APPEALINGLY BRIEF

THE LITTLE BOOK OF BIG APPELLATE TIPS

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How to Write Persuasive Briefs and Excel at Oral Argument

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of

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For The Honorable Joseph E. Klau (1902-1988)
Beloved Grandfather
Judge of the Connecticut Superior Court

About The Author

Dan Klau is one of New England's leading appellate lawyers. A graduate of Boston University School of Law, *summa cum laude,* he has successfully represented private and public sector clients in appeals in the Connecticut Supreme and Appellate courts, the United States Courts of Appeal for the First and Second Circuits and the United States Supreme Court.

Dan is the founding co-chair of the Appellate Advocacy section of the Connecticut Bar Association, a former columnist for the Connecticut Law Tribune (an American Lawyer Media publication) on appellate practice and procedure, and a frequent writer, commentator and lecturer on appellate, First Amendment and open government issues. He is the author of the legal blog *Appealingly Brief!*, and has been an adjunct professor at UConn School of Law since 2003, where he teaches privacy law.

When Dan is not practicing law, he can often be found at his piano writing humorous songs about the legal profession. He released his first album of musico-legal parodies, *The Billable Hour Blues*, in 2004, and his second album, *The Lawyer Is A ~~Tramp~~ Champ*, in 2015.

Dan and his wife, Jennifer, live in West Hartford, Connecticut. They have three children, none of whom exhibit any desire to become lawyers.

PREFACE

There are a number of excellent—and expensive—scholarly books on appellate brief writing and oral argument. There are very few handy—and reasonably priced—resources containing useful "tips of the appellate trade," so to speak. This book is intended to fill that void. It contains 37 tips, many with multiple sub-tips, pointers and suggestions, accumulated over twenty-five years of experience as an appellate advocate. It is designed for the bookcase (or iPad or iPhone) in every lawyer's office, within arm's reach, rather than tucked away on a shelf in the firm's library.

I use the word "accumulated" above because as much as I would like to take exclusive credit for the tips in this book, the truth is that they represent the collective wisdom of great lawyers and judges with whom I have worked and before whom I have appeared over the years, starting with Ellen Ash Peters, the former Chief Justice of the Connecticut Supreme Court, and then the late Honorable Mark R. Kravitz.

After graduating from Boston University School of Law in 1990, I was privileged to serve as Chief Justice Peters' law clerk. That remarkable experience instilled in me a desire to become an appellate lawyer. Following my clerkship and five years as a litigation associate at Ropes & Gray in Boston, Massachusetts, I returned to my home state of Connecticut and joined

Wiggin and Dana LLP. There I met Mark Kravitz, a former law clerk to Associate U.S. Supreme Court Justice (and later Chief Justice) William Rehnquist. Mark headed the firm's noted appellate practice group until his appointment to the United States District Court in Connecticut. I worked closely with Mark until shortly before his elevation to the bench in 2003. (Mark died in 2012 from ALS, at the much-too-young age of 62. His passing was a terrible loss not only to his family and friends, but to the bench and the bar as well.)

When you clerk for and work with brilliant judges and attorneys like Chief Justice Peters and Judge Kravitz, at least a little bit of their appellate wisdom and experience is bound to rub off. Lest I forget what they taught me, I wrote things down. I continued to make notes whenever I attended an appellate lawyer conference or an appellate law CLE. And, of course, I applied what I learned, and continue to learn from what I apply, in my appellate practice.

In 2008, I helped organize a project on behalf of the Appellate Advocacy section of the Connecticut Bar Association. We interviewed six present and past justices of the Connecticut Supreme Court about their views on effective appellate advocacy, with a heavy focus on appellate brief writing and oral argument. I took a lot of notes during those interviews.

The Honorable Barry Schaller (Ret.), then an Associate Justice of the Connecticut Supreme Court,

was the first judge I interviewed. For a number of years Judge Schaller has taught a course on appellate advocacy at Yale Law School, and he has invited me each year to speak to his class on the topics of appellate brief writing and oral argument. It is always an honor to share my thoughts on appellate advocacy with his students. Much of what appears in this booklet has been honed through those appearances.

As noted, this book is not a scholarly dissertation on effective appellate advocacy. Nonetheless, I believe the tips it contains can help all lawyers improve the quality of their appellate briefs and oral arguments, and thereby make them better appellate advocates. After reading this book, I hope you agree.

ACKNOWLEDGMENTS

No attorney in private practice, particularly in a large firm, can write a book intended to provide guidance to fellow lawyers without the support of his or her colleagues and firm. Since 2003, when I joined Pepe & Hazard, LLP, and continuing after 2010, when Pepe & Hazard merged with New Jersey-based McElroy, Deutsch, Mulvaney & Carpenter, LLP, I have been blessed with wonderful colleagues and a tremendously supportive firm. This book would not have been possible without their support.

In 2012, C. Ian McLachlan retired as an Associate Justice of the Connecticut Supreme Court and joined MDM&C after 16 years on the bench, the last nine as an Appellate Court judge and then Supreme Court justice. A lawyer could not ask for a better colleague, and an appellate advocate could not ask for a better resource. I relied on Judge McLachlan extensively in writing this book and thank him for sharing his thoughts and insights as an appellate jurist.

I am also indebted to former Connecticut Supreme Court Justice Joette Katz, who stepped down in 2010, after 18 years on the court, to take on arguably the most difficult and thankless job in Connecticut state government—running the Department of Children and Families. Commissioner Katz reviewed the draft of this book as only a former

Supreme Court justice could. Her edits, comments and suggestions were invaluable.

Two judges in particular—former Connecticut Supreme Court Chief Justice Ellen Ash Peters and former Associate Justice David M. Borden—have been, and continue to be, extraordinary influences on my legal career. They have supported, inspired and guided me professionally for twenty-five years. They are wonderful friends as well. Their vast appellate knowledge and experience permeates this book.

Lastly, thanks to my family, particularly my wife Jennifer and my three children, for their unconditional love and support, notwithstanding long hours at the office and a passion for the law that occasionally borders on the obsessive.

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PART ONE: PRE-APPEAL TIP

Tip No. 1

"If You Don't Preserve, You Don't Deserve." (Or The Importance Of Preserving Issues For Appeal.)

The time to start thinking (and worrying) about an appeal begins long before the trial court enters a final judgment in your case. *The time to begin thinking about an appeal is the very beginning of your case*. For plaintiff's counsel, that's before you draft your client's complaint. For defense counsel, that's when your client is served with the complaint, retains you and you begin to think about an answer or responsive motion.

Why must you begin to think about a possible appeal at the earliest stage of your case, and why must you continue thinking about it throughout the case? Because of a simple and well-established rule: with very few exceptions, appellate courts only consider and review issues and arguments that a party has *preserved*, that is, issues that a party actually raised in the trial court. Generally speaking, raising an issue for the first time on appeal is a no no.

The preservation rule serves several salutary functions, including preventing a litigant from "sandbagging" a judge or opposing counsel by raising an issue only if the litigant loses the case. It also allows for the immediate correction of possible error

while the case is still pending in the trial court, thereby avoiding the need for an expensive appeal and retrial.

In sum, if you don't preserve an issue for possible appeal by distinctly raising it in the trial court, you don't "deserve" to have it considered on appeal. This does not mean that you should make every conceivable argument in the trial court. Throwing mud against the wall and hoping some of it sticks is never a good strategy. Like everything else in the law, issue preservation requires the exercise of professional judgment.

One other thought. Trial lawyers have to make difficult judgments about how to present a case to a judge or jury. Sometimes, for sound strategic reasons, trial counsel may not want to make a particular argument that the law or the facts otherwise arguably supports. Or, trial counsel may simply disagree with a colleague, including an appellate adviser, who strongly believes that trial counsel should make a particular argument. For trial lawyers who find themselves in these positions, at least consider this: it is often possible to preserve an argument without shining a spotlight on it. Preserving an argument can often be accomplished in a couple of pages in a motion or memorandum or in oral argument before the trial court. In short, trial counsel can hedge their bets.

PART TWO: BRIEF WRITING TIPS

I. Tips Applicable To All Briefs

This section begins by addressing the importance of editing, the nature of the audience for whom appellate advocates write their briefs (appellate judges and their clerks); and the need to remember that an appellate brief constitutes an effort to *persuade*, not merely inform, that audience. The tips then become more specific and offer advocates specific suggestions for organizing briefs and making them more readable. The subject matter of some of the tips overlaps at times, particularly the ones addressing organization, but I think that they are sufficiently distinct in other ways to warrant separate treatment.

Tip No. 2

"Briefs Are Not Written—They Are Re-Written."

Unlike Athena, who was born fully grown from Zeus's brow, appellate briefs are not born fully formed from the fingertips of their authors. They continue to grow and develop following their premature birth as preliminary drafts. The way they grow and develop is through a constant nurturing process known as editing. Multiple drafts of a brief, reviewed by more than one set of eyes, are the rule, not the exception.

Noted federal appellate judge Alex Kozinski of the Ninth Circuit Court of Appeals was the keynote speaker at an appellate seminar I attended a few years ago. He said his opinions often go through upwards of seventy—yes, seventy—drafts before they are released. Personally, I think seventy drafts is a wee bit excessive. Still, his statement underscores my point about the importance of editing. With the possible exception of Lincoln's Gettysburg Address, *every* document can and must be improved through editing.

Tip No. 3

"Know Your Audience."

The ancient Greek maxim states "know thyself." For writers of all persuasions, however, the appropriate maxim is "know thy audience." Successful writers know their audience and tailor what they write to appeal (no pun intended) to their audience. To be effective, appellate lawyers need to know and understand their primary and secondary audiences: respectively, appellate judges and their law clerks.

By the time you stand at the lectern of an appellate court for oral argument, you will have lived and breathed your appeal for many months, sometimes even a year or more. Your brief, however, is only one of *dozens* that the appellate judges will read as they prepare for oral arguments during the term in which they will hear your case.

