

MAXIMIZING YOUR JOY AND RETURN ON INVESTMENT AS AN APPELLATE ADVOCATE

THOMAS E. LYNCH, III
MILES & STOCKBRIDGE, P.C.
MARCH 16, 2016

I. INTRODUCTION

a. The Appeal

- i. Height of intellectual challenge for trial lawyers
- ii. Intense – stressful but opportunity shape policy and the law
- iii. Interactive with other gifted advocates and with leading jurists
- iv. Reason some of us went to law school
 1. Challenge
 2. Opportunity to make difference
- v. Opportunity for memorable life experience (make it a positive one – The Energy Bus)

b. Understanding your “audience”

His Honor Chris Kehoe in his presentation to this organization in the fall “Writing Better Briefs” (11/18/2015) conveyed the following thought:

“The key to effective appellate advocacy is to imagine oneself an appellate judge. If one does that one will see immediately that the judge of such a court labors under an immense disadvantage. He has little time to spend on each case and is therefore bound to know far less about

the parties, the product or service involved, and the context than the advocate does.” Quoting, Richard A. Posner, *Reflections on Judging* 268-70 (2015)

- i. Import is to recognize that part of your role is to be the guide –
roadmap
- ii. Questions, not to put you on the spot, but to seek assistance –
(answer what you are asked!)
- iii. “Off the wall question”?

- 1. Help me understand

- c. Attributes of able appellate advocates

- i. Professionalism – respectful and courteous
 - ii. Focused – they know why they are there and what outcome
they are seeking
 - iii. Great listeners – are comfortable enough with preparation to
listen effectively
 - iv. Great communicators
 - 1. Eye contact
 - 2. Responsiveness (conversational)
 - v. Prepared but not “trapped”
 - 1. Flexible
 - 2. Understand what is critical to outcome

vi. Storytellers

d. Modern trend

i. Trial lawyer/appellate advocate vs. “Appellate Specialist”.

Trend seems to be increasing in direction of the latter.

ii. Different skill set

1. Trial

- a. Multi-tasking
- b. Interrogation “style” and advocacy
- c. Aware of body language
- d. Sensitivity to Judge/jury
- e. Fast paced and full of pitfalls

2. Appellate

- a. Focus – awareness of what must be decided
- b. Different style of communication
- c. Relationship with Court built over time
- d. Absolute awareness of time

3. Advantages and disadvantages to each

- a. Living with the case from birth can be important

II. PRACTICAL TIPS FOR “NEW” OR “NEARLY NEW” APPELLATE ADVOCATES

a. My first appeal

i. Seek an experienced mentor

ii. Visit the Courthouse

1. Get the feel of the Courthouse
2. Attend several arguments
3. Try to sense what approaches are and are not successful
4. Moot Court or other manner of personalized preparation

b. Logistics

i. Where to park

1. Distance/time
2. Be on **time!** Plan ahead – don’t take chances

ii. Access to Court

1. Frederick County Bar card (No go!)
2. Volume of records – alternative entrance

iii. Check in

1. As Appellant – plan in advance issue of reserving rebuttal
2. Co-Appellees – split?

iv. Should I sit through earlier arguments

1. Sense of Court
2. Can shift docket
3. Don't get caught elsewhere in Courthouse

III. GROUND RULES FOR SUCCESS (OR HOW TO AVOID DISASTER)

- a. Know the Rules – no harm in re-reading before you start your brief
- b. Success in Annapolis starts at home (preserving issues for appeal)

- i. Rule 8-131 of the Maryland Rules of Procedure provides:

(a) **Generally.** The issues of jurisdiction of the trial court over the subject matter and, unless waived under Rule 2-322, over a person may be raised in and decided by the appellate court whether or not raised in and decided by the trial court. Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court, but the Court may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal.

(b) **In Court of Appeals – Additional limitations.** (1) Prior appellate decision. Unless otherwise provided by the order granting the writ of certiorari, in reviewing a decision rendered by the Court of Special Appeals ordinarily will consider only an issue that has been raised in the petition for certiorari or any cross-petition and that has been preserved for review by the Court of Appeals. Whenever an issue raised in a petition for certiorari or a cross-petition involves, either expressly or implicitly, the assertion that the trial court committed error, the Court of Appeals may consider whether the error was harmless or non-prejudicial even though the matter of harm or

prejudice was not raised in the petition or in a cross-petition.

