The Bar Association of the City of Richmond

presents

Appellate Practice & Procedure in Virginia

December 3, 1998

BUILDING BETTER BRIEFS

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Building Better Briefs

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I. Good briefs are hard work, but they are worth it.

A. *Most issues* that go to a judge (or judges) and not to a jury *are or could be decided "on brief."*

B. *Push yourself*! Don't take the path of least resistance. Don't look for the easy way out. Don't allow yourself to settle for a superficial understanding of the facts, law, logic, or anything else.

C. Aim high, and dig deep. Find all that there is to find. Then, in your brief, use only what you need to use; but keep the rest close to your mind. You may need it.

D. Work to *understand* the *reasoning* processes at work in the cases – *not* just to be able to recite them. Usually not quick or easy, but the benefits are huge.

E. Don't gloss over your own weak points.

Ruthlessly seek them out – and *kill them!*

- If you were opposing counsel, how would *you* attack your own (draft) brief?

II. You should always be able to write it better than you can say it.

A. State court judges will read your briefs. File them.

B. On issues of law, your principal job is to educate the judge(s).

When necessary, your job is to demonstrate to a reluctant court that it is in a "box" of statute and precedent – and therefore, that it *must* decide the case your way, as a matter of law.

There is no easy way. Good briefs take a lot of time and thought.

C. Think First

1. Research before you write

2. Start with a plan (outline)

D. Rewrite, Rewrite, Rewrite

- "There is no such thing as good writing – only good rewriting."

E. Have someone else edit your work

F. Lay it aside for a few days and come back with a fresh eye

F. Read and edit for content, as well as grammar and form

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- Within a paragraph, and throughout a brief, find where the same general idea is expressed more than once; and then try to consolidate.

III. Think about what you are doing

A. Trying to persuade the judge in your case

1. Everything you do should be geared toward persuading the judge

2. No hard and fast rules - you may do different things for different cases

3. Experiment! (thoughtfully). Take your sentences and paragraphs apart and reassemble them. What is the clearest, strongest, and "concisest" way to say what you want to say?

B. Who is your judge

1. State or federal, trial or appellate

2. old or new

3. does she have background in case

4. scholarly, hard working, short attention span

III. Make it easy for the judge

A. He doesn't have much time, and he won't spend a lot of time. Therefore, never say in 40 pages what you could say in 35, or in 20, or 15. A brilliant argument is wasted if the judge stops reading (or stops paying attention) before he gets to it.

- avoid perfunctory introductions
- avoid unnecessary definitions
- avoid scholarly history
- avoid citations to accepted propositions of law
- don't say anything that doesn't have a purpose
- lead with your best argument (unless a legally & logically antecedent must come first – usually subject matter jurisdiction)
- only make good arguments

B. Give the judge context

1. Put yourself in the judge's shoes

2. Assume judge will not read the pleadings. Unless you know otherwise, assume she knows nothing about the case *or* the applicable law.

3. Tell her:

- what the case is about,

- what you want, and
- what your basic argument will be

in the first paragraph or two (or perhaps three, in an extreme case)

4. Get her attention

5. Give her enough context to allow her to understand the significance of what you say

C. Only argue the issue, but win the case

1. Know the issue and what is related to it

2. Don't argue points, factual or legal, that aren't relevant to the issue – no "so what" points

3. Describe the case and the facts in a way that will make the judge think you should win

D. Make it easy to read

1. Eliminate visual barriers to effective communication

- no small type
  - Most of this document is in Times New Roman 13 point – large enough for even most elderly judges to read without eyestrain and probably complies with most Courts' rules. It is slightly larger than `Courier (or Courier New) 12 point`, but somewhat easier to read. Times Roman 12.5 point is a good compromise (click in the font number window and type it in). Times New Roman 12 point, however, seems to catching on as a standard size. But ***always*** read all of the applicable rules of court, which may contain dark and hidden pitfalls for incautious or unwary practitioners.
- no long paragraphs
- no *long* block quotes – and *only* as many blocks as you *need*
- no long complicated headings (see Addendum 1)
- break it up with short sections
- make sure exhibits are legible

