smoothly and without distraction, to the inevitable conclusion that relief is necessary to correct the error or injustice of the result below, or that the result below was correct.

(e) A dignified and professional tone should be maintained. No matter how intense your feelings may be about what happened below, avoid sarcasm and other forms of intemperate and unwarranted attacks on opposing counsel or the court which not only are improper, but often counterproductive.

(i) Never accuse your opponent of lying or deliberately misstating the holding of a case. The most outrageous misstatements can be turned to your advantage in a professionally dignified manner.

(ii) Similarly, if your opponent indulges in absolutes ("There is no evidence..." or "it was undisputed that..."), the simplest and most effective way to torpedo his or her credibility is to quote the record evidence belying that assertion.

(f) Counsel must bear in mind that the function of an appellate brief is to assist, not mislead, the court and that they have an affirmative obligation to advise the court of adverse authorities, though they are free to urge their reconsideration (see Rules of Professional Conduct [22 NYCRRR 1200.0] rule 3.3 [a] [2]).

"(a) a lawyer shall not knowingly;

(2) fail to disclose to the tribunal controlling legal authority known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel."

(g) Always bear in mind the particular court you are addressing. When the appeal is to the highest court of the jurisdiction, it is a mistake to rely on

precedent alone. Be prepared to advance policy reasons why those precedents are (or are not) still valid.

(i) If the appeal is to an intermediate appellate court, such as the Appellate Division, you are less likely to prevail on an argument designed to show that public policy requires a change in the law.

(ii) An argument urging a change in the law should, however, be mentioned in your brief to an intermediate appellate court so as to preserve it.

(h) Case citations should always be to the official reports; a style manual should be obtained and followed; "string citations" – numerous citations strung together without discussion in support of the same position – should rarely be used. Citing and discussing two or three cases closely on point is more effective. Contrary cases should be distinguished, if possible.

(i) Footnotes are distracting and quotations are often overdone. Counsel should be cautious in the use of both devices.

(j) Care should be taken to make sure that all writing is gender neutral.

(k) If the brief refers to an esoteric text, administrative decision or court decision not readily available, the item cited should be reproduced and included at the end of the brief.

(l) The conclusion should state succinctly and clearly what you want the reviewing court to do and, where applicable, an alternative.

(m) Don't forget to <u>always</u> include a "<u>Table of Authorities and Cases</u>." All

citations must be accurate and, again, to official reports.

(6) A respondent's brief takes an approach substantially different from that of the appellant.

(a) The respondent's brief should not only answer the appellant's points – or state why it does not – but also present its own affirmative side of the case, on both the facts and the law.

(b) It is generally a mistake to accept appellant's statement of the facts or questions presented. In most cases, counter-questions or a counter-statement of the case should be prepared.

(c) The opinion below, if there was one, will usually provide important support for the respondent's position. Respondent, however, should not overlook the possibility that the trial judge reached the right result for the wrong reason.

(7) A reply brief by appellant should be limited to responding to new points or misstatements in respondent's brief.

(a) Sur-reply briefs are not permitted in any of the New York Appellate Courts.

(b) Likewise post-argument or post-submission communications to the court are not permitted unless they have been specifically requested or authorized by the panel.

SUMMARY - BRIEF WRITING

FIRST - You must know the record on appeal from cover to cover. As Thomas R. Newman states in his treatise on New York Appellate Practice – which we highly recommend – quoting Bacon, "Some books are to be tasted, others are to be swallowed, and some few to be chewed and digested." Newman goes on to say, "The proper handling of an appeal does not permit mere tasting or swallowing of the record; it requires that it be thoroughly chewed and digested." Know your record and do not misstate or overstate the contents of the record. Document crucial facts by page cites to the record and stay within the record.

SECOND - Keep the brief as simple and as short as you possibly can in the circumstances of the case. There is no reason – in 90% of the appeals that we hear – to test the rules on page limitations. Quite frankly, in most cases, a 15 or 20 page brief will do the job nicely.

THIRD - Selectivity in the number of points you raise is extremely important. Choose, at most, 3 or 4 of the strongest points and have sufficient confidence in them to withstand the temptation and, at times, the forceful recommendation of clients, to raise less compelling grounds.

FINALLY - No matter how intense your feelings may be about what happened below, a dignified and professional tone should be maintained. Attacks upon opposing counsel or the trial judge are improper and counterproductive.

You should therefore -

(1) Know the record

(2) Keep the brief short and simple

(3) Focus on the critical points

(4) Maintain a dignified approach

Note: See CPLR 5528 and 5529: "Content (and Form) of Briefs and Appendices" and the Rules of Practice of the court to which you are taking the appeal:

Court of Appeals 22 NYCRR part 500,

First Department 22 NYCRR part 600,

Second Department 22 NYCRR part 670,

Third Department 22 NYCRR part 800 and

Fourth Department 22 NYCRR part 1000.

EFFECTIVE ORAL ADVOCACY

The value of oral argument today is primarily in the opportunity it gives counsel to emphasize the essentials of his or her case and, through dialogue with the court, to answer whatever doubts have been left in the minds of the judges after reading the briefs.

The presentation must depend upon the judgment and style of each individual advocate and should be governed by the comfort level of the lawyer presenting. This makes advice about oral argument difficult, but there are several items that can be highlighted and stressed -

(1) First, should you argue or submit?

(a) In some cases, the choice is made for you by the rules of the court.

(b) In most cases, if appellant's counsel has the opportunity to argue, he or she should do so. Oral argument enables the judges and counsel to crystallize their focus by cutting through the mass of papers to reach the heart of the controversy.

(c) If you are a respondent, and the appellant intends to argue, you should be prepared to argue. What if you are a respondent and the appellant submits? In most cases, the respondent should not argue if the appellant submits.

