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The Briefing and Argument of an Appeal

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This writing is not intended to be exhaustive or all-inclusive. I shall give you the benefit of two vantage point- one that of an appellate judge in a busy court for ten years, and the other that of a lawyer active in appellate work for a still greater period; passing by Trial Term experience, both as a lawyer and as a judge, without attempt at pedantic display of learning and without ornate classical reference.

Court's Disposition of Appeals

In this Appellate Division, following argument or submission of an appeal, a report or informal opinion is written in every case. This report, with the record, briefs and argument, forms the basis for oral consultation with resultant decision. To keep down volume of decisions, few opinions are written in this department nowadays. We endeavor to confine opinions to cases which concern applications of new law, or novel applications of old law. Do not feel that your cause has been lightly considered if the decision slip is a mere note "affirmed without opinion" or "reversed" with a three line statement of the reason for the reversal. That three line reason probably has back of it a ten to forty or more page informal opinion dealing with every angle of the controversy. Be assured, therefore, that cases decided without reported opinion receive the same full consideration as those decided with published opinions.

We have no law's delay on appeal. Despite the vast increase in the quantity of litigation over a decade or two ago, every appeal noticed for argument at a given term is heard at that term. The decision is had, ordinarily, within a short time after argument or submission. The speed of an appellate court is the speed of its slowest member, just as the efficiency of a set of electric batteries is measured by the strength of the least effective unit. But, by and large, in practical effect, the variation is negligible.

The disposition of appeals is affected by the same factors which affect dispositions in Trial or Special Term. On appeal, of course, in many instances, contentions advanced below are abandoned and the scope of controversy generally narrows as the appeal progresses. This results from a more detached view of the importance of contentions which ensues after a trial and initial decision is had.

Preliminary Applications

Let me digress to refer to preliminary applications affecting appeals. Keep in mind that there is a fundamental jurisdictional requirement to a hearing in the Appellate Division. You must have served and filed your notice of appeal from either an order or a judgment to be entitled to make a preliminary application for a stay or similar relief. Strange as it seems, that is frequently overlooked with disaster. When you make such a preliminary application or make an incidental motion in an appeal already pending, observe the rules of the court. They are simple and few in number. The rule most flagrantly violated is Rule 11 in connection with seeking to dismiss appeals. This requires a brief statement of the status of the controversy and a showing of merit, particularly by the adverse party. Do not subject yourself to denial of relief or rebuke for failure to observe these simple rules.

Main Appeal

I shall confine myself to considerations common to an appeal from an order or an appeal from a judgment.

In your brief, of course, you begin woth a "Statement." This should indicate what the appeal is, where it came from, identify the parties, give their relation to each other and who claims to be aggrieved and to what extent. This should be short and crisp.

With that formal element behind us we are brought to some specifications in regard to an appellate presentation. The subject, like all Gaul, may be divided into three parts-the facts, the law and the argument thereon.

Facts

Let us consider the manner of presenting facts. When preparing a brief, take pains to get clearness and brevity. Do not sit down and dictate a long-minded statement of facts before you have examined exhaustively the evidence in the record and the pertinent law. Many facts and some of the questions of law which were deemed important on the trial lose their importance when evaluated in the solder atmosphere of the printed record. You obtain a better perspective as you progress to the prosecuting of an appeal. You develop a better sense of values as to which facts are essential and what questions of law are controlling. After you have decided which facts are essential to enable an understanding of your propositions of law, you are then called upon to select the most effective manner of stating those facts in your particular instance.

There is no universal rule, but the rule that most frequently lends itself to clarity, brevity and ease of understanding, is the recital of facts in their chronological order; that is, in the order of happening. This is the order of nature. Put yourself in the position of the court to whom you are speaking and make your recital in a manner that would enable you, if you were the court, to most quickly grasp what you wish to convey.