2. Make it flow

- dictate brief[†]
- read it out loud

[†] Subject to strong dissenting opinions

- work out stumbling blocks
- have someone else read it
- use section headings for transition, road markers
- consider using numbered paragraphs
- asterisks to set off wrap ups

3. Make it easy to use

- table of contents
- descriptive headings
- attach materials the judge doesn't have
- tabbed exhibits

IV. Elements of brief

A. Statement of the case - context

B. Facts

1. <u>Always very important</u>

- provides detailed context
- opportunity to make the judge think you should win the motion and the case

2. Organize and present facts to make your case look good

3. Avoid arguing the facts (except perhaps in a trial brief) – but ***recite*** them, ***without*** any overt display of emotion, in a way that makes them "speak for themselves."

C. Argument

1. Points of law you rely on

- know what they are and make them
- support with authority

2. Generally, organize pursuant to hierarchy of authority

- Constitutions
- statutes
- Supreme Court decisions
- lower court decisions
- encyclopedias, treatises, articles

- recent authorities generally are more authoritative (or more persuasive) than ancient ones – at least for as long as the judges who decided a *cited* case are *still* deciding cases

3. Remember what court you are in when considering authorities. *E.g.*,

- In a U.S. District Court or Court of Appeals, *first cite a case from that Court of Appeals*; then *support it* with a U.S. Supreme Court or Virginia Supreme Court case (*if needed* – don't cite three cases if one or two will do) – depending on whether the question is one of federal or Virginia law.
- In a Virginia State Court, first cite cases from the Virginia Supreme Court or the Virginia Court of Appeals – depending on which Court has appellate jurisdiction of your case (sometimes both).

4. <u>Always</u> relate the facts of your case to the law of your case.

D. Conclusion

1. Usually perfunctory

2. Always short

3. Always say precisely what you want the court to do

(Most important in appellate courts, where the relief you seek, and the relief to which you may be entitled, may not be clear on its face)

4. Occasionally, you can use it for an emotional "bang"

V. Gain credibility. Don't shoot *yourself* in the foot. (Make the other side do it.)

A. Use correct format

- no typos
- correct citation form
- correct spelling
- correct grammar

B. Don't include arguments that can't fly. They waste space and cost credibility.

C. Acknowledge the other side's position, and meet it head-on.

- Don't try to create the impression that something is undisputed if it's not.

D. Don't miscite cases

E. Address the hard points

F. It rarely *if ever* helps to disparage another party, his attorneys, or even his argument, at least overtly; and *it can hurt you – a lot!*

- Avoid excessive use of adjectives. Make the facts speak for themselves.
- You can effectively belittle arguments by exposing them as meritless.
- If you take a shot at the other side's arguments, do it with a little humor.
- If you take a shot, only take one, or at least do it sparingly.
- But if it's a fraud case, and the other party is a crook, you can go and ahead and say he's a crook. Just make sure the judges smile when they read it.

VI. Analytical tools for thinking about and writing good briefs

A. What kind of issue are you arguing about:

- a question of law, for the Court?
- a question of fact, for the Court or the jury?
- or a question that is partly or even entirely within the Court's discretion?

B. If it is a question of law, are you arguing about

- The *interpretation* of a legal rule or doctrine (*e.g.*, contributory negligence)?
- The *application* of a rule or doctrine (*e.g.*, contributory negligence in a new or unique context – jet skiing, say; or playing a "virtual reality" game)?
- Or the *selection* of the correct and applicable legal rule from among two or more options (such as competing statutes and/or common law judicial decisions)?

C. Are you in a trial court or an appellate court?

- On appeal, you can't just regurgitate your trial brief with an new cover. Appellate courts have different functions, so they ask different questions. The *issue changes* on appeal. Appellate courts do not *decide* cases. They *review* case decisions.
  - If the issue is a question of law (selection, interpretation, or application), did the lower court *err*? The appellate court's standard of review is plenary, or *de novo*; it reviews for an error of law.
  - If the issue is a question of fact, is there sufficient evidence to support the trial court's finding? Or does it "appea[r] from the evidence that [the] judgment is plainly wrong or without evidence to support it" (Va.

Code § 8.01-680), compelling a judgment for the other party as a matter of law? In a federal appeal, were any trial court findings "clearly erroneous" (Fed.R.Civ.P. 52(a)) – which is much the same thing, in practice?