(2) If permitted, the appellant should always reserve a minute or two for rebuttal – just in case your opponent misstates some fact or raises a new issue. The request for rebuttal time must be made at the opening of your argument.

(3) Counsel should always state his or her name and the party represented. Even if

we know you, state your name.

(4) Please don't simply rehash the brief. Don't read a prepared argument. Obtain and hold the court's attention and communicate with the members of the panel.

(a) Counsel should look not just at the Justice Presiding or the judge who authored a previous decision in your case, address each of the judges on the panel. Speak up. Wake up the court with an opening statement of what the appeal is about in a manner that will stimulate some questions.

(b) Stay behind the lectern. You are not trying a case before a jury and should not be pacing back and forth.

(c) Remember, in this era of the "hot" or well prepared bench, you should assume that the judges are familiar with the facts, and have generally read the briefs and – at least – some of the record and the key cases cited. Make your argument with this in mind.

(i) You need not devote much time to a statement of the facts, but be prepared with one so you can answer questions and comment upon any liberty taken by the other side with the record.

(ii) Should questions from the bench suggest that a judge is not well prepared or confused about a factual issue, respectfully explain the relevant facts.

(iii) Lead with your best points. Don't begin oral argument by listing

your points or correcting errors in your brief.

(iv) Don't try to argue every issue in your brief. Focus on one or two and rely on your brief for the rest.

(v) Don't waste time with full citation of case names or quotes from decisional law.

(d) If you are asked a question, do your best to answer it immediately; don't say "I will get to that later." The question was obviously important enough to the judge to cause him or her to interrupt your argument. It should be answered at once.

(i) If the question from the bench seems to indicate disagreement with your position, take the opportunity to emphasize your position and engage the court in further dialogue.

(ii) You must be absolutely candid in answering questions, even if the answer covers something you would rather not have discussed.

(iii) If you do not know the answer to a question, or have not previously thought about your case in the context of the question, do not be afraid to say so.

(iv) Before you make any concession, be sure you fully understand the question and all of its implications. If you do not understand a question, politely ask the judge to explain it.

(v) If you deem a question from the bench irrelevant, you should answer it anyway and then respectfully explain why you believe it is

not relevant.

(vi) When you have answered a question – move back to your argument. Do not say, "Does that answer your question, your honor?" If you haven't answered to the court's satisfaction, you'll soon know.

(5) Be flexible – If some of your allotted time is used up in a debate with a member of the court, be sure you have an alternative argument to touch upon the important issues you may not have had the opportunity to fully discuss.

(6) Don't lecture the court. For example, you need not tell the court that "summary judgment is a drastic remedy."

(7) Be civil. Avoid personal attacks on the trial judge or your adversary. While your adversary is arguing, refrain from facial expressions demonstrating disbelief or other emotions. If you refer to any of the judges on the court by name, be sure you know how to pronounce his or her name correctly. "Your honor" is fine, and safe.

(8) One difficulty that counsel may face is that at times members of the bench may converse among themselves. If this happens, simply continue with your argument, addressing it to those members of the bench still following you.

(9) Be mindful of the time allotted. Just because you requested a certain amount of time does not mean that you are under any obligation to speak that long. The court will not be disappointed if you finish your argument before your

time has been used up and prolonging the argument after your points are made may dilute its impact.

(10) Even though argument time has been reserved, if the respondent's points have been favorably covered during the appellant's argument by questions from the bench, the respondent should not hesitate to advise the court that he or she will rely on the brief unless there are any questions.

(11) Remember – the best arguments are conversations between lawyers and judges. Members of the court were at one time practicing lawyers just like you who enjoy dialogue with well-prepared lawyers. In the final analysis, if you advance a good part of your prepared argument and converse intelligently with the court without conceding your case away, you have likely made an effective legal argument and added something to your brief.

SUMMARY - ORAL ARGUMENT

FIRST - Time and genuine effort must be spent in preparing for the argument. If you are unprepared, it will be apparent to the court. You must be able to find relevant material in the record and you should review and be familiar with each of the cases relied upon in the briefs.

SECOND - Hold the court's attention by focusing on the critical issues. Lead with your best points and don't feel that you must argue every issue in your brief. Assume that the court is well prepared but be flexible and prepared to relate the facts.

THIRD - Answer questions directly and at once, even if it means you have to deviate from

your carefully prepared outline of the argument. Be absolutely candid in answering questions, but do not let questions intimidate you into surrendering a position you believe to be correct.

FINALLY - Be very careful not to exceed the allotted time. End your argument on a high note. Prepare a brief conclusion that summarizes the essence of your argument, which you can give in about 30 seconds in the event you run out of time.

You should therefore -

(1) Thoroughly prepare

(2) Focus on the critical issues

(3) Answer questions immediately, but carefully

(4) End your argument on a high note within the allotted time

Note: Consult the Rules of Practice of the Court to which you are taking the appeal regarding oral argument.

Court of Appeals 22 NYCRR § 500.18

First Department 22 NYCRR § 600.11 (f)

Second Department 22 NYCRR § 670.20

Third Department 22 NYCRR § 800.10

Fourth Department 22 NYCRR § 1000.11

Final Note

We also strongly recommend that, in your preparation, you consult the following New York State Bar Association Publications:

1) "Practitioner's Handbook for Appeals to the Appellate Divisions of the State of

New York" (Alan D. Scheinkman, Esq. and Professor David D. Siegel [2d ed 2005]) and

2) "Practitioner's Handbook for Appeals to the Court of Appeals" (Hon. Alan D. Scheinkman and Professor David D. Siegel [3d ed 2007]).