Make clear at the outset who are the parties involved and the relation of each of the order, and then refer to them by a brief name, not as the "appellant" or the "respondent," but rather as the plaintiff or the defendant in conjunction with their names. All too often the facts are stated in a brief so as to present an incomprehensible jumble. A typical one involved a controversy in relation to the rights of parties concerned with a mortgage and a bill of sale. It started with a recital of a fact that happened in June, 1928. Then followed three or four facts which

worked their way back to September, 1927, then, proceeding backward, crab like, facts were stated occurring back in March, 1927. Then the recital went into reverse and proceeded forward to what happened in July, 1927. It then reversed again and told what happened in August, 1928. All of this with a plethora of words, so as to make a confusing conglomeration covering several pages, all without adequate folio citations. What it was all about could not be grasped; merely a blurred condition of mind was produced.

As an experiment, applying the chronological method. I rewrote the facts with folio citations in one-half page as follows:

"On September 10, 1927, the defendant Toll Realty amid Construction Company, Inc. (hereinafter referred to as 'Toll') , executed and delivered a mortgage to plaintiff Boriskin for $3,750 on premises No. 2100 Utica avenue, Brooklyn, (18) . This mortgage was recorded (21) on September 23, 1927. On December 6, 1927, the defendant Best Plumbing Company filed a conditional sales agreement covering plumbing fixtures sold to 'Toll' for $8,100 with title to remain in seller. These fixtures were delivered and paid for except $1,500. On December 10, 1927 (26), the defendant 'Toll' defaulted in payment on an installment of mortgage principal due, and plaintiff Boriskin under the mortgage provisions, elected to declare the entire principal of the mortgage to be due, and began this action in foreclosure on June 8, 1928 (3) . He joined the Best Plumbing Corporation as a defendant. The claim advanced is that time mortgage is superior to the lien of the sales agreement, and this question is to be decided on pleadings which do not show the exact date of the installation of fixtures."

On this recital, just given, each fact is grasped by the mind and retained without difficulty as you progress to the culmination of the incidents involved in the controversy. You readily find that the question revolves around the effect of a bill of sale on the rights of the parties, which question may be then delved into further.

You will find, in most instances, that the chronological order is the most effective way to set out facts in a brief. But confine yourself to essential facts and eliminate unessential facts; however, do not eliminate an essential fact because it is not helpful. Face it and meet it.

Disputed and Undisputed Facts

Another thing you must decide is how to handle the undisputed and the disputed facts. Put yourself in the position of the one to whom you are speaking, the appellate court. Is your particular controversy one where it is advantageous to keep separate the disputed and undisputed facts? In many instances it is most effective to set out first the facts upon which both sides agree. You can sometimes build your law arguments on the undisputed facts. If that premise be not sufficient, then set out separately the disputed facts, giving the different versions fairly in a condensed form.

When you indicate the facts, do not send the copy off to the printer in that state. Many briefs submitted indicate that is precisely what is done. Revise your dictation brutally. If a dictated statement of facts cannot be revised so as to eliminate 40 percent of the verbiage the briefer is one of two extremes. He is either too poor a craftsman to write a brief because he does not know how to condense dictated matter and eliminate prolixity; or he is so sententious and concentrated in utterance as to be too valuable to devote his time to brief writing. Such a genius should not follow the law.

After the first revision of the facts has taken place, a second revision should take place with a further reduction of volume of another 10 per cent.

Rudyard Kipling's practice is confessed by him in his autobiography, published last month. He subjected all his writings to at least three drastic revisions, with an appreciable lapse of time between each, all to the end that he might blot out superfluous wordage.

When your revisions have ended, you should have a brief, clear recital of the facts, with the disputed facts, in most instances, segregated from the undisputed. The recital should follow the principle of climatic progression in order to intensify its force and acceptability. It has been said of a celebrated lawyer, that he stated his facts so clearly and so carefully confined himself to the essentials, that his main fact recital was more than half his argument on the law. There is no doubt that if your facts are well stated more than half your law argument is completed, since you are addressing a tribunal trained to recognize as you progress the controlling effect of pertinent principles of law on your recital of the facts.