Appellate judges live in a perpetual state of being overwhelmed by 8½ x 11 inch pieces of paper filled with 12 to 14 point Times New Roman or other font. They read and read, then write and write, then read and read again for a living.

Knowing that appellate judges are inundated with paper, you have two options: (1) you can make their jobs easier, or (2) you can make their jobs harder. You make their jobs easier by writing briefs that are easier to read and understand. The easier

your brief is to read, the more likely the judge will understand, absorb and remember your arguments and, most important, find them persuasive. Tips 4-11 are all suggestions for writing and organizing your briefs in a way that makes them easier for judges to read and understand.

I mentioned that law clerks are your secondary audience. Everything I say in this book about making briefs easier for judges to read also applies to their law clerks, but there are a few additional tips specifically related to clerks.

First, because most clerks are recent law school graduates, usually with law review experience, they tend to be Blue Book™ experts. Make sure you use proper citations throughout your brief. If you are sloppy, the clerk will notice, will think less of your effort and may tell his or her judge. Rightly or wrongly, the judge may assume that if you don't care about proper citations, you may not care about other things as well, like accurately describing the trial record and properly characterizing relevant case law and other sources.

Second, while appellate judges read your briefs and key cases cited therein, the clerks read *everything*. They read each case you cite to make sure you have accurately described the proposition for which you cited it. They read the trial transcript to make sure you properly quoted or summarized it. They look at exhibits you cite in your brief and/or

appendix. Some lawyers have a tendency to "push the envelope" in their briefs, i.e., to mischaracterize a case or the record. **DO NOT DO THAT**. The clerk will discover your misrepresentations and may tell his or her judge. From that point forward, you will never know why you are not deemed trustworthy.

Your credibility is critical to your success as an appellate advocate. Don't make easily avoidable mistakes that may damage, if not destroy, that invaluable asset.

Tip No. 4

"Get To The Point Quickly."

Because appellate judges read so many briefs, it is imperative that you help them understand—*immediately upon beginning to read your brief*—why the twelve to fourteen thousand words you are requiring them to read are *relevant*. You need to get ~~write~~ right to the point.

Arguably, this should have been Tip No. 1, but I don't think it would have had the same weight without first giving the reader an appreciation for the overwhelming amount of paper that confronts appellate judges every day.

Appellate brief writing is not a comedy routine; do not save the punch line for the conclusion of your brief. Continuing the comedy metaphor, tell the punch line first and then use the rest of your brief to persuade the judges why it is funny, that is, why they should accept your argument. By making your point at the very beginning of your brief, the judges will understand the relevance of the thousands of words that follow as they read them, instead of fuming as they read pages and pages of facts and procedural history without understanding the point. This technique will not produce laughs, but it is effective. Tips 7, 8 and 15 discuss ways to implement this "punch line first" approach.

Tip No. 5

"Don't Be Afraid To Spoon-Feed Judges."

In terms of their backgrounds and legal experience before ascending to the bench, many judges were either legal generalists or had highly specialized practices. Do not assume that the appellate judges who will hear and decide your appeal have expertise germane to your case.

As Judge Richard Posner of the Seventh Circuit Court of Appeals has remarked, do not be afraid to "spoon-feed" judges; they will not bite your hand. Use your brief to educate the appellate judges about basic factual and legal concepts that are central to your appeal, yet may be beyond their area of expertise. They will not be insulted. To the contrary, they will appreciate your efforts to educate them as long as your brief is crisp and not condescending.

For example, imagine that you are handling an appeal involving a question of trademark law. The judges on your panel may have no meaningful experience with intellectual property issues. Before focusing on the specific legal issue in your case, it may be helpful for your brief to include an overview of relevant trademark laws and principles.

Exactly how much basic education your brief should include is a matter of judgment. In exercising your judgment, remember that brief writing isn't

about showing the court how much you know, but what *the court* needs to know to rule in your favor. As a colleague likes to say, "Don't tell the court more about turtles than it needs to know about turtles."

Tip No. 6

"Appellate Briefs Are Not Law Review Articles." (Or How To Be Persuasive And Erudite At The Same Time.)

Once of my most vivid memories as a young associate is of a senior associate, now a successful partner, screaming in my face, "advocacy, advocacy, advocacy!" after reading my draft of a brief. After calming down, he explained that although my draft did a competent job of presenting relevant law and facts, it utterly lacked a strong point of view. It read more like a law review article than a work of legal advocacy.

Appellate briefs must be thoroughly researched and should set forth the relevant law with supporting citations. More importantly though, they need to explain how and why the law, coupled with the facts of the case, compels a decision in your client's favor. An appellate brief's raison d'être is to *persuade*, not just inform.

Consider an appeal in which a defendant appealing his conviction argues that the police obtained the key evidence against him through an unlawful search of his cell phone. Lawyers who fail to appreciate the distinction between explanatory and persuasive writing tend to start the arguments in their brief with a bland recitation of the black-letter

law. Their arguments usually look something like this:

ARGUMENT

> "The Fourth Amendment of the United States Constitution states [*insert text of Fourth Amendment*]. The United States Supreme Court has held that a search occurs for Fourth Amendment purposes when law enforcement infringes upon a person's legitimate expectation of privacy. [*insert cite*]
>
> In this case, as explained in greater detail below, the police violated the Fourth Amendment when they searched the defendant's cell phone without a warrant.

These two paragraphs set forth some law and basic facts, but they hardly project a strong point of view.

Now consider this alternative:

ARGUMENT

> Today's "smart phones" do not merely store telephone numbers; they are portable personal filing cabinets. Access to a smart phone means access to hundreds of text messages, thousands of

emails, photographs, banking and other financial data, and full contact information for hundreds of people. In short, smart phones contain a digital history, a digital dossier, of their owners' lives.

Smart phone owners—who constitute over 90% of the adult population in the U.S.—protect this private, often intimate, information through passwords and other safety protocols, such as thumbprint scanners. That smart phone owners have an actual, subjective expectation of privacy in the information on their phones is beyond dispute. The only question before the court is whether that expectation is one that society deems reasonable, thereby rendering cell phone searches by law enforcement subject to the warrant and probable cause requirements of the Fourth Amendment. *See Katz v. United States*, 389 U.S. 347 (1967) (holding that a Fourth Amendment search occurs when person has an actual expectation of privacy that is objectively reasonable.) For the following reasons the court should answer that question in the affirmative.

This example has a definite point of view. The facts and the law are interwoven in a manner that makes the correct answer appear self-evident.

Tip No. 7

"Where The Hell Are You Taking Me?" (Or Why Your Brief Should Include A Roadmap Of Your Argument.)

One thing I learned from clerking and from speaking with dozens of appellate judges is this: *it is a mistake to assume that all judges begin the process of preparing for oral argument by picking up the appellant's opening brief and turning to page one*. Some judges read the statement of the issues first; others start with the introduction or the summary of the argument; some like to scan the table of contents; others read the statement of the facts; some start by reading the trial court decision; and so on. Some judges have even told me that they read the appellant's reply brief first.

In short, there are a number of potential "entry points" for judges when they begin to familiarize themselves with the briefs and the trial record in a particular appeal. You should be aware of these potential entry points and understand that each one represents an opportunity for you to provide a meaningful "roadmap" of the appeal for the appellate judge. By roadmap I mean providing a sufficient level of detail at each potential entry point so that the judge understands what the appeal is about and what to expect as he or she reads the body of the brief. Knowing in advance where one is going makes the process of traveling the path to the destination easier

and, usually, more enjoyable. As someone once noted, "If you don't know where you are going, it is unlikely you will get there." Tips 7-9 and 15 contain specific suggestions for drafting statements of the issues, introductions, argument headings and other aspects of your brief so that they serve as meaningful roadmaps for what follows.

Tip No. 8

"Tell 'Em What You're Gonna Say, Say It, Tell 'Em What You Said." (Or Why Introductions Are Essential.)

My father shared this tip with me early in my teens. It has stuck with me over the years and has served me well as an organizing principle for my legal writing. (The tip applies to many other types of writing too.) The essence of this tip is that any piece of persuasive writing should have three components: (1) an introduction; (2) the body of the argument; and (3) a summary and/or conclusion.

Consistent with this tip, appellate advocates—whether they represent appellants or appellees—should include a formal introduction or preliminary statement at the beginning of their briefs, immediately following the tables of contents and authorities. Try to limit it to no more than two pages. (I discuss conclusions in Tip 17.) This particular part of your brief must be repeatedly rewritten, edited and reedited, to be concise and engaging.

An introduction is *not* a summary of the argument, which some appellate rules (like FRAP 28(a)(7)) require parties to include in their briefs. Rather, an introduction sets the stage for the appellate judges. It tells them what to expect in the body of your brief and enhances their interest in reading what follows by giving them a factual and legal "taste" of the appeal. An introduction says to the

judges, "Here is what the underlying case was about; here is what the appeal is about; this is how you should think about the issues on appeal; and this is why you should resolve them in my client's favor." The remainder of the brief is explication and amplification.

The organizational principles reflected in this tip also apply to what I call "arguments within arguments." For example, the Argument section of your brief may contain several distinct arguments, each one of which, standing on its own, entitles you to the relief you want the appellate court to grant (e.g., new trial, judgment, remittitur, etc.). Each distinct argument, like the brief as a whole, should have its own introduction, body (including Roman numerals, headings and sub-headings) and conclusion.

Tip No. 9

"Do Not Behead Your Argument Headings." (Or How Meaningful Argument Headings Make Great Roadmaps.)

Another way to provide appellate judges with a good roadmap of the trip they will take through your brief is to use meaningful argument headings and sub-headings. A meaningful argument heading, like a meaningful statement of the issue, contains just enough detail to give the reader a good sense of the issues the argument will address in the paragraphs that follow.

