



Appellate Brief Writing

June 15, 2021

10:00 a.m. – 11:00 a.m.

CT Bar Association

Webinar

CT Bar Institute, Inc.

CT: 1.0 CLE Credit (General)

NY: 1.0 CLE Credit (Skills)

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LAWYERS' PRINCIPLES OF PROFESSIONALISM

As a lawyer, I have dedicated myself to making our system of justice work fairly and efficiently for all. I am an officer of this Court and recognize the obligation I have to advance the rule of law and preserve and foster the integrity of the legal system. To this end, I commit myself not only to observe the Connecticut Rules of Professional Conduct, but also conduct myself in accordance with the following Principles of Professionalism when dealing with my clients, opposing parties, fellow counsel, self-represented parties, the Courts, and the general public.

Civility:

Civility and courtesy are the hallmarks of professionalism. As such,

- I will be courteous, polite, respectful, and civil, both in oral and in written communications;
- I will refrain from using litigation or any other legal procedure to harass an opposing party;
- I will not impute improper motives to my adversary unless clearly justified by the facts and essential to resolution of the issue;
- I will treat the representation of a client as the client's transaction or dispute and not as a dispute with my adversary;
- I will respond to all communications timely and respectfully and allow my adversary a reasonable time to respond;
- I will avoid making groundless objections in the discovery process and work cooperatively to resolve those that are asserted with merit;
- I will agree to reasonable requests for extensions of time and for waiver of procedural formalities when the legitimate interests of my client will not be adversely affected;
- I will try to consult with my adversary before scheduling depositions, meetings, or hearings, and I will cooperate with her when schedule changes are requested;
- When scheduled meetings, hearings, or depositions have to be canceled, I will notify my adversary and, if appropriate, the Court (or other tribunal) as early as possible and enlist their involvement in rescheduling; and
- I will not serve motions and pleadings at such time or in such manner as will unfairly limit the other party's opportunity to respond.

Honesty:

Honesty and truthfulness are critical to the integrity of the legal profession – they are core values that must be observed at all times and they go hand in hand with my fiduciary duty. As such,

- I will not knowingly make untrue statements of fact or of law to my client, adversary or the Court;
- I will honor my word;
- I will not maintain or assist in maintaining any cause of action or advancing any position that is false or unlawful;

- I will withdraw voluntarily claims, defenses, or arguments when it becomes apparent that they do not have merit or are superfluous;
- I will not file frivolous motions or advance frivolous positions;
- When engaged in a transaction, I will make sure all involved are aware of changes I make to documents and not conceal changes.

Competency:

Having the necessary ability, knowledge, and skill to effectively advise and advocate for a client's interests is critical to the lawyer's function in their community. As such,

- I will keep myself current in the areas in which I practice, and, will associate with, or refer my client to, counsel knowledgeable in another field of practice when necessary;
- I will maintain proficiency in those technological advances that are necessary for me to competently represent my clients.
- I will seek mentoring and guidance throughout my career in order to ensure that I act with diligence and competency.

Responsibility:

I recognize that my client's interests and the administration of justice in general are best served when I work responsibly, effectively, and cooperatively with those with whom I interact. As such,

- Before dates for hearings or trials are set, or if that is not feasible, immediately after such dates have been set, I will attempt to verify the availability of key participants and witnesses so that I can promptly notify the Court (or other tribunal) and my adversary of any likely problem;
- I will make every effort to agree with my adversary, as early as possible, on a voluntary exchange of information and on a plan for discovery;
- I will attempt to resolve, by agreement, my objections to matters contained in my opponent's pleadings and discovery requests;
- I will be punctual in attending Court hearings, conferences, meetings, and depositions;
- I will refrain from excessive and abusive discovery, and I will comply with all reasonable discovery requests;
- In civil matters, I will stipulate to facts as to which there is no genuine dispute;
- I will refrain from causing unreasonable delays;
- Where consistent with my client's interests, I will communicate with my adversary in an effort to avoid needless controversial litigation and to resolve litigation that has actually commenced;
- While I must consider my client's decision concerning the objectives of the representation, I nevertheless will counsel my client that a willingness to initiate or engage in settlement discussions is consistent with zealous and effective representation.

Mentoring:

I owe a duty to the legal profession to counsel less experienced lawyers on the practice of the law and these Principles, and to seek mentoring myself. As such:

- I will exemplify through my behavior and teach through my words the importance of collegiality and ethical and civil behavior;
- I will emphasize the importance of providing clients with a high standard of representation through competency and the exercise of sound judgment;
- I will stress the role of our profession as a public service, to building and fostering the rule of law;
- I will welcome requests for guidance and advice.