ii. Words to the wise

1. Understand and preserve issues for appeal with appropriate objections and proffers
2. Make sure record is complete
 - a. Exhibits marked
 - b. Record going to Annapolis (take the time to review!)
 - c. Record extract has requisite material (but not unnecessary records, pleadings, memoranda, Rule 8-501(c))

iii. Recent teachings from the Courts (the “Preservation Rule”)

1. Peterson v. State, 444 Md. 105, 118 A.3d 925 (2015)
(Opinion by McDonald, J.) Case involved appeal from conviction of defendant of first degree felony murder and other charges arising out of a pre-arranged drug deal that went bad. Prosecution presented three witnesses who testified that the defendant was the assailant who shot and killed the drug supplier.
 - a. Case very useful guide in many respects:

- i. Articulates constitutional right to confront accusers and examines standard of review;
- ii. Detailed analysis of the actual testimony of each witness and colloquy between Court and counsel;
- iii. Clear articulation of the purpose and application of the preservation rule to uphold trial judge's rulings.

“The purpose of the preservation rule is to ‘prevent unfairness and requir[e] that all issues be raised in and decided by the trial court, and these rules must be followed in all cases[.]’ Grandison, 425 Md. At 69 (quoting Abeokuto, 391 Md. At 327). Put another way, the rule exists ‘to prevent sandbagging and to give the trial court the opportunity to correct possible mistakes in its rulings.’ Bazzle v. State, 426 Md. 541, 561, 45 A.3d 166 (2012) (internal citations omitted); see also Robinson, 410 Md. At 103 (‘Fairness and the orderly administration of justice is advanced by requiring counsel to bring the position of their client to the attention of the lower court at the trial so that the trial court can pass upon, and possibly correct any errors in the proceedings.’ (internal citations and quotations omitted). An appeal is not an opportunity for parties to argue the issues they forgot to raise in a timely manner at trial. Nor should counsel ‘rely on this Court, or any reviewing court, to do their thinking for them after the fact.’ Grandison, 425 Md. At 70 (quoting Abeokuto, 391 Md. At 327.” (Emphasis added)

b. Specificity

“This revised theory of cross-examination, like the fourth page of the medical notes, was not presented to the trial judge at the time Mr. Hughes was on the stand. We are hard put to say that it was preserved as a basis for overturning Mr. Peterson’s conviction on the ground that the trial judge failed to allow his counsel to pursue it. A trial court is not required ‘to imagine all reasonable offshoots of the argument actually presented to [it] before making a ruling on admissibility.’ Sifrit v. State, 383 Md. 116, 136, 857 A.2d 88 (2004) (holding that a proffer based on one theory of admitting evidence did not preserve more detailed, and perhaps meritorious, theory); cf. Brecker v. State, 304 Md. 36, 39-40, 497 A.2d 479 (1985) (‘[W]hen an objector sets forth the specific grounds for his objection[,] ... the objector will be bound by those grounds and will ordinarily be deemed to have waived other grounds not specified’) (alterations added).” (Emphasis supplied).

2. Civil (Administrative Appeal) setting

Sutasinee Thana, et al. v. Board of License Commissioners for

Charles County, 2016 Md. App. LEXIS 7 (Md. Ct. Spec. App. Jan.

29, 2016). (Opinion by Zarnoch, J.)

“In this appeal of a decision of the Circuit Court for Charles County, a liquor licensee seeks to raise a First Amendment challenge to a ‘consent order’ of a county liquor board that prevented the

establishment from offering 'go-go entertainment.' In musical terms, this case, at first glance, may look like the Miracles' 1965 hit, 'Going to a Go Go' meets 1984's 'Footloose'.¹ Ultimately, we conclude that, because of waiver and preservation problems, the appropriate tune is the Grass Roots' 1967 hit, 'Things I Should Have Said.'"

Case, which arises out of the loss of a liquor license issued under terms of a Consent Order, is instructive in various respects for those of us who provide representation to clients before administrative/licensing Boards and agencies.

a. "Restaurant/Entertainment" facility petitioned for judicial review under Rule 7-201, et seq. of Maryland Rules from decision revoking two Consent Orders (under which business required to operate) and Class B liquor license. Three issues raised with Court:

- i. Absence of substantial evidence;
- ii. Violation of Article 24 of Declaration of Rights and Equal Protection and Due

¹ In the 1984 film, "Footloose," which was remade in 2011, the municipal council of the mythical town of Bomont banned dancing and rock music.