Consider the following two examples of an argument heading:

> I. **The Trial Court Erred In Dismissing Count One On The Ground That It Failed To State A Claim.**
>
> v.
>
> I. **Because Count One Properly Pled That Dr. Jones's Negligence Was The Proximate Cause Of The Plaintiff's Injury, The Trial Court Improperly Dismissed That Count.**

The first example is weak. It tells the appellate judge only that the advocate believes the trial court erred in

dismissing the first count of the complaint for failure to state a claim. The second example is strong. It tells the appellate judge the specific nature of the claim alleged in the first count and *why* the trial court erred in dismissing it.

Good argument headings come with a bonus: they appear in the table of contents for your brief. Strong argument headings and sub-headings in the body of your brief are thereby transformed into a powerful roadmap at the beginning of your brief. A judge scanning a table of contents containing strong argument headings and sub-headings can quickly grasp both the structure and substance of your arguments on appeal.

Tip No. 10

"Where Are My Eyeglasses?" (Or How To Make Your Briefs More Readable.)

In an ideal world of telepathic lawyers and judges, an advocate's thoughts would be transmitted directly to the appellate judge's mind and nothing would get lost in the process of interpretation or translation. In the real world, where thoughts are frequently communicated through a written medium that must, of necessity, be interpreted, even the greatest thoughts may be worthless if they are poorly communicated.

To be maximally effective, appellate briefs (indeed all legal writing) must be *readable*. Readability refers to the ease with which a reader can understand a written text. Readability cannot make a bad substantive argument good, but it will make a good argument better. Here are some pointers for improving the readability of your briefs:

- At the very beginning of your brief, succinctly state your reason for writing what follows. That way the judge will understand *why* she is reading the many pages of your brief as she reads them. See Tips 7-8.

- "Brevity is the soul of wit." (*See* W. Shakespeare, *Hamlet*, Act II, Scene II (1602)). True wisdom does not require long-winded explanations, lengthy speeches or intensive,

time-consuming discussions. So, keep your sentences short. On average, they should not exceed 15 – 18 words.

- Use the "Fog index." The Gunning Fog Index, usually just called the Fog Index, is an algorithm for measuring the readability of English text. (Fog Index calculators are readily available on the web.) Essentially, the algorithm is a weighted average of the number of words per sentence and the number of complex (i.e., multisyllabic) words in a given number of words. In general, the higher the Fog Index, the more difficult a text is to read.

- Avoid legal and technical jargon and overuse of abbreviations and acronyms.

- Do not clutter your brief with irrelevant information, especially dates, names, numbers and other factoids that are not necessary to advance your argument.

- Have you used "picture" terms in your writing? (Use familiar terms and concrete examples to illustrate your point.)

- Is the logic of your argument clear? Do your transitions make sense?

- Avoid inserts and clauses that break the flow of a sentence:

  Bad: This contract, unless revocation has occurred at an earlier date, shall expire on November 1, 1989.

  Good: Unless revoked at an earlier date, this contract shall expire on November 1, 1989.

  Better: This contract shall expire on November 1, 1989, unless revoked at an earlier date.

- Do your verbs show action? Avoid the passive voice, "smothered verbs" and "noun sandwiches":

  a. *action verbs*

  Bad: We should give recognition to Joan for her efforts.

  Good: We should recognize Joan for her efforts.

  * * *

  Bad: The jury should give consideration to John's alibi evidence.

Good: The jury should consider John's alibi evidence.

* * *

Bad: The company should make payment of the filing fee to the clerk's office.

Good: The company should pay the filing fee to the clerk's office.

b. *passive voice*

Bad: It was decided that Joe should be nominated for the position of treasurer.

Good: We decided to nominate Joe for treasurer.

* * *

Bad: The law was passed by Congress to improve access to health care.

Good: Congress passed the law to improve access to health care.

* * *

Bad: It was ruled by the court that the defendant breached his contract with the plaintiff.

Good: The court ruled that the defendant breached his contract with the plaintiff.

c. *"smothered" verbs (verbs that are transformed into nouns by endings such as: - tion, - ment, -ance, - ence, etc.)*

Bad: We will make arrangements for the production of the pamphlet.

Good: We will arrange to produce the pamphlet.

Better: We will produce the pamphlet.

* * *

Bad: As a result of your investigation, what is your determination?

Good: What did you determine from your investigation?

Better: What did your investigation determine?

d. noun sandwiches

Noun sandwiches (also called noun strings) are clusters of nouns that are grouped together. (E.g. computer allocation system). Avoid them.

Don't say:	"Underground mine worker safety protection procedures development."
Instead say:	"Development of underground procedures for the protection of the safety of mine workers."

For additional tips of this nature, see "Drafting Legal Documents: Principles of Clear Writing," available through the National Archives at http://www.archives.gov/federal-register/write/legal-docs/clear-writing.html.

Tip No. 11

"A Picture Can Be Worth A Thousand Words."

Although lawyers generally use words to convey their thoughts to judges, there are times when the simplest, clearest, most effective way to convey a thought is through something other than traditional text. Sometimes a picture, a diagram, a map, a simple chart, etc., is the best way to make a point.

For example, in a zoning or land use dispute you should include a plot plan or map in your brief (assuming it is in the trial court record) and use it as a point of reference for the court. In a personal injury case arising out of a car accident at an intersection, a diagram of the intersection and the location of relevant vehicles may be useful. Years ago I handled a federal tax appeal in which the IRS argued that the client, who owned a business, was paying himself an unreasonably high salary (and deducting it as a business expense) instead of paying out dividends (which are not tax deductible). I used several charts and graphs to show that the client's compensation was reasonable in comparison to comparable businesses.

Be judicious, however, when using non-textual devices in brief writing. Too many pictures = clutter. A single picture may be worth a thousand words, but a brief overfilled with pictures isn't worth the cost of the paper on which it is printed.

Tip No. 12

"You're Out Of Order Counselor!" (Or Things An Appellate Advocate Should Never Say Or Do In A Brief.)

Appellate litigation, like trial litigation, is an adversarial process. It is a battle in which one side wins and the other side loses. However, it is a battle fought with the mind and a pen, not a muscular arm and a sword. The battle is won in the legal realm by the advocate who persuades the appellate judges of the merit of the advocate's arguments. Nevertheless, because appellate litigation is an adversarial process, all lawyers are occasionally tempted to include a zinger or two in a brief. *Do not succumb to that temptation*. Zingers are neither professional nor effective as an advocacy technique.

Here is a short list of things appellate lawyers should never do:

- Never, ever, ever—and I really mean never ever—misquote the trial record or a case. Your credibility as an advocate is critical to your chances of success, especially in a close case. Do not damage your credibility with such easily avoidable mistakes. That goes for spelling and grammar errors as well.

- Never engage in *ad hominem* attacks on opposing counsel, the opposing party or the trial judge.

- Don't confuse overblown rhetoric with persuasive, logical arguments.

- Don't "throw stuff against the wall and hope something sticks." (See Tip 14 on Issue Selection.)

- Don't ignore the opposing side's arguments. Too often appellate briefs are ships passing in the night. You must explain why the opposing arguments are wrong or irrelevant. While it is a mistake to tie yourself to the other side's case, you must address opposing counsel's arguments while making your own case.

Tip No. 13

"Help, My Appendix Is Rupturing." (Or Why You Should Not Treat The Appendix On Appeal Like A Vestigial Organ.)

Most appellate court rules require the parties to submit an appendix to their briefs, and the rules describe what the appendix should contain. For example, FRAP 30(a)(1) states that an appendix must contain: "(A) the relevant docket entries in the proceeding below; (B) the relevant portions of the pleadings, charge, findings, or opinion; (C) the judgment, order, or decision in question; and (D) *other parts of the record to which the parties wish to direct the court's attention.*"

I italicized (D) because I think that is where lawyers tend to get confused, which leads to bloated appendices. Too often lawyers fill their appendices with entire transcripts (rather than excerpts); long multi-page exhibits (when only a particular page is relevant); and memoranda of law from the trial record (even though appellate practice rules usually say memoranda should not be included in the appendix). Lawyers may think they are doing the appellate judges a favor by putting all of this material at the judges' fingertips. Instead, the lawyers are displaying their lack of understanding of the terms "relevance" and "necessary."

Appellate advocates should also remember FRAP 30(a)(2) (and most analogous state appellate court rules): "Parts of the record may be relied on by the court or the parties even though not included in the appendix." Although your brief must contain proper citations to the trial court record when referring to a transcript, exhibit, pleading, motion, decision, etc., the cited document does not necessarily have to be included in the appendix. Beyond the mandatory contents of the appendix, you should only include documents that are both relevant and essential.

As you are writing your appellate brief, it may be helpful to imagine whether a particular document from the trial record contains something that you would actually want to quote at oral argument. If the answer is yes, consider including the document in the appendix.

Remember these rules and tips and your appendix won't burst.

II. The Appellant's Brief

Tip No. 14

"Choose Wisely My Son."
(Or The Importance Of Issue Selection.)

I believe that the single most important quality an appellate advocate must possess is not deep knowledge of appellate rules and procedures, but sound judgment when selecting the issues for appeal. I cannot overstate the importance of issue selection. I know some experienced appellate advocates who tell potential clients, "I select the issues. Period. End of story. If you are not comfortable with letting me select the issues, do not hire me."

By the time a case goes to final judgment in the trial court, including post-verdict or post-judgment motions, the record is filled with dozens and dozens of decisions, orders and judgments that are potential grounds for appeal. Adverse rulings on pre-trial motions to dismiss, discovery motions, motions in limine, evidentiary rulings during trial, jury charges, post-verdict motions, etc.—all constitute possible issues a party could raise on appeal. As the Grail Knight told Indiana Jones when he was confronted with a large selection of chalices, only one of which was the Holy Grail and could save his father's (Sean Connery!) life, "You must choose. But choose wisely . .