No statement of fact should be given without there being inserted after it the folio number in the record where it may be found. No fact should be stated which is not in the record. A good practice with regard to designating the folio is merely to put in brackets the number of the folio is merely to put in brackets the number of the folio without putting in the syllable "Fol." When the bracketed figure of a citation is given, folio is understood. The practical effect of this method is that you get better receptivity from the mind of the reader of the brief, since the syllable "Fol." in constant repetition has a retarding effect upon mind reception. To test this, take the same matter and put it in two paragraphs. Read one with a lot of folio citations in it having the syllable "Fol." interspersed throughout and read another form of the same paragraph with the syllable "Fol." eliminated and merely the number of the folio inserted in brackets and see how much easier it is to grasp the one with the syllable "Fol." eliminated..

If the appeal is from a Special Term judgment based on facts resolved on disputed oral versions and you are an appellant do not state the facts m disregard of the findings against you. Be a realist and meet the situation with

which an adverse finding confronts you. If the appeal is from a judgment based on a jury's verdict and you are an appellant, do not state facts in disregard of those imported by the jury's verdict. Meet the dilemma which confronts you by giving a fair statement of the conflicting versions of the facts, stating first those permissibly accepted by the jury. Otherwise you will be in the position of seeming to argue from an unsound premise.

You now have your facts stated. Do not attempt to write any point, on either the facts or the law, until you have finished your revision of your statement of facts. This concentrating on one phase of your brief at a time before taking up your points will inevitably tend towards accuracy, clarity and brevity and avoid irrelevant law point excursions.

In special instances, except for the barest outline, to avoid unnecessary repetition, the pertinent facts may be given in a law point.

Law

Your next problem is how to set out your points. You should have proper sequence-an orderly method of presenting them as a result of an exhaustive examination of the law. Keep clearly in mind the big question or questions of law involved. Do not scatter your fire. If an appeal has a dozen points, it is highly probable that none of the points is any good. Do not be a fly speck lawyer, seeing the small imperfections and overlooking the big defect. Develop the capacity for seeing the crucial or vital question or questions involved in the controversy and concentrate on them. A proposition of law, like a statement of fact, that needs too much explaining is likely to be a proposition of law that is not sound or worth expounding. That is true of ordinary life. Your daily experience should teach you that in the average instance at least, a thing that does not lend itself to quick and ready explanation is usually a thing that is not capable of being effectively or honestly explained at all.

When presenting arguments of law, keep constantly before you the state of mind of the one to whom you are talking; what he knows or does not know of the background of the problem. Present your point in a manner that will be readily grasped. When you do this, you have done all that any lawyer has a right to expect to be able to do, that is, make himself understood and understood quickly. This is not the day for florid written or oral argument; avoid it.

If you make your point understood and it is rejected, that involves no reflection on you as a lawyer. But if you have a point and do not make yourself understood, whether it be a sound or unsound point, that does involve a serious reflection upon you as a lawyer. When representing your points, do so in an orderly fashion. Have your brevity reveal that you have taken out the material which is not important and have presented merely the essential matter and the vital citations. Do not set our innumerable cases to justify a doctrine which can be sustained by a single case. Let your industry show itself. Pick out the best case in your group and leave the redundant others uncited. Cite preferably a decision in the department in which you are arguing. Do not quote excerpts from an opinion in a cited case. The court can examine the case itself. It is sufficient to summarize the doctrine of a cited case. A skillful can state the rationale of the principle of a case, if he concentrates on doing it, in less space than is given to it in the opinion. This is due to the opinion stating the doctrine in the process of growth, with supporting reasoning.

Of course this rule is not invariable. There are times when a short extract from an opinion fits exactly that for which you are contending, but that is less often the case than the contrary.

