NUTS AND BOLTS OF MARYLAND APPELLATE PRACTICE

Wednesday, March 16, 2016

Honorable Kathryn Grill Graeff

TIPS FOR APPELLATE ORAL ARGUMENT

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Maryland Court of Special Appeals
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I. GOAL – to persuade the judges to reach a particular outcome
– We want to get it right. Help us do that.
– Be clear on what you are asking the court to do.

II. ELEMENTS OF AN EFFECTIVE ARGUMENT
–Approach
– Treat the argument as a conversation. Judges have read the briefs, and oral argument is the advocate's opportunity to address the judges' concerns and questions.
–Know the applicable standard of review
–Focus on the law, not emotions

– Speaking style –Engage the judges' attention
– Make eye contact with the judges – do not just read your notes
–Speak slowly, clearly, and candidly, and respectfully
–If you refer to a judge by name, make sure you know how to pronounce the name
–Start with a brief description of the case – what it is about – why it is interesting
–Give a roadmap of your argument why you prevail
– Ex. The trial court was (right / wrong) for the following three reasons – then list the reasons and began to discuss each one

-Questions

-As indicated, this is your opportunity to persuade the judges. Use that opportunity effectively. Answer the questions directly and fully. Do NOT avoid the questions.

- If the premise of question is wrong, politely say so and explain

- Listen closely to the question and determine the *type* of question:

1. A neutral request for information
2. A concern
   - make sure to address
   -acknowledge a weakness but explain why not a barrier in your case
3. A hypothetical – prepare for – know limits of the rule you are proposing
4. A friendly (helpful) question – a "softball"
5. A tangential question – answer and move back to critical issues

- If you do not understand the question, seek clarification

- If you do not know the answer to a question, say so

-Never misrepresent the facts or the law

-Respond to the question with a yes or no, and then explain or qualify

-After answering, transition back to your argument

- Preparation is critical
    - -An advocate should have a thorough command of the facts and be able to direct the court to where information can be found in the record
    - -Prepare in advance for questions the Court may ask
        - – What are you asking the court to hold? What is the rule you are proposing?
            - – Is any other rule acceptable?
        - -Hypos – How will rule work? – What are the practical consequences?
        - – Moot courts prior to argument are very helpful
        - – Do not respond to a hypothetical by saying that is not the facts of this case. We know that, but we have to think about how a ruling may affect other cases
- Recognize that sometimes less is more
    - – You do not have to use all your allotted time
    - -Quit when you are ahead

Writing Better Briefs

Christopher B. Kehoe
Maryland Court of Special Appeals
2016

> *[T]he 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.*
>
> Richard A. Posner, *Reflections on Judging* 269 (2015)

Summary of Presentation

Some common attributes of excellent briefs: (1) they contain the information that the appellate court will need to decide the case; (2) they address predictable concerns that judges may have about the facts or the party's contentions; (3) they are intellectually honest; (4) they hold the judges' interest throughout; (5) they are professional in language and tone; and (6) they accomplish all of this in ways that lead to the lawyer's desired result.

The too-frequent disconnect between the information that judges need to decide the case and the information provided by lawyers. The recurring problems of (1) inadequate and user-unfriendly extracts (and a simple and obvious solution—detailed tables of contents); and (2) the failure to integrate information in the extract into the analysis in the brief.

From page limit to word count: how a recent change to the Maryland Rules enables innovative lawyers to write better and more persuasive briefs: integrating photographs, charts and maps into the brief itself, and using better typographical practices without penalizing the client.

Step-by-Step Through Your Brief: Some Do's and Don'ts

1. Before you begin, review the rules of procedure pertaining to appeals, especially Md. Rules 8-501 (Extract); 8-503 (Style and Form of Briefs) and 8-504 (Contents of Briefs).

2. The purpose of **the statement of the case** is to provide judges with a clear understanding of the procedural context of the appeal so that they can identify issues with finality of judgment or timeliness of the appeal. It should be succinct

and non-argumentative. It is not the appellate equivalent of an opening statement and lawyers who use it for that purpose are wasting their time.

3. The **question(s) presented** should set out the issues raised by the appeal. Again, the statement of questions presented should be succinct and non-argumentative. Make sure that you address the issues in your brief in the same order and that you address all issues. (These points may seem obvious but many lawyers don't do this.) There is no reason to use ALL CAPS in a statement of the issues (or anywhere else in a brief).