. ."[1] Your job when representing an appellant is to separate the wheat from the chaff and identify the handful of issues worth pressing on appeal.

When engaged in that task, it is essential to remember that not all mistakes are legally significant or consequential. For example, perhaps you believe that the trial court erred in overruling your objection to opposing counsel's admission of a particular document or certain testimony in evidence. Even if the appellate court shares that belief, it does not automatically follow that you will win your appeal. You must also persuade the appellate court that the trial court's error was *harmful*. (This is known as the "harmless error" doctrine. A full discussion of the doctrine is beyond the scope of this book, but all appellate advocates need to be well-versed in it.) Only legally harmful errors are worth considering for possible appeal.[2]

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[1] *Indiana Jones and the Last Crusade* (1989).

[2] *See, e.g.,* Fed.R.Evid. 103(a) ("A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party."); Fed.R.Civ.P. 61 ("Harmless error") ("Unless justice requires otherwise, no error in admitting or excluding evidence—or any other error by the court or a party—is ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order. At every stage of the proceeding, the court must disregard all errors and

Issue selection can be scary. Lawyers often fear that if they limit the number of issues they raise on appeal, they risk losing their appeal because they forwent a potential winning argument. That is a risk, but it is a small risk and one well worth taking.

When an appellate judge picks up an appellant's brief in a civil case and sees a statement of the issues with more than several issues, her reaction is: "Oy, here's yet another attorney who hasn't really thought about issue selection and is hoping and praying that one of his issues will happen to resonate with us." By contrast, when an appellate judge picks up a brief with only one, two or three issues, her reaction is: "Excellent! This attorney has really thought about this case and is only presenting the few issues that are worthy of my limited time and attention. This lawyer has clearly exercised *professional judgment*." You want appellate judges to place you within the second category of attorneys *because it contains the attorneys to whom appellate judges pay the most attention*. In a close case, that attention can mean the difference between winning and losing.

In civil cases, I work hard to limit myself to 2 or 3 issues. This is a rule of thumb, so by all means break it if you really think you have more issues worthy of appellate consideration. Remember though, appellate rules in all federal and state courts impose

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defects that do not affect any party's substantial rights.")

strict page or word limits. The more issues you raise in your brief, the less space you have to devote to each issue. It makes little sense to raise an issue on appeal if you can't argue the issue properly due to space limitations. Moreover, many appellate courts refuse to consider "inadequately briefed" arguments. Such arguments are deemed waived.

Thus far I've limited my comments to civil appeals. Attorneys representing defendants in criminal appeals face a different set of concerns, often constitutional in nature, which may require them to raise more issues on appeal. In particular, the failure to raise an issue in a criminal appeal may preclude subsequent federal review of the issue, which could result in a Sixth Amendment ineffective assistance of counsel claim in a habeas corpus proceeding. Even though the burden is on the defendant to show that the unpreserved claim would have been successful—a difficult burden for a defendant to meet—no defense attorney wants to find him or herself staring down the barrel of an ineffective assistance claim. That understandable concern creates an incentive to raise marginal claims. Still, even lawyers handling criminal defense appeals should think long and hard about issue selection.

One final thought. Although this tip focuses on the importance of issue selection to appellants, issue selection is also relevant to appellees. It is appropriate at times for appellees to include a counter-statement of the issues in their briefs. See Tips 18-19.

Tip No. 15

"Beware The Whether Man."
(Or How To Draft Your Statement Of Issues.)

The statement of the issues is often the first part of the brief that an appellate judge reads when she begins to prepare for oral argument. How you present or "frame" the legal issues in that statement can significantly affect how the judge responds to what follows in your brief. Thus, attention must be paid to how issues are initially framed. I often spend days drafting and editing my statement of the issues.

Most appellate court rules say little more than that an appellant must include in his opening brief a "statement of the issues presented for review." FRAP 28(a)(5). Some jurisdictions, like Connecticut where I practice, add that the statement must be "concise." *See* Conn. Practice Book § 67-4(a). What does that mean? How is an advocate permitted to frame an issue in the statement of issues and, perhaps more importantly, how *should* the advocate frame the issue(s)?

Many lawyers, particularly young attorneys fresh out of law school whose appellate experience may be limited to their first year moot court seminar, interpret the statement of issue rule to mean that they must present a single sentence issue that begins with the word "Did" or "Whether." For example:

Statement of Issues

> "Did the trial court err when it admitted Plaintiff's Exhibit D in evidence?
>
> or
>
> "Whether the trial court erred when it granted the defendant's motion for summary judgment."

I'll be characteristically blunt in expressing my feelings about framing issues this way: **I HATE THEM**. Nothing in the federal rules or the state rules with which I am familiar requires a single sentence statement of each issue.[3] Furthermore, framing the issues this way is a terrible way to begin a brief. Drafting a statement of issues this way tells the appellate judge nothing meaningful about the issues that an advocate wants the judge to decide.

So, how should you frame your issues? My mentor, Mark Kravitz, taught me the following

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[3] As an aside, allow me to offer readers a little tip about how I think court rules of practice should be interpreted. Some lawyers believe that unless there is a rule that expressly permits them to do "X," they cannot do "X." I disagree with that approach. My view is that unless a court rule expressly or by clear implication forbids a lawyer to do "X", the lawyer can do it, *as long as he or she has a good reason*. In my experience, judges usually accept that approach.

approach, which I have subsequently learned many (but not all) appellate judges and experienced advocates recommend as well. I call it the "statement, statement, question" approach. Here is an example:

> A party seeking to introduce a document in evidence under the business record exception to the hearsay rule must first establish that the document was prepared in the ordinary course of business. The plaintiff presented no such evidence with respect to Exhibit D, a purported invoice of goods sold to the defendant. Under these circumstances, did the trial court err in admitting the exhibit and was the error harmful?

Students of formal logic will recognize this as a syllogism. These three short sentences are still concise, yet they tell the judge so much more about your issue and what to expect as she reads your brief. Moreover, framing the issue this way makes the answer to the ultimate question obvious if the two premises—one legal, one factual—are correct. The purpose of the remainder of the brief is to establish the truth of the premises. The judge who opens your brief and finds the issue framed this way knows exactly what the case is about and how it should be resolved, assuming that you can prove your premises.

Here's another example:

> In opposition to the defendant's summary judgment motion, the plaintiff submitted the affidavit of a witness who heard the plaintiff's supervisor say, "Joe is getting close to retirement. It's time to get rid of him." Nevertheless, the trial court concluded that the plaintiff failed to present evidence, sufficient to create a triable issue of fact, that the defendant fired him based on his age. Did the trial court err in granting the defendant's motion?

Again, framing the issue this way tells the judge exactly what the appeal is about and how it should be resolved, as long as the premises are correct.

I have seen variations on the preceding approach. For example, some lawyers start with the question and then follow it with the factual statements:

> Did the trial court improperly grant the defendant's summary judgment motion, given that the plaintiff properly submitted the affidavit of a witness who heard the plaintiff's supervisor say, "Joe is getting close to retirement. It's time to get rid of him?"

The point to remember is this: whether you begin your statement of the issue with a fact or a question, include just enough legal and factual detail in the statement to give the judge a real sense of the issue *and* how it should be decided.

Tip No. 16

"Just The Facts (That Matter) Ma'am." (Or How To Write An Effective Statement Of Facts.)

The statement of the facts is a critical component of an appellate brief. Standing on its own, the statement should tell a compelling story that leaves the appellate judge with a strong "feeling" that your client should prevail on appeal. It needs to accomplish that objective, however, without overtly appealing to the judge's emotions. Here are a few pointers that will help you write a more persuasive statement of the facts:

- *Do not pepper your statement of the facts with lots of adjectives, adverbs and rhetorical flourishes.*

Appellate judges do not respond well to overuse of adjectives, adverbs and other overt appeals to their emotions. This does not mean that a statement of the facts should be drab, neutral, vanilla. To the contrary, the statement is a piece of advocacy, just like every other section of your brief, and it should have a point of view. That point of view, however, should be reflected in the substance and organization of the statement, not through liberal use of words that modify nouns and verbs.

For example, "the defendant stabbed the victim five times in the chest with a hunting knife and then

left her to die" is preferable to "the defendant brutally, viciously and repeatedly drove an enormous hunting knife into the victim's chest and then callously left her to bleed to death, slowly and painfully." The latter may be effective in a closing statement to a jury, but not in a statement of the facts in an appellate brief.

- *Limit your statement of the facts to those facts that are relevant to the issues you have raised on appeal.*

Many lawyers make the mistake of including far more factual detail in their briefs than is relevant to the issues they are appealing. To illustrate, the underlying case may have been a complex environmental dispute over who was responsible for toxic waste at a landfill and how liability should be apportioned. However, if the sole issue on appeal is whether the trial court properly dismissed the plaintiff's claim as time-barred, the statement of the facts should not discuss the details of the environmental evidence at length; they are largely irrelevant. I say largely because the plaintiff-appellant may want to discuss some of the evidence so the judge understands something about the harm that the plaintiff will bear if the dismissal is affirmed.

Consider another example, such as a medical malpractice case that resulted in a plaintiff's verdict but only nominal damages. The plaintiff appeals and the sole issue is whether the trial court erred in excluding the plaintiff's damages expert as

unqualified. The underlying facts of the case may be horrific—a labor and delivery gone bad, an emergency c-section, the birth of child with severe handicaps due to oxygen deprivation. No doubt the trial included graphic testimony about what happened during the labor and delivery process and its immediate aftermath. But most of those graphic details are irrelevant to the legal issue on appeal. To be sure, the brief should include a brief factual background of the case, but not a lengthy, detailed description of the facts. Appellate judges will recognize the latter as an advocate's transparent attempt to appeal to their emotions and encourage them to decide the case based on their gut feelings, not the law and the trial record.