Honor:

I recognize the honor of the legal profession and will always act in a manner consistent with the respect, courtesy, and weight that it deserves. As such,

- I will be guided by what is best for my client and the interests of justice, not what advances my own financial interests;
- I will be a vigorous and zealous advocate on behalf of my client, but I recognize that, as an officer of the Court, excessive zeal may be detrimental to the interests of a properly functioning system of justice;
- I will remember that, in addition to commitment to my client's cause, my responsibilities as a lawyer include a devotion to the public good;
- I will, as a member of a self-regulating profession, report violations of the Rules of Professional Conduct as required by those rules;
- I will protect the image of the legal profession in my daily activities and in the ways I communicate with the public;
- I will be mindful that the law is a learned profession and that among its desirable goals are devotion to public service, improvement of administration of justice, and the contribution of uncompensated time and civic influence on behalf of those persons who cannot afford adequate legal assistance; and
- I will support and advocate for fair and equal treatment under the law for all persons, regardless of race, color, ancestry, sex, pregnancy, religion, national origin, ethnicity, disability, status as a veteran, age, gender identity, gender expression or marital status, sexual orientation, or creed and will always conduct myself in such a way as to promote equality and justice for all.

Nothing in these Principles shall supersede, supplement, or in any way amend the Rules of Professional Conduct, alter existing standards of conduct against which a lawyer's conduct might be judged, or become a basis for the imposition of any civil, criminal, or professional liability.

Faculty Biographies

Hon. Nina F. Elgo, Connecticut Appellate Court

Judge Nina F. Elgo is the first Asian Pacific American judge appointed to the Connecticut Appellate Court and was the first Asian Pacific American judge appointed to the Connecticut Superior Court.

Governor Dannel P. Malloy nominated Judge Elgo to be a judge of the Appellate Court and the General Assembly confirmed her appointment on May 25, 2017.

Prior to her appointment to the Appellate Court, Judge Elgo served as a Superior Court judge since May 5, 2004. In this role, she heard civil matters in the Hartford Judicial District and also served as presiding judge for the Child Protection Session in the Middlesex Judicial District. Additionally, she presided over criminal, juvenile and habeas corpus cases in the Hartford, Tolland and New Haven judicial districts.

Judge Elgo has served on various committees designed to improve the court system. Since 2012, she has served as a member of the Connecticut Bar Examining Committee and previously served on the Rules Committee of the Superior Court. For many years, Judge Elgo served on the Committee for Judicial Education and has been a frequent faculty member/facilitator of the Connecticut Judges' Institute. Additionally, in 2013, Governor Malloy appointed her to represent the Judicial Branch as a member of the Connecticut team selected to participate in the Three Branch Institute on Child Social and Emotional Well-Being Initiative sponsored by the National Governors Association.

Judge Elgo is the recipient of various awards and recognitions. In 2015, Judge Elgo was honored with the Native Daughter of Norwich Award; in 2014, she was the recipient of the CT Asian Pacific American Bar Association Impact Award; and in 2013, Judge Elgo was the recipient of the Edwin Archer Randolph Diversity Award. As the first Asian Pacific American judge in Connecticut, Judge Elgo was honored in 2006 by the Connecticut Trial Lawyers Association Women's Caucus as a "Trailblazer in the Connecticut Judiciary." She was also a recipient of the 2007 Connecticut Bar Association's Young Lawyers Section Diversity Award.

Judge Elgo is a member of the Swift's Inn, a Bencher Emeritus member of the Oliver Ellsworth Inn of Court and is a James W. Cooper Fellow and member of the Education and Program Committee of the Connecticut Bar Foundation. She was also active for several years with the Connecticut-Pskov Russian American Rule of Law Consortium.

Judge Elgo is a first generation Filipino-American, born in Groton, CT and raised in Norwich, CT. She received her BA from Connecticut College in 1984 and her Juris Doctor from Georgetown University Law Center in 1990. Judge Elgo is married to Attorney Christopher Kriesen and they have a daughter, Caroline.

WESLEY W. HORTON, PARTNER

Horton Dowd Bartschi & Levesque

Attorney Horton's appellate practice covers a wide variety of legal issues, from constitutional matters, to domestic relations, insurance, personal injury, and land use. He began his law career as the law clerk to Justice Charles House of the Connecticut Supreme Court (1970 to 1971). Building on that experience, he has become one of the premier appellate lawyers in the state of Connecticut. The list of cases on which he appears as counsel, either at argument or on the brief, spans 35 years and numbers in the hundreds. He has argued over 125 cases to the Connecticut Supreme Court; he argued and prevailed in the notable condemnation case, *Kelo v. New London*, 545 U.S. 469 (2005), before the U.S. Supreme Court.