Compare (examples and formatting taken from actual briefs with only the names changed to protect the innocent):

> **THE CIRCUIT COURT ERRED IN REFUSING SMITH'S REQUEST FOR PRE-JUDGMENT INTEREST BECAUSE PRE-JUDGMENT INTEREST IS RECOVERABLE AS A MATTER OF RIGHT UNDER A CONTRACT TO PAY RENT ON A DATE CERTAIN AND THE CIRCUIT COURT CONCLUDED THAT ANDERSON OWNED A SUM CERTAIN (i.e., BASE RENT) ON THE DATES SPECIFIED IN THE CIRCUIT COURT'S MEMORANDUM OPINION.**

with:

> The trial court erred in refusing to award pre-judgment interest because Anderson was contractually required to pay specific amounts of rent on specific days.

— and —

> **APPELLANT DID NOT PRESERVE FOR REVIEW THE ISSUE OF WHETHER THE TRIAL COURT CORRECTLY PRECLUDED APPELLANT FROM TAKING THE VIDEOTAPE DEPOSITION OF A WITNESS FOR USE AT TRIAL WHEN APPELLANT DID NOT PROFFER WHAT THE WITNESS WOULD HAVE TESTIFIED ABOUT, AND EVEN IF APPELLANT DID PRESERVE THE ISSUE, THE COURT WAS CORRECT IN QUASHING THE DEPOSITION WHEN THE DEPOSITION WAS TO BE TAKEN AFTER THE DISCOVERY DEADLINE AND EIGHT DAYS BEFORE TRIAL, AND APPELLANT MADE NO OTHER ATTEMPT TO HAVE THE WITNESS TESTIFY EVEN THOUGH THE TRIAL WAS RESCHEDULED.**

with:

The trial court correctly denied appellant's motion to use an expert witness's videotaped discovery deposition at trial.

A. Appellant failed to preserve this issue for appellate review.

B. Appellant's motion was not timely filed.

C. Appellant was not prejudiced by the trial court's ruling because the trial was later rescheduled, giving her ample opportunity to arrange for her expert to be present to testify at trial.

4. The **statement of facts** should clearly and fairly explain them. Don't ignore unfavorable facts but place them in context. Refer to parties by name instead of "appellant" and "appellee" etc. Beware of the gap between what you know about the facts of the case (nearly everything) and what the judges know (nothing).

Judges are not advocates and will not search a record to glean from it facts to support a party's contentions. Be precise in your references to the extract and include line numbers of transcripts when available. Provide enough information about a reference to enable the reader to decide whether to interrupt reading the brief to look at the extract.

Compare:

Bad: Acme was fully aware of the deficiencies in its performance of the contract. (E. 247–87.)

(The writer is asking the judge to review 40 pages of extract to find an undisclosed number of factual nuggets to support the assertion.)

Typical: Acme was fully aware of the deficiencies in its performance of the contract. (E. 247; 252; 287.)

(An improvement but the reader doesn't know what you're actually referring to. He or she might well set the brief aside and pick up the extract to find out, thus destroying the continuity you're seeking to accomplish.)

Better: Acme was fully aware of the deficiencies in its performance of the contract. (E. 247: lines 18–23 (deposition of Andrew Smith, Acme's CEO); E. 252: lines 6–25 (deposition of Wallace Jones, Acme's project manager); E. 287 (internal company email dated 4/7/09 from Jones to Smith "As we've previously discussed, we're having some real challenges with the Simpson Industries installation.")).

5. The **statement of the standard of review** is intended to help litigants to focus on the appropriate standard. An extended discussion adds little to the persuasive power of your brief.

6. Your **Argument** must include both legal authority and how those principles

apply to the specific facts of your case together with a **conclusion** that identifies the specific appellate relief you're seeking. It is the lawyer's duty to connect the dots between the law and the facts. Make sure that what you want to argue has been preserved for appellate review.

When you cite to a Maryland case, pin cite to the official report. (Maryland judges have the Maryland Reports and Maryland Appellate Reports in their chambers. They do not have the Atlantic Reporter.) At least for the Court of Special Appeals, parallel citations to the Atlantic Reporter aren't necessary.

Consider rhetorical techniques like "front loading" and "road mapping."[1] "Front loading" provides sufficient introductory information about your argument to enable the reader to focus on your argument as you develop it. Front loading can often be accomplished by a well-crafted summary of argument. "Mapping" includes the effective use of headings to indicate the progression of your argument from one step to the next. A considerable amount of information may appropriately be placed within a heading.