Of course, if the appeal presents a sufficiency of the evidence claim, you need to marshal the evidence in detail, but *only* the evidence relevant to the issue on appeal.

- ***Do not ignore bad facts and evidence. Acknowledge and address them.***

Rare is the case in which every fact or bit of evidence favors one party or the other. How should an advocate deal with bad facts or evidence? The ostrich with its head in the sand approach never works. The advocate who ignores inconvenient facts and evidence highlights their unfavorable character by allowing opposing counsel to write or say, "Your honors, allow me to tell you about a critical fact that my opponent kept from you."

The most effective way to deal with bad facts is to acknowledge them in your statement of the facts and then explain to the best of your ability why the fact is not as bad as it seems and why it is not an impediment to the relief you seek in your appeal. Perhaps you think the bad fact is legally irrelevant. Or perhaps the bad fact, when viewed in context with other facts, is not bad at all, or at least not as bad as it seems.

While you should generally acknowledge bad facts in the statement of the facts, the statement is not the only appropriate place in your brief to address them. As explained below, you can address them in part in the statement and in more detail in the Argument section of your brief.

- *Include additional factual detail in the Argument section of your brief.*

Sometimes it does not make sense to include all of the facts that are relevant to your appeal in the statement of the facts. At times it is preferable to save some factual detail for the Argument.

Imagine that you represent the defendant/appellant in an appeal in a personal injury case. You have decided to raise several issues on appeal, one of which is whether the trial court erred in allowing the plaintiff's causation expert to testify. (You think there were serious flaws in his

methodology and you filed an unsuccessful *Daubert* motion before trial.[4]) The most effective way to present your argument may be to: (i) use the statement of the facts to introduce the judges to the factual background of your underlying case; (ii) wait until you make your *Daubert* argument in the Argument section of your brief before adding further factual detail about the expert's methodology. If you use this approach, consider including a sub-heading in the Argument section, such as "A. Additional Facts Relevant To The Plaintiff's *Daubert* Argument."

One note of caution about dividing facts up along the lines I just described. The rules of appellate practice in some jurisdictions provide that if a fact is not included in a party's statement of the facts, the fact cannot be considered elsewhere in the party's appellate brief. I've used the approach I describe above in such jurisdictions without any problems. Still, you need to know whether your local jurisdiction strictly enforces that type of rule, if it exists.

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[4] *See Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993) (establishing standard for admissibility of expert testimony under federal rules of evidence).

Tip No. 17

"OK, You Win. So Now What Do You Want Us To Do?" (Or The Importance Of The Conclusion And Statement Of Relief Requested.)

FRAP 28(a)(9) states that an appellant's brief must include "a short conclusion stating the precise relief sought." Most states have a comparable rule. Sometimes the relief you want is obvious, sometimes it isn't. Either way, you need to tell the appellate court exactly what you want it to do if it agrees with your arguments. Appellate opinions typically include something called the rescript. It is a sentence or two at the end of the opinion by which the appellate court gives direction to the lower tribunal (trial court or intermediate appellate court) concerning the further disposition of the case. It is, in effect, the order of the court on the appeal. The statement of relief requested helps the judges draft that order.

Let's say you represent a defendant who is appealing a plaintiff's verdict and you believe your client is entitled to a new trial. You should write, "The court should reverse the judgment and remand the case for a new trial." What if you believe your client is entitled not to a new trial, but to judgment in his favor? "The court should reverse the judgment and remand the case with instructions to enter judgment for the defendant." Or what if you think the trial court erred in denying a motion to dismiss the case for lack of subject matter jurisdiction? "The court should

reverse the judgment and remand the case with instructions to grant the defendant's motion to dismiss."

If you have raised multiple issues on appeal, the appropriate relief for one issue may be different from the relief appropriate for another issue: "As to count one of the complaint, the court should reverse the judgment and remand the case for a new trial. As to count two, the court should reverse the judgment and remand with instructions to enter judgment for the defendant. As to count three, the court should reverse the judgment and remand the case with instructions to grant the defendant's motion for a remittitur."

I could give many other examples, but I think these make the point. The bottom line is that you must make sure you tell the appellate court *exactly* what relief you want if you win.

This discussion applies to appellants, but appellees need to think about this issue as well. For appellees, the statement of relief requested is usually simple: "The judgment of the trial court should be affirmed." It can become a bit more complicated if the appellee believes the appellant has requested relief to which he is not entitled even if prevails. For example, the appellant may claim that he is entitled to the entry of judgment in his favor, but the appellee may believe that a new trial is the proper remedy if the appellant wins. In this situation the appellee must explain why the appellant is not entitled to the relief

he requests and should set forth the appropriate relief.

III. The Appellee's Brief

Tip No. 18

"Not Chess, Mr. Spock, Poker." (Or Deciding Whether To Accept Or Reject The Appellant's Framework For Her Appeal.)

I relish the challenge of representing appellants. I love selecting the issues and framing the appellate debate the way I think it should be framed. However, unless you only represent criminal defendants on appeal, or you are so successful in private practice that you can limit your clients to appellants, you are going to represent appellees too. Representing an appellee, though, does not mean that you are limited to reacting to the appellant's arguments on their own terms. It does not mean that you must accept the way the appellant has framed the debate.

Written effectively, an appellant's brief does much more than raise a particular set of issues; it also orients the judges to the appellant's case and tells them, "This is how I [the appellant's lawyer] want you to think about this appeal." Thus, one of the first decisions that appellee's counsel must make after reading an appellant's brief is whether to try to beat the appellant at his own game or try to change the game. Changing the game changes the rules. As

Captain James T. Kirk will say in several hundred years, "Not chess, Mr. Spock, poker."[5]

For example, consider a case in which the appellant argues in his brief that the trial judge made several erroneous conclusions of law. The appellant

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[5] Star Trek fans will recognize this famous line from "The Corbomite Maneuver," the tenth episode of the original series to air on TV (on November 10, 1966), but the third episode actually filmed (following two pilots). After an alien vessel threatens to destroy the Enterprise and all efforts to escape the alien's tractor beam have failed, Mr. Spock turns to Captain Kirk and says, "In chess, when one is outmatched, the game is over. Checkmate." A few moments later Kirk has a verbal tiff with Dr. McCoy, in which McCoy threatens to write Kirk up in his medical log for pushing a young officer to the brink of a mental breakdown and adds, "Now that's no bluff." Kirk responds angrily, "Any time you can bluff me Doctor!" and then has an epiphany. He turns to Mr. Spock and says, "Not chess, Mr. Spock, poker." Kirk then constructs a bluff—the Corbomite Maneuver—and avoids the destruction of the Enterprise and its 430 crew members. Mr. Spock, the logical Vulcan, saw the situation as game of chess in which checkmate appeared to be the only outcome. Captain Kirk, the emotional human, changed the game to poker, which created a new set of game rules and possible tactics, like bluffing, thus expanding the range of potential outcomes.

further argues that errors of law are subject to de novo review. Upon reading the appellant's brief, you believe that what the appellant described as errors of law are really factual findings, subject to clearly erroneous review, which the appellant is mischaracterizing to obtain a more favorable standard of appellate review. How should you respond?

If you really believe that the appellant is mischaracterizing "what the case is about," you need to call him on it and correct the mischaracterization. You need to change the game. Then you need to explain why you should win the new game. To use the example above, you should explain why the alleged legal errors are really factual findings, note the proper standard of review of such findings, and cite to the evidence in the record that supports the trial court's factual findings or the jury's verdict.

What if you think the appellant is mischaracterizing the issues on appeal, but you are not confident that you can persuade the appellate court of that position? In that situation, it may make sense to draft an "even if" brief. That is, your opposition brief should explain why you think the appellant is mischaracterizing the issues, but it should also explain why the appellant's arguments fail "even if" they are properly characterized.

Consider a case in which the plaintiff brought a claim for breach of implied covenant of good faith, which the plaintiff and the trial court treated as a

tort—over your objection. The jury rejects the plaintiff's claim as presented. He appeals, raising certain alleged trial court errors as grounds for his appeal and continuing to characterize his claim as sounding in tort.

You may have many reasons why you think the jury verdict should be sustained even if the plaintiff's claim is a tort. You could play the plaintiff's game and still win. However, you may also have very strong arguments why the claim actually sounds in contract, not tort. If so, you should consider using at least part of your brief for the appellee to tell the appellate judges that the plaintiff and trial court played the wrong game. They should have played contracts, not torts. Of course, you then need to explain why you win the contracts game.

If you think the appellant is playing the wrong game in his brief, where in your brief for the appellee should you inform the court of that belief? Why, in your introduction and counter-statement of the issues! See Tips 17 and 19.

Tip No. 19

"There's Another Side To This Story Your Honors." (Or Why Appellees Should Include Counter-Statements Of The Issues And Facts In Their Briefs.)

Although court rules governing the content of briefs usually require appellants to include a statement of the issues and a statement of the relevant facts in their opening briefs, they often permit, but do not require, appellees to include those elements in their briefs. For example, FRAP 28(b) provides that the statements of the issues and of the case (i.e., the facts) need not appear in the appellee's brief "unless the appellee is dissatisfied with the appellant's statements."

Shame on the appellee's attorney who foregoes the opportunity to provide the appellate judges with a counter-statement of the issues and the facts.

Just as wise advocates representing appellants draft their statements of the issues and the facts with a point of view favorable to their clients, so too should advocates who represent appellees provide counter-statements favorable to their clients.

This does not mean that when an appellant says "day," the appellee must say "night." It does not mean that an appellee should reject everything an appellant says in his statement of the issues and facts. Rather, it means that an advocate representing an appellee

should reframe the issues and the statement of facts *as necessary and appropriate* to give the appellate judges a perspective on the case that is as favorable as possible to the appellee.

