New York Law Journal

Forceful Brief Writing and Oral Argument

The best way to win an appeal is to thoroughly prepare your case on the facts and on the law.

By **Joseph P. Napoli and Kristina Georgiou** | November 20, 2018

In his celebrated article, John W. Davis, the leading advocate of his time, observed that the supreme objective of a brief is to convince the judicial mind. Davis, *The Argument of an Appeal,* 26 A.B.A.J. 895 (1940). What is required is a technique of presentation that will persuade to the optimum.

"His (Chief Justice Hughes') biographer, Mr. Merlo Pusey of the Washington Post has written me that his remedy was:'... to present his case so clearly, so quickly, and so forcefully as to forestall any questions which might arise in the judge's mind before the question could be asked. That seems like a pretty large order, but he seems to have succeeded in many instances. Justice Cardozo told his associates on the Supreme Court

that when Hughes appeared before him in New York, he always waited for twenty-four hours to make his decision to avoid being carried away by the force of Mr. Hughes' argument and personality.'"

Vanderbilt, Arthur T., Forensic Persuasion (1950 John Randolph Tucker Memorial Lectures delivered at Washington and Lee University), page 30.

Legal research should begin at the very inception of the case; that is, when the case comes into the office, prior to the drawing of the pleadings and prior to trial. It is at this stage that you will decide the legal theory upon which you will prepare and try your case. The best way to win an appeal is to thoroughly prepare your case on the facts and on the law.

Preliminary Statement

An appellate brief is usually arranged into various parts: preliminary statement, statement of facts, questions presented, argument and conclusion.

Every part of the brief, including the preliminary statement, should be used to convince the court of your position.

The function of the preliminary statement is to give the court at the outset the jurisdictional history of the case and to tell the court something about the general nature of the case.

In almost every case there will be one point of law which will determine the case on appeal. This should be brought to the court's attention in the preliminary statement at the very beginning of the brief. It will aid the court in reading the brief and prepare the court for the argument portion of your brief.

"The power of clear statement," thundered Daniel Webster over 100 years ago, "is the great power at the Bar." (From an 1849 letter to R.M. Blatchford, quoted in M. McNamara, *2000 Famous Legal Quotations* 89 (Lawyer's Co-operative Publishing Co., Rochester, 1967)).

Daniel Webster's criterion of clear statement should be followed not only in the preliminary statement but throughout the brief.

Questions Presented

The questions to be determined on the appeal should precede the statement of facts to enable the court to read the facts in light of the questions that must be determined. The selection and sequence of the "Questions Presented" should also contribute to the objective of convincing the court of your position.

Each question presented should be drafted to include the facts that give rise to the issue that is to be determined on the appeal. Thus if one of the issues involved on the appeal was the contributory negligence of the plaintiff, it should be framed to include the facts surrounding said negligence. For example: "Was the plaintiff contributorily negligent as a matter of law in walking into the dark and unlit stairway leading into the basement?"

The appellant should place his strongest arguments first, both in the "Questions Presented" and in the "Argument" that is to follow the "Statement of Facts."

Statement of Facts

Preparing the statement of facts is the most difficult and most important part of any brief. All of the material facts must be presented impartially and comprehensively. A plain and simple chronological statement of the material facts is usually the best.

In order to generate a statement of facts for your brief, it is necessary to digest the record first—both the transcript of the testimony at the trial and the exhibits. Digesting is an art. How effectively it is done will determine not only the amount of time consumed, but also the quality of the resulting factual statement. Do not treat it as a routine exercise. Stating facts fully and effectively is considerably difficult, but most important.

Ordinarily, facts determine the law that is applicable to a case and governs the outcome. Accordingly, facts should always be developed to the full. Every effort should be made to get all the juice out of them. The discovery of a tiny, but significant little nut or bolt may turn what would have been a defeat into a victory. Thus, digesting the record and checking the record references of each draft of the Statement of Facts should be done with great care, in order to dredge up every significant nugget, no matter how small, and to present the inferences and overtones.

Every brief needs the vital factor of organization, both in the Statement of Facts and in the Legal Argument. The best way to organize a Statement of Facts is to assemble it into compartments that are introduced by headings. Headings within the Statement of Facts makes it easier for the reader to absorb the written material and refer back to essential facts, when necessary, in reading the Legal Argument. In addition, the process of organizing a Statement of Facts in this manner compels the writer to prepare the brief with greater care and forces the writer to give adequate treatment to each introductory heading.