- If the issue is whether a Circuit Court properly entered judgment on a jury verdict *or* set aside the verdict and entered judgment *n.o.v.*, was there credible evidence to support the verdict?
- If the issue is the trial court's action on a matter within its discretion, appellate review generally is very limited, for "abuse" of discretion; but be aware that there are different "shades" of discretion.
- If the issue is a "mixed question" of fact and law, is the appellant attacking the factual or the legal components of the decision below – and does his lawyer know the difference?

- Most trial courts don't want to select or interpret a legal rule. They want to find the facts and apply the rule. If they must choose between competing rules or interpretations, they generally want fairly simple, straightforward explanations, backed by citations and quotations, that compel a result for one side or the other.
- Appellate courts usually *do not* want to deal with issues of fact. They want facts that are neatly packaged and established in the court below. Appellate courts are more interested in the lower court's choice and interpretation of legal rules and its application of the rules to the facts – and in announcing the *correct* rule for this and similar cases. That is their job. Trial courts sit to decide cases. Appellate courts review case decisions; but perhaps their primary role is to decide legal issues, establish precedents, and clarify the law.
- Appellate courts often are more attuned (and more willing to listen) to more sophisticated reasoning. Reasoning by analogy and history are valuable methods of argument. Reasoning from the *reasons for* the creation or patterns of development of a legal rule may be especially persuasive.
- Trial courts want to know about *this case*. Appellate judges frequently are just as interested in more "abstract" issues – in hypothetical cases that test the effect of a decision; and in larger, more abstract, conceptual, and seemingly even metaphysical questions such as ultimate consequences, intellectual consistency, and "play[ing] the game according to the rules."
- In a trial court, you may have some latitude to experiment with a variety of arguments (depending on the judge).
- On appeal, you *must* select the *few, very best* arguments that you have. Appellate judges normally are highly skeptical of claims that trial judges

have “gone off the deep end.” As a rule of thumb, limit yourself to a maximum of three arguments or assignments of error in any appeal. Four should be the ***maximum***, with ***very*** rare exceptions. With five, six, or more assignments of error, many or most appellate judges begin with an effective ***presumption*** that ***none*** has any merit. Judges expect you to do the hard work of sorting the wheat from the chaff. If you ask them to do it for you, they may not bother. (At least doubly true in appellate courts with discretionary jurisdiction, such as by petitions for appeal or *certiorari*.)

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ADDENDUM 1

(Which of these captions is the most "reader-friendly"?)

A. **DEFENDANTS SHOULD BE AWARDED THEIR ATTORNEY'S FEES AND COSTS, BECAUSE PLAINTIFF'S COUNSEL HAS UNREASONABLY AND VEXATIOUSLY INCREASED THE DEFENDANTS' EXPENSES IN THIS PROCEEDING.**

B. **DEFENDANTS SHOULD BE AWARDED THEIR ATTORNEY'S FEES AND COSTS, BECAUSE PLAINTIFF'S COUNSEL HAS UNREASONABLY AND VEXATIOUSLY INCREASED THE DEFENDANTS' EXPENSES IN THIS PROCEEDING.**

C. **Defendants Should Be Awarded Their Attorney's Fees And Costs, Because Plaintiff's Counsel Has Unreasonably And Vexatiously Increased The Defendants' Expenses In This Proceeding.**

D. **Defendants Should Be Awarded Their Attorney's Fees And Costs, Because Plaintiff's Counsel Has Unreasonably And Vexatiously Increased The Defendants' Expenses In This Proceeding.**

E. **Defendants should be awarded their attorney's fees and costs, because plaintiff's counsel has unreasonably and vexatiously increased the defendants' expenses in this proceeding.**

F. *Defendants should be awarded Their Attorney's Fees and Costs, Because Plaintiff's Counsel has Unreasonably and Vexatiously Increased the Defendants' Expenses in this Proceeding.*

G. Defendants should be awarded Their Attorney's Fees And Costs, Because Plaintiff's Counsel has Unreasonably And Vexatiously Increased the Defendants' Expenses in this Proceeding.

H. Defendants should be awarded their attorney's fees and costs, because plaintiff's counsel has unreasonably and vexatiously increased the defendants' expenses in this proceeding.