For example, consider a plaintiff-appellant who frames his issue on appeal as follows:

> Did the trial court err when it excluded the testimony of [witness x], who would have said that the light was red when the defendant drove through the intersection and hit the plaintiff?

Counsel for the appellee might consider including a counter-statement of the issues at the beginning of his brief, which reframes the issue this way (assuming the facts support the alternative framework):

> Four witnesses testified for the plaintiff that the light was red when the defendant drove through the intersection. Did the trial court reasonably exercise its discretion to avoid cumulative testimony when it precluded the plaintiff from presenting a fifth witness who would have offered the same testimony?

As for the counter-statement of facts, the question for the appellee's counsel is whether to provide an entirely new statement or, alternatively, to just point out the particular ways in which the

appellant's statement is incorrect or misleading. If the appellant's statement is by and large accurate and balanced, the latter approach is generally preferable. If the appellant's statement contains numerous inaccuracies or misleading statements, the former approach may make more sense.

IV. The Reply Brief

Tip No. 20

"It's Called A Reply Brief, Not A Repeat Brief." (Or Why A Good Reply Brief Is Not Just A Shorter Version Of The Opening Brief.)

The appellant gets the final written word in an appeal—a relatively short reply brief.[6] Many appellate courts do not require an appellant to file a reply brief. I know several appellate judges who think they are usually a waste of time and paper. In conversations with these judges, however, I learned that their negative opinion of reply briefs was based on their view that most are poorly written. They all agreed that well-written reply briefs are valuable. Thus, I think it is a mistake for appellants' counsel not to take advantage of having the last word, *provided that he uses that opportunity properly*.

The fundamental mistake many lawyers make when they draft a reply brief is to repeat the arguments they made in their opening brief, in slightly abridged form. As the title of this tip states,

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[6] In a cross-appeal, the cross-appellant gets the final word, but only with respect to the issues raised on the cross appeal, at least in theory. I have seen some cross-appellants use their reply brief as a sur-reply to the appellant's reply brief. I think that is a misuse, even an abuse, of the cross-appellant's reply brief.

such a document is a repeat brief, not a reply brief. A repeat brief serves no purposes other than to waste a judge's time and arouse her ire.

A reply brief need not rebut every single argument an appellee has made. The appellant's opening brief should have anticipated and addressed most of the appellee's likely counter-arguments.

Thus, properly drafted, *a reply brief is a pithy response to the most damaging arguments an appellee makes in his opposition brief and which the appellant has not already adequately addressed in his opening brief*. A reply brief targets the most significant flaws in the appellee's arguments with laser-like precision and concisely rebuts them. If the appellee has miscited the trial record in a material respect, the reply brief corrects the miscitation. If the appellee has mischaracterized the holding in a key case upon which he relies, the reply brief notes the mischaracterization. If the appellee makes an argument that he failed to preserve below, the reply brief notes that fact. If the appellee fails to address a major argument in your opening brief, the reply brief notes that as well.

Stylistically, a reply brief may appear very different from an opening brief. For example, instead of the customary Roman numerals and all or initial capitalized argument headings found in an opening brief, a reply brief may dispatch with the appellee's

arguments through bullet points or arguments numbered simply "1., 2., 3.," etc.

A word of caution: Some appellate judges prefer reply briefs that contain enough background information about a case and the issues on appeal to allow them to read the reply brief *first* and understand what the appeal is about. Other judges think that including such background information in a reply brief is unnecessary.

Personally, I agree with the latter group of judges and I write my reply briefs with them in mind. (Hey, you can't please everyone all of the time.) However, local knowledge about the preferences of the judges who will hear your case is always invaluable. If you know that the judges before whom you will appear like reply briefs with background information, give them what they want. For such judges, however, an abbreviated introduction and/or restatement of the issues should be sufficient.

PART THREE: ORAL ARGUMENT TIPS

Tip No. 21

"Questions Are Your Friends."[7] (Or Why Oral Argument Is About The Judges, Not You.)

I spent many years as an associate drafting appellate briefs for partners who then enjoyed the fame and glory that comes with standing before a panel of appellate judges, making an argument with wit and aplomb and, hopefully, winning the appeal. I yearned for the day when I would appear before an appellate panel and enjoy that same fame and glory.

Admit it, we trial and appellate lawyers like, no love, the sound of our own voices. We love to hear ourselves talk. We are comfortable in front of an audience. We want people to listen to what *we* have to say.

My advice? Lose that attitude before your next oral argument.

Before technology made it relatively easy and inexpensive to prepare elaborate written briefs for judges, oral argument was *the* way advocates conveyed their arguments to judges. Oral arguments

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[7] Thanks to appellate advocate Linda Morkan, of Robinson & Cole LLP, for the title of this tip.

often lasted for hours, even days. In the famous case of *McCulloch v. Maryland*, 17 U.S. 319 (1819), oral argument before the United States Supreme Court lasted nine days!

Those days are long gone. Briefs are now the primary vehicle for conveying legal arguments to appellate judges. The purpose of oral argument today is to give the judges who will decide your appeal the opportunity to ask the questions that are on their minds after having read the briefs in your case. Instead of viewing judges' questions as inconvenient things you need to answer and as unpleasant interruptions in your well-rehearsed legal soliloquy, view them as your friends.

You can learn a lot from judges' questions. For example, you may learn that a judge has misinterpreted the trial record, which gives you the opportunity to educate the judge about the correct interpretation. You may learn that a judge has a fundamental misconception about your appeal, which again gives you the opportunity correct the misconception. You may learn that a judge has a different understanding of a key legal precedent than you, which gives you the opportunity to persuade the judge the think differently about the precedent.

Sometimes a question is intended to help you, for example, by suggesting an answer to another judge's hostile question. Sometimes a question suggests an alternative theory that still leads to the result you

want, albeit via a different legal or factual route than you had proposed in your brief. Lawyers are often so wedded to their own arguments that they don't recognize when a judge is saying through a question, "Counselor, there is another way for you to win that you may not have considered." Don't reject a helping hand.

In sum, oral argument is your one shot as an advocate to learn what is on the judges' minds, your one opportunity to learn what *they*—the ultimate decision makers—care about. Better to know what is troubling them about your case while you still have a chance to persuade them. Once oral argument is over and they are gone, they are gone.

Tip No. 22

"Listen, Think, Talk—In That Order." (Or Why Lawyers Should Take A Moment To Listen And Think Before Answering Judges' Questions.)

This tip follows naturally from the preceding one. Because oral argument is usually your first, last and only opportunity to learn what is on the minds of the judges who will decide your appeal, you need to listen carefully to their questions. This is easier than it sounds, but it becomes natural with experience.

Especially for young lawyers, but also for more seasoned lawyers with limited experience appearing before appellate tribunals, the pressure of the "clock," i.e., the limited time allotted for oral argument, and concerns about awkward silences between questions and answers, often leads to speaking without listening and thinking. Answers tend to be rushed, which inversely correlates with their quality.

Except when offered in response to the simplest of questions, good answers require active listening and a moment or two of reflection. Judges want quality answers to their questions and have no problem with (and indeed prefer) advocates who take a moment to think before answering. The advocate who understands this about judges does not feel pressured to begin formulating the answer to a question while the judge is still asking it. Instead, the advocate focuses all of his or her attention on the

question while it is being asked, then pauses and thinks about it for a moment before answering.

I'm not suggesting that appellate lawyers routinely allow five to ten seconds of silence to fill the courtroom after each question from a judge. However, taking a couple of seconds to think before answering judges' questions will improve your listening skills and the quality of your answers.

Tip No. 23

"Will You Please Answer The Damn Question!"

One criticism I hear appellate judges repeatedly levy against inexperienced appellate advocates is that they refuse to give direct answers to direct questions. Instead, the advocate serves up an answer that dances around the question or, worse, doesn't address it at all.

This drives appellate judges nuts. It also makes them angry. When a judge becomes angry with an advocate, the judge starts to close her ears (and her mind) to anything else the advocate has to say. So, when a judge asks you a direct question, you should give a direct answer—at least initially. (I'll explain my caveat momentarily.)

Although I am not a psychologist (and have never played one on TV), I think advocates refuse to answer direct questions with direct answers when they are worried that the direct answer may be bad for their client. That worry is understandable and may be warranted in any given instance, but it does not justify dodging a judge's question.

What should you do when a judge asks you a question, the answer to which may be unhelpful, if not downright damaging, to your client's case? First, answer the question directly. Then, and only then, do your best to explain why the answer is not as

damaging as it may initially appear. In short, answer first, explain second. If you answer the question directly, the judge will be happy and usually will allow you to explain your answer. If you try to explain first, the judge will reasonably interpret your conduct as evasive and may get upset. (See Tip 35 for related advice on what to do if a judge asks you a question you are prepared to answer directly, but planned to address later in your argument.)

Tip No. 24

"To Moot Is Astute."

Oral argument is about answering judges' questions. Pre-oral argument mooting sessions, particularly when the lawyers doing the mooting were not involved in the trial or preparation of the appellate briefs, are an invaluable way to prepare for those questions. I have known one or two fine appellate advocates who did not believe in being mooted before oral argument. *But only one or two*. Subject to those one or two exceptions, successful appellate advocates are successful in large part because they are willing, indeed eager, to submit to the intense questioning of a mooting session, often several times, before oral argument.

Mooting can be formal or informal. In a formal session, the advocate usually stands at the head of a table in a conference room, gives her opening remarks and then answers questions for 20 or 30 minutes from colleagues sitting around the table, all of whom have previously read the relevant briefs and other materials. This format simulates the actual oral argument.