Process Clauses of 14th Amendment to the
U.S. Constitution

iii. Revocation of license purportedly beyond
Board power

b. On appeal from Circuit Court decision upholding
Board's findings and conclusion, Appellees raised
for the first time constitutional challenge to Consent
Order restrictions and rulings under First
Amendment

Recitation of requirement to preserve issues for appellate
review:

“As shown by these cases, it may be risky for a
liquor board to adopt, as an affirmative policy,
restrictions on certain forms of dancing or musical
entertainment. However, the First Amendment
issue has been waived and is not preserved for our
review.

‘Ordinarily, the appellate court will not decide any
other issue unless it plainly appears by the record
to have been raised in or decided by the trial
court.’ Md. Rule 8-131(a). This proposition holds
for appeals from administrative agencies, such as
the Board, *Motor Vehicle Admin v. Shepard*, 399,
Md. 241, 260 (2007) (It is a settled principle of
Maryland administrative law that, in an action for
judicial review of an adjudicatory administrative
agency decision, the reviewing courts should
decline to consider ‘an issue not raised before the

agency'), and applies to equally constitutional issues where the litigant is not challenging the constitutionality of statute in its entirety, *Yim, LLC v. Tuzeer*, 211 Md. App. 1, 49 (2013) (Citations omitted) ("[E]ven constitutional issues 'must be pursued and exhausted' before the relevant administrative agency 'before resort[ing] to the courts'"); *Ins. Com'r of State of Md. V. Equitable Life Assur. Soc. Of U.S.*, 339 Md. 596, 622 (1995)." (Emphasis supplied).

c. **Warning:** Decide early what you propose to challenge and do so throughout the process. Problem here is at every level: failure to preserve at Board hearing; before Circuit Court; **and** at time issued Consent Order with offending provisions

"Moreover, licensee is precluded from challenging the terms of the consent order because the licensee proposed the contested terms and because it failed to appeal the allegedly unconstitutional condition at the time it was included in the court order. *Fells Point Café*, 344 Md. At 141 (holding that 'when a licensee agrees to reasonable restrictions in order to obtain a license that clearly would not otherwise be granted, the licensee will be estopped from later arguing that the Board had no power to place such a restriction on the license'). Although Thai Palace argues that the Board would not modify its liquor license unless it agreed to the restriction on go-go entertainment, the record does not reveal any statements made by the Board on this point, and the document containing these restrictions was submitted by the licensee's attorney. Further, the record reflects that the licensee did not appeal the legality of the second consent order after it was

issued. *See Fells Point Café*, 344 Md. At 137 (‘If a licensee feels aggrieved by the conditions sought to be placed on his or her license, he or she should seek judicial review at the time the conditions are imposed’).” (Emphasis added)

c. Finality

- i. For matter to be appealable we start with the fundamental premise that there must be a final judgment. (See *Waterkeeper Alliance, Inc. v. Maryland Dep’t of Agric.*, 439 Md. 262, 96 A.3d 105 (2014) (application where two cases consolidated)
- ii. There are instances when interlocutory appeal is possible (described in *Waterkeeper Alliance, Inc. v. Maryland Dep’t of Agric.*: A Judicial Decision is Appealable Only if it Constitutes a Final Judgment ... Volume 45, Number 2, U. Balt. L.F. 246, 248 (Spring, 2015))

“Having determined the 2011 Order was not a final judgment, the court examined whether the order fell within one of the three noted exceptions: ‘(1) interlocutory orders that are appealable by statute; (2) orders that are appealable by the common law collateral order doctrine; and (3) orders that adjudicate completely one of multiple claims in an action and are certified (and certifiable) under Rule 2-602(b), or, alternatively, Rule 8-602(e)(1)(C).’ *Waterkeeper*, 439 Md. at 286, 96 A.3d at 119 (citing *Salvagno v. Frew*, 388 Md. 605, 615, 881 A.2d 660, 666 (2005)). The court determined that none of these exceptions applied to the 2011

Order. *Waterkeeper*, 439 Md. at 286-88, 96 A.3d at 119-21.”

iii. Post-Trial motions

See presentation on this topic by Brynja Booth – Appellate Practice Tips and Anecdotes from a Civil Practitioner’s Standpoint (11/18/15)

1. Discussion of 10 day motions under Maryland Rules 2-532, 2-533, 2-534
2. Compare courts’ revisory power under Maryland Rule 2-535

From the presentation of Ms. Booth:

...Unless an appeal is dismissed when the Rule 2-535 motion comes before the trial judge for a hearing, the movant/appellant must elect between his motion and his appeal. *Tiller v. Elfenbein*, 205 Md. 14 (1954). If the appeal is dismissed before the hearing, the motion stands for a hearing as though no appeal has been entered. *Id.* If the appeal is not dismissed, the trial court has no jurisdiction to consider the matter. *Eisenbeiss v. Jarrell*, 52 Md. App. 677 (1982); see also *Visnich v. Washington Sub. San. Comm’n*, 226 Md. 589 (1961).

