

MARYLAND STATE BAR ASSOCIATION
LITIGATION SECTION, APPELLATE PRACTICE COMMITTEE
and
THE TALBOT AND WICOMICO COUNTY BAR ASSOCIATIONS

NUTS AND BOLTS OF APPELLATE ADVOCACY

Thursday, March 15, 2007
5 – 7 p.m.

Historic Tidewater Inn
101 E. Dover Street
Easton, MD 21601

- Petitioning for Certiorari
- Appealable Judgments and Orders
- Appellate Advocacy Tips and Pointers

Hon. Dale R. Cathell, Court of Appeals of Maryland
Hon. Sally D. Adkins, Court of Special Appeals of Maryland
Kevin F. Arthur, Esq., Kramon & Graham, P.A.
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FUNDAMENTAL BRIEF-WRITING PRINCIPLES

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A. BEGINNING THE BRIEF

Principle 1: Develop your theme

Principle 2: Know your audience

B. STATEMENT OF THE CASE

Principle 3: Advocate from the beginning, but do so without arguing

Principle 4: Paint a picture that is intended to persuade the reader to the writer's point of view

Principle 5: Continue to articulate the theme long after the introductory sentence

Principle 6: The statement of the case should be short, but long enough so that the reader understands the issues that the case involves

Principle 7: The statement of the case should make clear that the appellate court has jurisdiction over the appeal

Principle 8: As a general rule, all appellee's and respondent's briefs should include a statement of the case

C. QUESTION PRESENTED

Principle 9: The question should be (a) a brief argument summary, (b) adversarial and designed to elicit a favorable response, and (c) developed to include enough law and facts so that the reader has a sufficient understanding of the case

Principle 10: Provide a complete explanation of the issue on appeal

Principle 11: The question should emphasize the proper focus

Principle 12: Minimize the number of questions

Principle 13: Consider whether to condense your opponent's questions

D. STATEMENT OF FACTS

Principle 14: Tell a story

Principle 15: Establish and maintain your credibility with accuracy and fairness

Principle 16: Use the statement of facts to advance the theme of the brief

Principle 17: It is usually necessary to include a complete statement of facts in an appellee's or respondent's brief

Principle 18: State only those facts that are necessary to understanding the legal issues that the case involves

Principle 19: Provide record extract cites for each of the facts that you discuss

Principle 20: Discuss the decision being reviewed

Principle 21: Decide where to put the heart of the best facts

Principle 22: Consider when to repeat "great" facts

E. SUMMARY OF ARGUMENT

Principle 23: State the theme of the brief

Principle 24: Include all significant issues and sub-issues

Principle 25: Use the summary as an organizational tool

F. ARGUMENT

Principle 26: Give context before discussing details

Principle 27: Begin the argument by (a) succinctly identifying the central issue that the appeal presents, (b) stating why that issue was correctly or incorrectly resolved below, (c) setting forth the applicable law, and (d) saying why the law supports your position

Principle 28: Incorporate the standard of review and other pertinent information into the argument

- Principle 29: Use Principle 27 together with IRAC – Issue, Rule, Application, Conclusion
- Principle 30: Advocate your case, not general propositions
- Principle 31: Use topic sentences that move the argument forward
- Principle 32: Give context to paragraphs by telling the reader where you are going
- Principle 33: Use headings and subheadings to organize and provide context for the argument
- Principle 34: An argument that consists of separate issues should have a separate heading for each
- Principle 35: As a general rule, develop YOUR position before advancing any rebuttal argument
- Principle 36: Advance YOUR position even when writing a reply brief
- Principle 37: Give context to the cases you cite to enable the court to understand their relevance
- Principle 38: Use parentheticals to explain the significance of the cases you cite
- Principle 39: Use cases to support propositions
- Principle 40: Discuss material facts from other cases sparingly
- Principle 41: Be brief in distinguishing cases that the other side cites
- Principle 42: Carefully scrutinize the use of footnotes
- Principle 43: Keep the subject and verb close together
- Principle 44: Avoid using lengthy quotations, either from cases, statutes or other sources
- Principle 45: Sustain your argument with substance, not adjectives