Other appellate advocates (including myself) prefer a more informal mooting session. I ask several colleagues to read the briefs and then join me in a conference room. I begin the session by testing my opening remarks. We work on those remarks until we

are comfortable with them. Then I ask my colleagues to ask me all of the questions that are on their minds after reading the materials I provided. I answer each question and we review each answer. If an answer is not satisfactory, we do not move on to another question until we have developed the best possible response to the question just asked. The objective is to anticipate as many questions as might possibly arise at oral argument and hone the answers to those questions. A well-honed answer to a difficult question may not convince a judge that it is a persuasive answer, but it will signal the judge that you have given the question considerable thought.

Some lawyers have told me that their clients can't afford to pay for mooting sessions. I understand the economics of law practice, so this complaint does not fall on deaf ears. The short answer, however, is that an appellate advocate cannot afford not to do a mooting session. You have 20-30 minutes to put your best foot forward to a panel of judges. You need to prepare properly, not only for the client's sake, but to maintain your own professional reputation. If that means eating some billable time, so be it.

Finally, a word to solo practitioners: Just because you don't have a colleague working with you does not mean you can't do a moot session. If the matter is worth appealing, it's probably worth having the client pay an outside lawyer to moot you. If the client won't or can't pay, ask a fellow lawyer from another firm to do you a favor and offer to do one in return.

Tip No. 25

"Don't Bloat Your Note(book)." (Or What Is Truly Important In An Oral Argument Notebook.)

Babies have pacifiers. Toddlers have blankets. Appellate lawyers have oral argument notebooks. All are items that we hold onto for dear life and that keep us calm, but which we don't really need. Thus, I am a fan of oral argument notebooks, provided that they don't contain too much material and that advocates reach for them during oral argument infrequently, if ever. They are there "just in case." They should never become a crutch on which an advocate becomes reliant.

Other than stressing that less is more, exactly what should an oral argument notebook contain? Every experienced appellate advocate I have met has a slightly different answer to that question. My oral argument notebooks contain my opening remarks, an outline of my arguments, and a page or two containing absolutely critical citations to the trial record, key pages in the briefs and appendix, and very short descriptions of the most key cases. If I think that one or two cases are controlling in the appeal, I'll include copies of them in the notebook. Similarly, if a particular statute is crucial, I'll include it in the notebook, along with its legislative history. In twenty-five years of practice, I have only reached for my notebook a few times during oral arguments.

Tip No. 26

"Don't Read, Converse."
(Or Why You Should Never Read A Prepared Speech.)

This tip is short and simple: *Do not stare down at the lectern and read prepared written remarks.* As Tip 24 explains, it is OK to bring to the lectern a thin notebook with an outline of your argument and other key documents to which you may refer if necessary. But do not read from a prepared speech and do not read your brief to the judges. Your objective is to engage the judges in a conversation. That requires you to look at them, not the lectern, while you speak.

Tip No. 27

"Don't Repeat What's In Your Brief."

Oral argument is an opportunity to focus the appellate court on the issues you want to focus on (at least until the judges tell you they want to talk about something else that interests them). You don't have to discuss every argument in your brief. Be selective. Tell the court you intend to focus on issues A and B, while of course happily answering any questions the judges may ask on any issue. Focusing your argument on a particular subset of issues is not a sign that some arguments are weak. It is a sign that you are exercising professional judgment, which the judges will appreciate. It is OK to rely on your briefs for certain arguments.

This tip is particularly useful in criminal cases where, as discussed in Tip 14, defense attorneys may feel pressed to include marginal issues in their briefs for issue-preservation purposes. Except in response to questions from the bench about the marginal issues, the defense attorney does not need to mention them during oral argument.

Tip No. 28

"T-Minus 60 Seconds And Counting." (Or Making The First Moments Of Oral Argument Count.)

Although you should prepare an outline of the arguments that you intend to make during oral argument, never forget that oral argument is for the benefit of the judges. (See Tip 21.) They may begin asking questions that require you to depart from your outline. Unless you are appearing before the United States Supreme Court, however, most appellate courts will give you a little bit of time for introductory remarks before the questions fly.

Do not waste those precious few moments by reciting the facts of the case or its procedural history. The judges have read your brief; they know those things. Use the first 45 to 60 seconds to get straight to the heart of the argument that you want the judges to accept.

The opening moments of oral argument are like the first several paragraphs in the introduction of your brief. Those moments are your opportunity to tell the panel, "This is what ***I*** would like to talk about today. This is what ***I*** think is important about this appeal." Like the introduction in the written brief, the first moments of oral argument are your opportunity to set the stage for the argument.

This is not inconsistent with the position in Tip 21 that oral argument is for the benefit of the judges. There is nothing improper about telling the judges what you want to talk about during oral argument. The point of Tip 21 is that once judges start asking questions, you need to respond to what's on their minds.

Tip No. 29

"Shut Up And Sit Down."
(Or How To Avoid Overstaying Your Welcome.)

This tip follows naturally from the preceding one. As noted, appellate advocates love to argue. That is both a blessing and a curse. Many lawyers think that they must use all of the time they have been allotted for oral argument, as if leaving time on the clock is a mortal, or at least a venial, sin. They keep talking and talking, using up their precious allotted time, even after the judges on the bench have stopped asking questions.

The wise appellate advocate understands that just because the rules allot a particular amount of time for oral argument does not mean that she must use all of her time. To the contrary, wise advocates know when to shut up and sit down. If the bench has gone cold, the advocate can say, "If there are no further questions your honors, I'll rely on my briefs for the remainder of my argument." Trust me when I say that appellate judges love an advocate who makes his points and then sits down, even if time remains on the clock.

Lawyers occasionally ask me, "Dan, what if I haven't finished making all the points I want to make? Shouldn't I keep talking?" My answer is "no." As I explained in Tip 21, the purpose of oral argument is to give the judges the opportunity to ask the

questions that are on *their* minds after they have read the briefs. If they don't have questions, rehashing arguments you've already made in your briefs is pointless.

If, notwithstanding my advice, you still feel compelled to make all of your points at oral argument, at least consider making them as concisely as possible. You do not need to present them with the same level of detail that appears in your brief. The judges will ask if they want further detail.

What should an advocate do if oral argument starts out with a stone cold bench and stays that way? Let's say you've made your introductory remarks, moved into the heart of your argument, yet the judges are just sitting there, staring politely or doodling on their notepads. The absence of questions can mean two things: (1) your case is a total loser and the judges have concluded that asking questions is pointless; (2) your case is a clear winner and asking questions is pointless. Faced with a cold bench, should you continue to drone on?

For reasons already stated, I think you should stop. But if you still feel compelled to touch on all of your points, here is my advice: Per Tip 28, use your introductory remarks to tell the panel the several points that you intend to focus on during your argument. Then make your first point. If the bench is quiet, move quickly to your next point. If the bench remains quiet, move on to point three. If the bench is

still quiet: (i) tell that court that if there are no further questions, you will rely on your brief for the rest of your arguments; (ii) briefly state the relief you seek (e.g., affirm, reverse, new trial, etc.); and (iii) *sit down*. You will have given the judges the opportunity to ask questions about each of your issues, but you will not have spent an inordinate amount of time on any of them.

One final note for attorneys representing appellants. Remember, you get the final word at oral argument. Many courts will allow you to reserve unused time from your opening argument for rebuttal (beyond what you reserved when you commenced your argument). A bench that was quiet during your opening argument may have questions for you during rebuttal.

Tip No. 30

"Briefs Can Be Props."
(Or How To Use Your Color-Coded Briefs To Engage The Bench In Your Argument.)

Like oral argument notebooks, it is fine to have the appellate briefs with you at the lectern as long as you don't use them as a crutch. Once in a while, however, their colorful covers can be useful during oral argument.

On rare occasions during oral argument the best way to answer a judge's question may be to refer the judge to a specific page in a particular brief, which may contain a critical concession by opposing counsel, a key quote from a transcript, or something similar. One way to direct the judge to that important page is to say, "Your honor, on page ___ of the appellant's brief . . . ." That's fine. Or you can pick up the appellant's brief, raise your arm slightly so that the judges see the color of the brief you are holding, and then make the statement above.

I watched my mentor, Mark Kravitz, use this tip to great effect in many arguments before the Connecticut Supreme Court and the Second Circuit Court of Appeals. The judges saw the color of the brief, quickly picked their corresponding brief up, and easily moved to the page at issue. They were engaged.

Tip No. 31

"But I Wasn't Trial Counsel, Your Honor." (Or Why You Must Know The Trial Record Cold.)

Too often I've watched a judge ask an inexperienced appellate advocate about something that happened at trial, only to hear the advocate respond, "I don't know honor, I wasn't trial counsel." (I tend to witness this most often in criminal appeals, where appellate counsel are often appointed.) That answer is never acceptable.

As appellate counsel, you need to know the trial record cold. You need to have read every page of the trial transcript, reviewed every exhibit, read every pleading, motion, order and memorandum of decision. And you should know *why* trial counsel made the decisions he or she did below. Sometimes trial counsel's reasons for making a particular decision are relevant on appeal, especially if they were strategic in nature.

Tip No. 32

"But That's Not This Case Your Honor." (Or How *Not* To Answer Hypothetical Questions.)

I cannot tell you how many times I've witnessed the following colloquy between a judge and an advocate during an appellate argument:

> Judge: "Counselor, consider a situation in which the facts are x, y and z. How would the legal rule for which you are advocating in this case apply in that case?"
>
> Attorney: "But that is not this case, your honor."
>
> Judge: "I know it is not this case, counselor. That's why it's called a hypothetical question."

Appellate judges ask hypothetical questions because they want to know how their decision will affect not only the particular case before them, *but future cases as well*. Understanding how a legal rule will operate in different factual situations is an essential part of the judicial decision-making process, especially at the appellate level. Thus, appellate advocates must be prepared to answer hypothetical questions during oral argument.