Attorney Horton has participated in some of the most notable cases in the state, representing individuals and corporations. Attorney Horton handled the breakout school finance case, *Horton v. Meskill*, 172 Conn. 615 (1977), and continues to work for the betterment of the Connecticut school systems through *Sheff v. O'Neill*, 238 Conn. 1 (1996). He also successfully sustained the validity of a pre-nuptial agreement in a multi-million dollar divorce in *Friezo v. Friezo*, 281 Conn. 166 (2007). Attorney Horton won the reversal of a \$32 million verdict in *Glazer v. Dress Barn*, 274 Conn. 33 (2005).

Attorney Horton consults with counsel at the trial level to assist with complicated legal matters or in preparation for possible appellate issues. Such cases include representation of insurers and plaintiffs, contract questions, coverage issues and divorce litigation involving multi-million dollar estates.

Attorney Horton has been a Fellow of the American Academy of Appellate Lawyers since 1991. Membership in the Academy is by invitation only. Attorney Horton served as President of the American Counsel Association, 2008-2009, of which he has been a member since 1991.

Appellate Brief Writing (2021CLC-TT01)

Timed Agenda

Choosing Issues – 15 Min.

Statement of Facts – 15 Min.

Argument by Appellant – 15 Min.

Argument by Appellees & Reply Argument – 15 Min.

WRITING THE APPELLATE BRIEF

Appellate briefs should have clarity, honesty and brevity. Clarity means you know what you want to say and you know how to say it. Honesty means you don't exaggerate good points and ignore weak ones. Brevity means you say what you have to say and then stop.

Lawyers love using specialized jargon and convoluted prose. They think that short Anglo-Saxon words are the sign of an ignorant person. They never use a period when a comma, dash, or colon will do. They never make a point once when they can make it twice. They obscure or exaggerate a point for fear that a clear or honest statement is a sign of weakness. They lengthen a presentation for fear that brevity shows a lack of commitment to their client. My experience is that judges detest obscurity, exaggeration, and wordiness.

Clarity is not easy to achieve. A clear brief cannot be a rush job. On the other hand, I cannot write a brief over a long period of time without losing my train of thought. I generally do not even start the brief until I have read the complete trial transcript and the relevant cases and assembled a pile of notes. Then, one quiet day when I can be left alone, I plunge in and start writing.

I generally write the statement of facts first. Unless the facts are undisputed, my factual statement is occasionally almost as long as my argument. Getting the facts in proper order and sifting out the irrelevant ones deserves more time than most lawyers are willing to spend. A brilliant legal argument will be lost if the Court can't figure out what the facts are.

Once the factual statement is completed, I move into the argument. I do not repeat the facts, but simply refer to the statement of facts where necessary. I divide the argument into sections and tell the Court exactly what I am claiming at the beginning of each section. My conclusion is usually one sentence long, in which I state precisely the relief I am seeking. A lawyer's credibility is one of the most important commodities in any courtroom.

Nothing is gained by taking liberties in discussing the law or facts, especially in an appellate court where there are law clerks who are sure to keep you honest. A scrupulously honest statement of facts is most important. Nothing undermines your credibility more effectively than meritorious attack on the accuracy of your statement of facts.

Some lawyers who are very fair in their statement of facts cannot seem to avoid exaggeration in their argument. A dubious position starts with the word “clearly”. A helpful case is “squarely on point”. An irrelevant case is preceded by the word “see”. A harmful case is “clearly distinguishable”. A devastating case is ignored or disparaged in a footnote. I prefer a more balanced statement in both oral and written presentation so long as it does not sound like a concession (unless I intend a concession, in which case I say so directly). Thus, I would not go so far as to call a weak argument “weak”, but I have been known to call a close call a “close call”.

Honesty is compatible with vigorous advocacy. The way to handle a damaging case, for example, is not to say it is clearly distinguishable, but to admit that it is a problem and then to discuss why as a policy matter it should be limited or, if the Court has the power to do so, overruled.

Brevity and clarity go together. My first draft of a brief invariably lacks some clarity. I strive, not always successfully, to make the second draft shorter than the first, for I usually clarify by shortening sentences, striking half the adverbs and adjectives, and saying something only once.

Judges hate long briefs. I try to go nowhere near the 35-page limit. When I finish what I have to say, I stop.

Wesley W. Horton, May 2021