A Rule 2-535 motion, if filed within 10 days of the entry of judgment of the court, will be treated as a motion under Rule 2-534 and will have the same effect on the appeal time. *Alitalia Linee Aeree Italiane v. Tornillo*, 320 Md. 192, 200 (1993).

d. Brief writing

- i. Style and form of brief – Rules 8-503; Rule 8-112

- ii. Maximum length – Effective 1/1/16: Rule change for briefs filed in Maryland appellate courts. See Rule 8-503(d) (Announcement attached)

Court Paper	Current	New
Petition for Certiorari, CSA Reply Briefs, and Amicus Brief CSA	15 pages	3,900 words
CSA Principal Briefs (Appellant/Cross-Appellee CSA)	35 pages	9,100 words
COA Principal Briefs	50 pages	13,000 words
COA Reply Briefs	25 pages	6,500 words
Appellee/Cross-Appellant (CSA)	35 or 50 pages	9,100 or 13,000 words (if reply included)
Appellant/Cross-Appellee (COA)	50 pages	13,000 words

Additionally, lines must be double spaced, Md. Rule 8-112(c) and only proportional fonts are allowed. *Id.* All margins must be at least 1 inch Md. Rule 8-112(d). Certification required of Compliance. See Rule 8-503(g). (For non-compliance, appeal may be dismissed. See Rule 8-503(h)).

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CONTACT:

[Angelita Plemmer Williams \(mailto:angelita.williams@mdcourts.gov\)](mailto:angelita.williams@mdcourts.gov)

[\(mailto:lou.gieszl@mdcourts.gov\)](mailto:lou.gieszl@mdcourts.gov)

[Terri Charles \(mailto:terri.charles@mdcourts.gov\)](mailto:terri.charles@mdcourts.gov)

410-260-1488

Maryland Judiciary
Office of Communications and Public
Affairs
2001-E/F Commerce Park Drive
Annapolis, Maryland 21401
410-260-1488

December 15, 2015

New Rules Concerning Briefs Filed in Maryland's Appellate Courts Take Effect January 1

(ANNAPOLIS, Md. – December 15, 2015) On January 1, 2016, new rules will go into effect that alter how documents filed in Maryland's appellate courts will look and how long they can be.

The new rules set forth the requirements for type size, spacing, margins, and word count for briefs filed in the Court of Appeals and the Court of Special Appeals, as well as for petitions for writ of certiorari in the Court of Appeals. The new rules are expected to help increase the readability of these documents, as well as standardize their size and appearance.

Under the new rules, the length of briefs and petitions will be measured by the number of words, rather than page length. Litigants will be required to certify the number of words that are in the documents.

Maryland Rule 8-503 sets forth the new requirements for appellate briefs; Rule-8-303, for petitions for writ of certiorari. Rule 8-112 states the new compliance requirement. The form for the Certification of Word Count and Compliance required to be filed with these documents is available on the Maryland Judiciary website.

Overviews of the new requirements and certification forms are available online:

- [Filing briefs in the Court of Appeals](http://www.mdcourts.gov/coappeals/filingbriefs20160101.html)
 [\(http://www.mdcourts.gov/coappeals/filingbriefs20160101.html\)](http://www.mdcourts.gov/coappeals/filingbriefs20160101.html)
 [\(http://www.mdcourts.gov/coappeals/filingbriefs20160101.html\)](http://www.mdcourts.gov/coappeals/filingbriefs20160101.html)
- [Filing briefs in the Court of Special Appeals](http://www.mdcourts.gov/cosappeals/filingbriefs201601.html)
 [\(http://www.mdcourts.gov/cosappeals/filingbriefs201601.html\)](http://www.mdcourts.gov/cosappeals/filingbriefs201601.html), including suggestions for how to determine word count

www.mdcourts.gov/cosappeals/filingbriefs201601.html
(<http://www.mdcourts.gov/cosappeals/filingbriefs201601.html>)

More complete information is available in the [rules order filed on September 17, 2015](http://mdcourts.gov/rules/rodocs/187thro.pdf)
(<http://mdcourts.gov/rules/rodocs/187thro.pdf>).