The best way to prepare for hypothetical questions is through a pre-oral argument mooting process. See Tip 24. By having fellow lawyers read your appellate briefs and then ask you questions during a simulated argument, you will be exposed to hypothetical questions well in advance of oral argument, thereby affording you the opportunity to consider how best to answer the questions.

Of course, no matter how many moot sessions you have had, you may find yourself standing in front of judges who are asking hypothetical questions you've never considered. This situation calls for "thinking on your feet." Thinking under pressure is difficult, but it is an essential part of oral argument. Nothing beats experience as a teacher, but there are a few things an advocate can do—beyond mooting sessions—to address hypothetical questions:

- Listen to the hypothetical carefully. Some of them can be quite long.

- If the question is so long that it becomes confusing, it is OK to ask the judge—after he or she has completed to question—for clarification.

- When faced with an unanticipated hypothetical question, it is OK to pause for a moment to think before answering.

Tip No. 33

"With All Due Respect Your Honor." (Or How To Agreeably Disagree With A Judge.)

Even though judges wear robes, they are human and, ergo, fallible. They may make a statement during oral argument concerning their understanding of the trial record or the law, which you believe is incorrect. Under such circumstances, it is incumbent upon appellate counsel to correct the judge.

Many appellate advocates, fearful of offending the appellate judge, start their answer with the phrase, "With all due respect your honor. . . ." That seems respectful at first blush, but most appellate judges with whom I have discussed the subject find it unnecessary, even patronizing. Some even interpret it as an expression of the opposite sentiment. They prefer the advocate who says something like, "I understand your statement your honor, but I disagree and I'd like to explain why." That is direct without being obsequious or disrespectful.

Of course, the judge may not find your explanation persuasive. If the judge continues to press the issue, there may be no value in using your limited oral argument time to try to persuade the judge otherwise. If you find yourself in that position, the best thing to do is to politely attempt to move the discussion to another issue—and perhaps to another judge.

Tip No. 34

"Quit Hogging My Time Judge!" (Or How To Deal With A Judge Who Dominates Oral Argument.)

Appellate advocates will occasionally find themselves before an appellate panel with a judge who takes over the oral argument. Such judges hog your precious argument time, interrupt you when you are answering their questions, interrupt other judges when they are asking you questions or while you are trying to answer their questions, and generally make your life miserable. How should you respond to such judges?

First, stay calm and remain polite and respectful. You gain nothing from calling a judge out for his or her rude behavior. The other judges on the bench likely share your frustration, but they will stand by their brethren and sistren. You are always better off taking the high road.

Second, if one judge interrupts you while you are answering another judge's question, you may be tempted to say, "I'll answer your question after I finish answering Judge so and so's question." Some judges think that is the proper response, although they may phrase it a bit more deferentially, e.g., "May I finish answering Judge so and so's question and then answer yours? "Other judges prefer the advocate

to answer the interrupting judge's question and then return to answering the first judge's question.

I once watched the late U.S. Supreme Court Chief Justice William Rehnquist firmly direct former Solicitor General Seth Waxman to answer an "interrupting" justice's question after Waxman asked that justice for permission to finish answering the previous justice's question. Unfortunately, this is a situation that has no single right answer. Depending on the bench, you may be damned if you do and damned if you don't. C'est la vie.

Third, try to turn the judge's persistent questions to your advantage. Remember, questions are your friends. They are also opportunities to move oral argument in the direction you want. You need to answer questions directly, but you can also use them as segues to another topic. For example, after you answer the judge's question, you can say, "I'm glad you asked that question, your honor, because it ties into a question that Judge __ asked a few moments ago about [insert topic]." Or, "That's an important question, your honor, and it relates to another issue I would like to discuss. . . ." This solution is not perfect, but it works more often than you think.

Tip No. 35

"I'll Get To That Issue In A Moment Your Honor." (Or Why You Need To Be Prepared To Abandon Your Battle Plan.)

"The best laid plans of mice and men," or so the saying goes.[8] Although you should have an outline of the argument that you want to make at oral argument, you must also be prepared to depart from that outline when necessary.

Appellate judges frequently ask questions that advocates are prepared to answer, but don't want to address at the moment. For example, a judge's question may relate to the fourth topic on an advocate's outline, but the advocate may still be discussing topic two.

When confronted with such a situation, you should resist the temptation to say, "I'll get to that in a moment, your honor." Instead, depart from your predetermined order of addressing issues, answer the judge's question, and then return to your outline. (That may be one of the rare occasions when it is permissible to look at your oral argument notebook.)

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[8] *See* Robert Burns, "To A Mouse" (1785) ("The best laid schemes o' Mice an' Men Gang aft agley.")

The preceding advice applies equally to counsel representing appellants and appellees. However, for lawyers representing the appellee, being prepared to abandon your battle plan and think on your feet is essential. The argument you were prepared to make in response to the argument you thought the appellant would make may be useless if appellant's counsel and/or the judges go in a different direction than you anticipated. When appellee's counsel stands at the lectern after the appellant's opening argument, counsel needs to respond to *that* argument, not the argument the appellant made in his brief (although part of the appellee's argument may include pointing out how the appellant's position has changed.)

Tip No. 36

"Concede When You Must, But Not If You'll Bust." (Or How To Maintain Your Credibility Without Giving Your Case Away.)

Appellate judges often use oral argument as an opportunity to seek clarification from counsel about which issues on appeal, legal and factual, are truly disputed. Questions that begin with the words, "Isn't it true counselor" or "Don't you agree counselor," are usually questions seeking such clarification.

When asked such a question, too many lawyers reflexively refuse to concede anything. They think that concessions are bad per se. That is a mistake. Not every fact or legal issue in an appeal is controverted. You do not do your clients any favors when you refuse to concede points that are not reasonably in dispute. You also risk undermining your credibility as an advocate. By contrast, you enhance your credibility when you concede an indisputable point.

Of course, judges sometimes press a lawyer to concede a legal or factual issue that would effectively resolve the appeal against the lawyer and his client. You are under no obligation to concede your client's case away.

You should begin thinking about possible concessions from the very start of the appeal. It

should be part of the issue selection process. Years ago I worked on an appeal of a $16 million legal malpractice judgment against a prominent Connecticut law firm and several attorneys. After much discussion and debate, we decided not to contest the trial court's finding that our clients (the defendants) breached the standard of care. That is, we conceded liability. We decided to focus instead on errors in the trial court's findings and conclusions concerning damages and causation.

Our decision to concede liability was a calculated risk, but taking calculated risks is the essence of legal judgment. Moreover, such judgment is what appellate judges expect from appellate counsel. (By the way, the Connecticut Supreme Court accepted our damages arguments, reversed and vacated the judgment and remanded the case to the trial court with instructions to enter judgment for our clients based on the plaintiffs' failure to prove damages with reasonable certainty.)[9]

[9] *See Beverly Hills Concepts, Inc., et al. v. Schatz and Schatz, Ribicoff & Kotkin, et al.*, 247 Conn. 48, 717 A.2d 724 (1998).

Tip No. 37

"Don't Muddle Your Rebuttal."

Most appellate courts afford appellant's counsel the opportunity to reserve a certain amount of time for rebuttal argument. (Note to appellants' counsel: when you first stand up at the podium to introduce yourself and begin your opening argument, don't forget to tell the court how much time you want to reserve for rebuttal. *E.g.,* "May it please the court, my name is Daniel Klau. I represent ____. I would like to reserve ___ minutes for rebuttal.")

How much time to reserve is a matter of judgment, but I typically reserve 5 to 7 minutes in a 30 minute argument, and 3 to 5 minutes in a 20 minute argument. In the Second Circuit, where arguments are often limited to 5 or 10 minutes, I'll reserve as little as a minute. If the judges continue to ask questions, they'll usually let the clock continue to run.

Now, recall Tip 29, "Shut Up and Sit Down." Just because you have reserved rebuttal time does not mean you are obligated to use it. If opposing counsel has not done any real damage and your written briefs adequately addressed everything he said, or if the bench was deafeningly silent during opposing counsel's argument, the right thing to do may be nothing, other than standing up briefly to tell the

judges that you have nothing further to say beyond what you said in your briefs.

If you decide to use your rebuttal time, DO NOT REPEAT points you made during your opening argument. Like a reply brief, the point of rebuttal argument is to rebut, not repeat. While your opponent is arguing, listen very carefully to his argument and, equally importantly, to the questions the judges ask. Jot down notes on a yellow pad or index cards of points that may warrant rebuttal or clarification. The list may grow fairly long. Therefore, as you make the list, you should simultaneously prioritize your potential rebuttal points *because you may not have time to make all of them*. (I put an asterisk next to certain points to mark their relative importance.) Pick the top 2 or 3. Rebuttal argument, like a reply brief, must be surgical. Rebuttal arguments are like verbal bullet points: short, direct and concise. "Your honors, counsel made three points in his argument that I would like to address."

CONCLUSION

My objective in writing this book has been to provide lawyers with a handy and concise, yet still meaningful, guide to the most important considerations in appellate brief writing and oral argument. I hope I have succeeded. If I have, it is because of the invaluable appellate guidance I have received over the years from extraordinary teachers. If I have failed, the responsibility is solely mine.

There is a millennia-old story about a stranger who challenged a renowned rabbi to teach him the entire Torah (the Five Books of Moses) while standing on one foot. Undaunted by the challenge, the rabbi responded, "That which is despicable to you, do not do to your fellow man. This is the whole Torah. The rest is commentary. Go and learn it."

This small book is no Torah, nor can I reduce the tips it contains to a single Golden Rule. But if you recall nothing else, remember the following six tips:

- As to brief writing: (1) know your audience; (2) get to the point quickly; and (3) edit, edit, edit!
- As to oral argument: (1) questions are your friends; (2) answer judges' questions directly; and (3) to moot is astute.

Happy appeals, and may the odds be ever in your favor.

If you enjoyed this e-book and would like to buy the print edition, click here for purchase information.