G. CONCLUSION

- Principle 46: Do not include an argument summary in the conclusion

RECORD EXTRACTS AND JOINT APPENDICES: A HOW-TO

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1. What is it called?
 - a. A record extract, if filed in the Maryland appellate courts, *see* Md. Rule 8-501
 - b. A joint appendix, if filed in the federal appellate courts, *see* Fed. R. App. Proc. 30
2. In either forum, the appellant is responsible for preparing and filing the record extract/joint appendix.
3. Whether you represent the appellant or the appellee, immediately upon the filing of the notice of appeal:
 - a. read the governing rule and the court's instructions to be sure you know format, deadlines, etc.
 - b. list your issues
 - c. abstract the pertinent deposition and trial transcripts (use a law clerk or paralegal, if available)
 - d. check your exhibit list to make sure it accurately reflects what did and did not come into evidence
 - e. if you want to include exhibits that are color pictures and you represent the appellant, send them out to get enough color copies for all copies of the extract; *see* 4 e. below if you represent the appellee
4. As soon as abstracts are done:
 - a. read the abstracts, and decide what you need
 - b. compile and check the transcript pages against the abstracts for accuracy
 - c. assemble pertinent exhibits

Note: if the appeal is from a grant of summary judgment, as a general rule, include all exhibits attached to the summary judgment papers

- d. if you represent the appellant, send the opposing counsel a written listing of what you are planning to include
 - i. both the Maryland and Federal Rules encourage counsel to agree on the contents, so, whenever possible, pick up the phone, discuss the contents, and send a letter identifying the contents
 - ii. absent agreement, the appellant shall serve on the appellee, within either 15 days (Md. Rule 8-501(d)(1)) or 10 days (Fed. R. App. Proc. 30(b)) of the time the record is filed with the appellate court, a statement designating those parts of the record to be included
 - iii. include what the Rules require and only those other parts of the record necessary for deciding the issues raised on appeal. *See generally* Md. Rule 8-501(c); Fed. R. App. Proc. 30(a)
 - iv. remember that every part of the record included will likely prompt a counter-designation from opposing counsel
 - v. when opposing counsel responds with transcript pages and exhibits:
 - check exhibits to be sure they were admitted
 - check transcript pages to be sure they don't require additional pages for your responsive argument
 - e. if you represent the appellee, wait to hear from opposing counsel, and either call counsel or send a letter with your designations sufficiently in advance of the time (no later than two weeks before) the appellant's brief is due
5. If you represent the appellant, when writing the brief
- a. don't number the extract pages yet
 - b. temporarily cite to transcript pages and exhibit numbers
 - c. check each citation in the brief against the transcript pages and exhibits to make sure that it says what you say it says, and that you have all the pages you need
 - d. notify the opposing counsel at least a week before your brief is due of any additional pages you intend to include, so he or she can request additional pages in response to your additions

- e. number the extract pages only when you are sure you have copied everything that is to be included
 - use labels with page numbers, if possible
 - record extracts are numbered E. ___ if filed as a separate document, or App. ___ if included as an appendix to your brief (*see* 5 g. below); joint appendices are numbered J.A. ___
 - use asterisks “or other appropriate means to indicate omissions in the testimony or in exhibits,” Md. Rule 8-501(i). *See also* Fed. R. App. Proc. 30(d)
 - f. the very last step is to substitute the extract page number for the transcript and exhibit cites in the brief
 - g. you ordinarily should file in the Maryland appellate courts the joint record extract as a separate document, although it may be appended to your brief if it is not too long, *i.e.*, less than 75 pages
 - h. you must file in the federal appellate courts a separately bound joint appendix
6. If you represent the appellee and the record extract does not contain materials you previously designated, or you discover additional materials you want included after the record extract has been filed:
- a. you may file an appendix to the appellee’s brief containing those materials and, unless the materials are voluminous, include them as part of your brief
 - b. include at the beginning of the appendix a statement of the reasons for the additional materials
 - c. number the appendix at the bottom Apx. ___
 - d. the Fourth Circuit’s Local Rule 28(b) requires that the additional materials be filed as a separate document (called an addendum) and be accompanied by a motion for leave to file them
7. Whether you represent the appellant or the appellee, you may include in an appendix to your brief copies of all pertinent statutes, rules, and regulations
- this appendix is numbered at the bottom App. ___ when it is part of an appellant’s brief in the Maryland appellate courts; Apx. ___ when part of an appellee’s brief; and Rep. App. ___ when part of a reply brief
 - in the federal appellate courts, these materials are attached as an addendum filed as part of the brief
8. Deferred record extracts/appendices are permissible in all appellate courts. *See* Md. Rule 8-501(1); Fed. R. App. Proc. 30(c)