Mario Cuomo, in his article *Appellate Advocacy: Some Observations and Suggestions* (N.Y.L.J., Oct. 3, 1963), stated:

"The presentation of the facts, therefore, presents the brief writer with his greatest challenge. In most cases the facts are the. prime stuff out of which his argument must be produced. *It must be drawn. so as to suggest—if not impel—the solution sought after,* while at the same time being honest and straightforward. It must be reduced to the· material essence and unencumbered by irrelevancies, without being incomplete. It must be faithful to the record without depriving itself of the benefit of anything · commonly known or judicially noticeable that might aid in the cause. All in all, the task is a delicate one—as difficult as it is important." (emphasis supplied)

Legal Argument

Cuomo continued:

"... it is of pervasive importance to the presentation of a case on appeal that the court be shown how the result requested is compelled by equity and the dictates of justice; ... If he is to be an advocate he must breathe life into his cause by showing, as vividly as possible, that the conclusion he urges will serve a greater cause than mere uniformity. The advocate must convince the court that his solution will result immediately in justice between the parties and ultimately in justice to the community."

Each portion of the Brief devoted to Legal Argument is broken down into separate Points, and each Point must begin with a good point heading. A point heading is the very apex of a pyramid of argument. It should state the heart of the argument in broad-brush but clear and if possible, vivid terms. A well-written heading immediately informs the reader what the writer is driving at.

Writing a good point heading is not easy; if too long or prolix, the heading cannot be readily understood. On the other hand, if the heading is too short, it may be so cryptic that it may not convey the message at all. Only a middle course will really work. A heading should be as short as possible, yet long enough to be absolutely clear. It must be interesting and provocative and contain your Legal Argument applying it to the facts of the case.

In developing a Legal Argument, it is best to lead from strength rather than weakness. Hence, present the strongest points first. The order may be different when background material necessary for an understanding of the points should logically come first. Weak points dilute strong points, and should be placed last or omitted, depending on the writer's judgment. Within each Point the writer must weave the principle or principles of law he is relying upon with the operative facts that relate to his Argument.

The cases and authorities relied on must be cited and analyzed. *First*, in citing and discussing cases, it is usually best, again, to lead from strength rather than weakness. Put the best cases first. *Second*, in introducing a case, it is usually desirable to summarize what the case holds before turning to its details. In fact, all legal writing is more easily understood if the conclusion is stated before the reasoning is provided.

Third, cases should be presented fully enough so that the reader will not feel that, in order to understand it, he has to read the opinion. An effective treatment states the form of action, the relevant facts, the holding of the case, and one or more apt quotations. This comprehensiveness gives the case a more solid appearance than a sketchy summary would provide. *Fourth*, when an opinion contains a particularly cogent phrase that may come close to the heart of your own case, emphasize it by repetition.

A certain amount of conscious repetition of major points is often desirable. Otherwise, a main point may be overlooked by the reader. The end of each Point should contain a conclusion summarizing the major Argument or Arguments made throughout the Brief.

Conclusion Within Brief

The summaries at the end of each Point should be combined and drafted into a Conclusion that has the key facts, principles of law and the requested prayer for relief: Affirmance, Reversal or Modification.

Oral Argument

Mr. Justice Brennan has said:

"Oral argument is the absolutely indispensable ingredient of appellate advocacy … Often my whole notion of what a case is about crystallizes at oral argument. This happens even though I read all the briefs before oral argument; indeed, that is the practice now of all the members of the Supreme Court …" Brennan, *Harvard Law School Occasional Pamphlet No. 9, 22-23* (1967).

Oral Argument does not advance a client's cause simply because it is oral. Standing at the lectern and simply talking (or worse, reading) is not the kind of advocacy to which Mr. Justice Brennan was referring.

To advance the cause, Oral Argument must do the things that it is supposed to do. If it does not, it is not only ineffectual in advancing the client's cause, but may very well be harmful.

The following list contains many of the fundamental aspects as well as practical tips that go into effective Argument:

(1) **Thorough Preparation:** Counsel must not only know his own case, but also be prepared to answer any question on any problem which is closely related to his case.

(2) **Favorable First Impression:** Counsel must be neatly attired and be possessed of a respectful manner as evidenced by his observation of the proper formalities and courtesies.

(3) **Effective Opening:** Counsel's opening must mentally awaken the court.

(4) **Statement of the Issue:** Counsel should tell the court the specific issue that it is called upon to decide.

(5) **Statement of Cardinal Facts:** The statement of the facts should be limited to the essential facts. Counsel must develop these facts in a clear and effective manner.

(6) **Argument Must Be Concrete:** Principles of law should not be discussed abstractly, but in relation to the particular facts of the case.

(7) **Argument Must Stimulate Interest:** The presentation must be animated and enthusiastic. It must indicate sincerity of purpose and a desire to assist the court in arriving at a just and proper result.