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Court of Appeals

ROBERT C. MURPHY COURTS OF APPEAL BUILDING

Filing Briefs with the Court of Appeals

New rules will go into effect January 1, 2016

1. Covers of briefs:

- a. Appellant's brief - white
- b. Appellee's brief - blue
- c. Reply brief - tan
- d. Amicus curiae brief - gray

2. Fonts - Commercial and Computer

The following fonts are approved by the Court of Appeals for use in briefs, petitions for writ of certiorari, and other papers prepared by commercial printers or computer printers. This list is provided for your guidance -- these fonts are suggested, not mandatory. Be sure to read Maryland Rules 8-112 and 8-504 carefully for requirements as to type size, spacing, margins and the statement in the brief as to the typeface used.

Antique Olive	CG Times
Arial	Courier
Arial Rounded	Courier New
Book Antiqua	Footlight MT Light
Bookman Old Style	Letter Gothic
Britannic	MS LineDraw
Century Gothic	Times New Roman
Century Schoolbook	Universal

3. Length of briefs:

Be sure to read Maryland Rule 8-503 carefully. The form for the required Certification of Word Count and Compliance with Rule 8-112 is available here [\[PDF
\(..appellate/certificationofwordcount.pdf\)\]](#) [\[DOC
\(..appellate/certificationofwordcount.doc\)\]](#).

- a. Appellant and Appellee - 13,000 words
- b. Reply brief - 6,500 words
- c. Amicus brief - 6,500 words

4. Filing of briefs (Unless otherwise ordered by the Court:

- a. Appellant's brief due within 40 days after the filing of the record.
- b. Appellee's brief due 30 days after the filing of the appellant's brief.
- c. Appellant's reply brief due within 20 days after the filing of the appellee's brief but in any event not later than 10 days before the date of argument.
- d. File 20 copies of each brief.

For more information or clarification, refer to Chapter 500 of Title 8 of the Maryland Rules.

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Court of Special Appeals

ROBERT C. MURPHY COURTS OF APPEAL BUILDING

Filing Briefs with the Court of Special Appeals

(New Rules Effective January 1, 2016)

1. Filing of briefs (unless otherwise ordered by the Court):

- a. Appellant's brief due within 40 days after the clerk sends notice of the filing of the record.
- b. Appellee's brief due 30 days after the filing of the appellant's brief.
- c. Appellant's reply brief due within 20 days after the filing of the appellee's brief but in any event not later than 10 days before the date of argument.
- d. File 15 copies of each brief and, if filed as a separate volume, 10 copies of any record extract. (For MDEC cases, see # 5 below).

2. Covers of briefs:

- a. Appellant's brief - yellow
- b. Appellee's brief - green
- c. Reply brief - red
- d. Amicus curiae brief - gray

3. Fonts - Commercial and Computer:

The following fonts are approved by the Court of Appeals for use in briefs, petitions for writ of certiorari, and other papers prepared by commercial printers or computer printers. This list is provided for your guidance -- these fonts are suggested, not

mandatory. Be sure to read Maryland Rules 8-112 and 8-504(a)(8) carefully for requirements as to type size, spacing, margins and the statement in the brief as to the typeface used.

Antique Olive	CG Times
Arial	Courier
Arial Rounded	Courier New
Book Antiqua	Footlight MT Light
Bookman Old Style	Letter Gothic
Britannic	MS LineDraw
Century Gothic	Times New Roman
Century Schoolbook	Universal

4. Length of briefs (see Rule 8-112):

- a. Appellant and Appellee briefs - 9,100 words
- b. Reply brief - 3,900 words
- c. Pursuant to Rule 8-503(g), the brief must contain a certification of the word count substantially in the following form:

CERTIFICATION OF WORD COUNT AND COMPLIANCE
WITH RULE 8-112

1. This brief contains _____ words, excluding the parts of the brief exempted from the word count by Rule 8-503.
2. This brief complies with the font, spacing, and type size requirements state in Rule 8-112.

Signature

d. The word count can be obtained from either Microsoft Word or WordPerfect by selecting appropriate text and running the word count function for the appropriate software. For instance, in Microsoft Word 2013, highlight the text, click on the **REVIEW** tab and select the **WORD COUNT** button. In WordPerfect, select the text to be counted, click on **TOOLS**, and select **WORD COUNT** from the drop down menu.

5. MDEC:

For MDEC cases, the record copy of the brief and record extract must be e-filed by the due date for the brief. Eight paper copies of the brief and record extract must be filed. (Rule 20-404).

This is a brief summary of the rules regarding the filing of briefs. Please refer to Chapter 500 of Title 8 of the Maryland Rules for complete information on the style, formatting and filing of briefs in the Court of Special Appeals.

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