Compare:

> A. Did the Trial Court Err In Admitting the Psychological Evaluation of Appellant?

with:

> A. If preserved, Smith's assertion that Dr. Anderson's evaluation was inadmissible is inconsistent with this Court's holding in *In Re Calvin R.*, 175 Md. App. 205, 234 (2007).

A **footnote** is a signal to the reader that the information contained within it is not necessary in order to follow the writer's reasoning.

The only legitimate use of **acronyms** in persuasive legal writing is to make it easier to follow the argument. Acronyms accomplish this only when they are short (usually three letters is best, e.g., FBI, ALJ, DEA). Unfamiliar acronyms are an invitation to confusion. If you have to use them, include a glossary.

There are a limited number of ways to **emphasize text**. All of them work best when used sparingly. **Bold**, *italics* and <u>underlining</u> each have advantages and disadvantages. ALL CAPITALS has only disadvantages.

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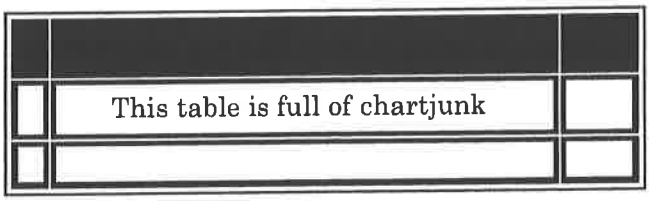
[1] I have borrowed these terms from Stephen V. Armstrong and Timothy P. Terrell's *Thinking Like a Writer: A Lawyer's Guide to Writing and Editing* (3rd Ed. 2008).

Bold is the **most commonly used technique** but **overuse of bold fonts** can result in a **sense of fatigue—"stop screaming at me."** *Italics* are less visually intrusive but lawyers and judges tend to use *italics* for case names. *Italicized text* can get lost on the page. Underlined text, if used very sparingly, avoids the "stop screaming at me" syndrome and won't be confused with a case citation, unless, of course, you underline citations.

There is some research that suggests that underlined and ALL CAPITALIZED text is more difficult to read than unformatted text. Overuse thus invites the reader to skip over extended passages. This is exactly what you don't want to accomplish.

Other techniques, such as changing text size or text font (or both), should not be used in persuasive legal writing.

Tables can be extremely effective ways of presenting information. Lawyers tend to underutilize them in briefs. If you decide to use a table, avoid "chartjunk"—visual elements that distract the reader's attention from the information you're trying to convey.



	This table isn't	

7. I believe that the greatest source of appellate judicial frustration lies in record extracts. Remember, the judges deciding your case know nothing about it. Take the time to make sure that your **record extract** complies with Rule 8-501 and is organized in a way that will be accessible to readers who are totally unfamiliar with your case. Include a **very detailed table of contents.**

Bad:

Appellee's Motion for Partial Summary Judgment filed July 7, 2014 and Exhibits	E. 240
Appellant's Reply and Cross-Motion For Summary Judgment	E. 350

Good:

Appellee's Motion for Partial Summary Judgment filed July 7, 2014 and Exhibits	E. 240
Exhibit 1: Affidavit of Trooper Jose Garcia, MSP, responding police officer	E. 272
Exhibit 2: Accident Report Prepared by Dennis Anderson dated December 27, 2013	E. 277
Exhibit 3: Affidavit of Roger Boykin, Eyewitness to accident	E. 288
and so on . . .	

The first item in the extract after your **very detailed table of contents** should always be the docket entries.

When the extract includes excerpts from a transcript, clearly mark omissions.

When the length of an extract requires multiple volumes, consider grouping similar materials in the same volume, *e.g.*, Volume I, pleadings; Volume II, transcripts; Volume III, exhibits. In any event, the cover page for each volume should prominently display the exact pages contained therein. It is helpful if the table of contents for the entire extract is included in each volume.

8. Many lawyers have a tendency to organize an **appellee's brief** as a mirror image of the appellant's. Before you do so, think about whether addressing the appellant's contentions in the order that he or she presented them to the Court is the most effective way of communicating your client's case.

Always consider whether the arguments presented by the other party have been adequately preserved for appellate review. *See, e.g.*, Md. Rules 2-517; 5-103 and 8-131. If you contend that an issue is not preserved, present an alternative argument.

9. **Reply briefs** aren't always necessary. A reply brief is necessary if the appellee contends that one or more of your contentions is unpreserved.

10. Your **binding options** are metal coil, plastic coil, thermal tape, velobinding, and stapling. I've listed them in order of my perception of ease of use to the reader. I believe that my views are widely shared by other appellate judges.