(8) **Counsel must not divert the attention of the court** by annoying mannerisms, distressing gestures, reading long quotations, or unnecessary citation of cases.

(9) **Counsel must be able to answer the court's questions** in a competent and lawyer-like manner.

(10) **The Conclusion must be brief and concise,** and must state the relief requested.

Preparation

Every good trial lawyer knows that the great secret of being a successful trial lawyer does not lie in talent at courtroom histrionics or cross-examination ability or the like, although these are valuable talents; the great secret of being a successful trial lawyer is adequate preparation. Not to the same degree, but to a considerable extent, the same secret is true of Oral Argument on appeal.

Oral advocacy on appeal does require certain talents and inner resilience and fortitude that is not required in general- practice, or even in trial practice to the same degree. Indeed, there are many lawyers who should seriously consider letting someone else handle their appeals. But preparation is still a big "secret" weapon. Any lawyer who is basically qualified to appear in an appellate court will improve the quality of the representation he gives to his client if he will take the time required to prepare his Oral Argument adequately and devote that time to the proper manner of preparation.

The Law

The first and most obvious task in preparing for oral argument is in mastering the law of the case by a thorough study of the briefs.

The next task is to study the pertinent authorities. In doing so, read carefully the authorities on both sides of the case. It is a common error for counsel to have an "ostrich" approach to the cases cited against him. It is important to handle the cases that hurt as well as the ones that help.

"Shepardize" all cases on both sides, without exception. Check the clerk's office of the court in which the case is pending as to any related cases recently decided or under consideration. If there are related cases, obtain Briefs from the Clerk's office or counsel in the case.

Facts

Study the Record on Appeal. The facts on an appeal are contained in one place and one place only, and that is in the record. There is no substitute for the laborious reading and rereading of testimony and examination of the exhibits. This area of preparation is the one probably neglected most of all by counsel handling appeals.

The appellate judges interviewed by the author are unanimous in urging that counsel who intend to argue an appeal familiarize themselves with the facts in the record to such an extent that they can put their finger on any piece of testimony or evidence in that record at a moment's notice.

Topical Outline: After having already gone through the laborious process of soaking yourself in your case and polishing your Argument, you now need at the lectern a short topical outline of your Argument with brief catch phrases that are selected by you personally, so that they will recall to your mind at a glance the whole substance of the Argument that you want to make on each issue. These should be printed in a fairly large, highly legible fashion on plain white sheets of paper, or typed with extra large characters, using very wide margins on both sides and top and bottom with ample spacing between the topics.

This outline should contain items located in such a way that they are quite visible and available but do not distract from the substance of the outline itself.

Handling Questions

Answer questions immediately, forthrightly and use them as hammers with which to drive home the force of your Argument. Rather than seeing them as an interruption or a delay in your Argument, counsel should, as John W. Davis said, "Rejoice when the Court asks questions."

This is your priceless opportunity to engage the judge's mind directly, to discover what his doubts and reservations are, possibly his misconceptions of the facts or law, and to deal directly and forcefully with them, at a time when he is surely paying close attention. Never defer the answer to the question with the explanation that you will be coming to it later. As many appellate judges have said to counsel in such circumstances: "Counsel, you are there now." Instead, turn the question to positive advantage, using it to further the progress of your Argument and to help in the task of persuasion.

Remember that the judge is neither stupid nor inexperienced. The question will always be germane to the issue, and it will be probing toward a key point in the Argument.

Also, every Argument is made up of several points that are interrelated. You may have selected one sequence of organization or one method of approaching the explanation of your position, but there will always be other ways of approaching the same question. Seize upon the question the judge has asked as the "doorway" into that section of your Argument to which it pertains.

If your Argument is logical and cohesive, it should not be too difficult to begin at any point in it and progress forward, adding the necessary other points, and reach the same conclusion. If the question is directed t your legal Argument and not just to a record reference or something very brief it is normally impossible to answer it without including the other interrelated or major premises or presumptions that are a part of your Argument on that point.

Wherever possible, utilize this opportunity to nail down that particular portion of the Argument raised by the question. It may not be in the sequence you had planned to cover it, but cover it fully and completely, nevertheless, and then consider it to be done with.

In this way the answering of questions is not "lost" time, at all. It is time very valuably spent in covering a portion of your Argument that you were going to cover anyway but covering it in a way that is likely to be much more effective.

Conclusion

Each part of the Brief should be used to convince the court of your position. This should be done with the shortest, most concise and clearest of Briefs. Consideration should always be given to the work load of the court and to the objective of getting the court's attention to what you think is important in winning the appeal—via a clear and concise Brief and effective Oral Argument.

Joseph P. Napoli *is a partner and* **Kristina Georgiou** *is an associate at Napoli Shkolnik, PLLC.*