11. **Maximum Length:** Maryland rules changed effective January 1, 2016. Rule 8-504(d):

Court Paper	Prior	Current
Petitions for Certiorari, COSA Reply Briefs, and Amicus Briefs COSA	15 pages	3,900 words
COSA Principal Briefs Appellant/Cross-Appellee (COSA)	35 pages	9,100 words
COA Principal Briefs	50 pages	13,000 words
COA Reply Briefs	25 pages	6,500 words
Appellee/Cross-Appellant (COSA courts)	35 or 50 pages	9,100 or13,000 words
Appellant/Cross-Appellee (COA)	50 pages	13,000 words

Text must be double spaced, Md. Rule 8-112(c), and only proportional fonts approved by the Court of Appeals may be used. *Id.* All margins must be at least 1 inch, Md. Rule 8-112(d), but may be wider.

The Court of Appeals maintains a list of approved fonts that is available on the Court's webpage. (I've crossed out fonts that are no longer widely available. Courier is a monospaced font which the Court now longer permits.)

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

The Court of Appeals' list of approved fonts states that: "This list is provided for your guidance—these fonts are suggested, not mandatory." Why? I think there may be two reasons.

First, the fonts approved by the Court are **system fonts**, that is, they're included with the Microsoft and Apple operating systems. System fonts come and go. For example, CG Times, Britannic, and MS Line Draw are no longer available from Microsoft. The Court does not prohibit the use of other system fonts.

Second, there is another universe of fonts, known as **professional fonts**, that are available for purchase. Professional fonts that lawyers might use are designed for additional clarity and legibility. There is at least one professional font designed

specifically for use in legal documents. The Court's rule doesn't prohibit their use.

Recommendations

Typography is the skill and art of presenting text in a visually pleasing, easy-to-read manner. Employing good typographical practices enhances a logical, well-considered argument; bad typography can detract from one. Now that Maryland's appellate courts count words instead of pages, lawyers can use good typographical practices, for instance, wider margins, without penalty.

An important element of typography is selecting the appropriate font for your message. Everyone's default font seems to be Times New Roman. But, as its name suggests, Times New Roman was designed for use by newspapers. If your goal is to cram as much content as you possibly can into a finite number of pages, Times New Roman is the font to use.

However, in a world where briefs are limited by number of words instead of pages, there are better choices. Fonts like Book Antiqua, Bookman Old Style, and Century Schoolbook are easier to read on the printed page than Times New Roman. Of the three, I suggest you consider Century Schoolbook. Sans serif fonts like Arial, Antique Olive, and Universal, if used at all, should be limited to headings.

Some useful resources

Effective Legal Writing and Advocacy:

(1) Stephen V. Armstrong and Timothy P. Terrell, *Thinking Like a Writer: A Lawyer's Guide to Writing and Editing* (3rd Ed. 2008).

(2) Antonin Scalia and Bryan A. Garner, *Making Your Case: The Art of Persuading Judges* (2008).

(3) Paul Mark Sandler & Andrew D. Levy *et al., Appellate Practice for the Maryland Lawyer: State and Federal* (4th Ed. 2014).

(4) Richard A. Posner, *How Judges Think* (2008) and *Reflections on Judging* (2015).

(5) Kevin F. Arthur, *Finality of Judgments and Other Appellate Trigger Issues* (Rev. Ed. 2014).

Typography:

(1) Matthew Butterick, *Typography For Lawyers* (2nd Ed. 2015). A very good resource and particularly useful because it contains step-by-step guidance on implementing his suggestions for the word processing systems most frequently used by lawyers: Word, WordPerfect and Open Office. Butterick's website, typographyforlawyers.com, contains a great deal of free information.

(2) Ruth Anne Robbins, "*Painting With Print: Incorporating concepts of typographic and layout design into the text of legal writing documents*" J. ALWD 2 (2004): 108-150. An excellent article by Professor Robbins explaining how the eye sees, and the mind processes, printed material and how these insights should affect legal typography. Accessible at http://works.bepress.com/ruth_anne_robbins/2.

(3) *The Practitioner's Handbook for the United States Court of Appeals for the Seventh Circuit* pp. 128–35, accessible at http://www.ca7.uscourts.gov/. The Seventh Circuit's recommendations for better brief formatting are particularly relevant because that court counts words and not pages.

(4) Edward R. Tufte, *Envisioning Information* (1990) and *The Visual Display of Quantitative Information* (2d Ed. 2002). Two classic books on integrating images and charts with text.