When citing cases give the official series. The New York Supplement is published ahead of the official series, but when you use that publication, give the official citation furnished by its publisher. Do not use the word "supra" in referring to a case cited earlier in your brief. This practice is permissible in an opinion, but awkward for the court in a brief. Repeat the volume citation, unless the prior reference is close by.

When you dictate your points and the galley proof comes back from the printer, do not approve it until you have had every quotation verified and every citation checked on title, spelling, volume number and page. It is a reflection upon you to file a printed brief with the volume number or the page number transposed or wrong or in which you refer to a Court of Appeals volume when you intend and Appellate Division volume of that number and page. It is inexcusable for you to fail to indicate by an asterisk matter omitted from a quotation. Such slovenliness carries with it the impression to a judge's mind that the writer is not dependable with respect to his

assertions concerning either the facts or the law.

Follow the same process with your points of law that you did with your facts. Do not take up the second point until you have boiled down, revised and completed your first point. Avoid involved sentences and strive for terseness. In writing your first point do not reiterate the facts set out in your statement of facts, but merely state enough of the facts to bring out in bold relief your proposition of law. Follow this method with each successive point, making the successive points few in number.

Long briefs generate the suspicion that the lawyer is wanting in discriminating judgment and does not know how to pass upon relative values of facts or points of law. This observation is applicable to men who have been at the Bar many years as well as to beginners. Prolixity is a somewhat universal fault. Courts have had occasion to decline to receive briefs and direct counsel on both sides to classify their facts and their law under proper headings, and to do so with brevity and clarity. Too often we have briefs running into hundreds of pages, which instead illumining the controversy merely bring obscuring confusion and, to a certain extent, disability to sound judicial disposition of the questions presented. Do not let the fact that your adversary is given to prolixity cause you to fail to adhere to the rule of brevity.

I had a personal experience with one case in the Court of Appeals nearly twenty-five years ago, when my adversary filed a brief of ninety pages. There were but three narrow questions involved, and the brief filed against that bulk consisted of nine pages. That short brief pointed the way to the result that came forth from the court.

Oral Argument

When should a lawyer make an oral argument, and when should he submit upon printed briefs? There is no rule universally applicable. You must decide for yourself whether or not oral argument will be helpful to an understanding of your appeal. There are some questions that do not lend themselves to helpful oral argument. For instance, oral argument does not help on an appeal from an order to strike out numerous paragraphs in a pleading, and in the event that is not done, to require the alleged causes of action to be separately stated and numbered, and in the event that is not justifiably required, to dismiss upon the ground that no cause of action is in any event stated. This recital indicates that multitudinous detail has to be examined and paragraphs matched off against each other so that the questions involved may be passed upon. Oral argument in such an instance is of no avail. Such a situation requires intense effort to keep each question and time matter relating thereto separate and distinct, to the end that there may be the utmost clarity and brevity of statement respecting it. This can be done best in a brief, where the opportunity for frequent revision is available and where the order of arrangement of what is urged can be fixed upon so that such argumentative matter can be considered against or alongside the part of the record to which it relates. Such material should be so arranged that it will meet the problem of bringing home understanding to the court. This can be done more readily in a brief.

But oral argument on some questions advantageously supplements the brief. When such oral argument is deemed helpful it should not be presented as a mere parroting of the written brief. A graphic style of oral presentation should be used. But do not open your oral argument with an unmeasured denunciation of the result below or an unrestrained characterization of any part of it. Postpone characterization or expression of opinion until you have made your factual and law argument on your grievance. Then if characterization or denunciation is needful, and it seldom is, its value or justification can be more readily appraised. Good taste requires characterization, when warranted, to be measured and retrained-skillful repression after a provocative situation has been unfolded, paradoxical though it seems, adds force to an argument.

On oral argument it is not essential, as in the brief, in most instances, to identify in a detailed way the formal steps by which the litigation arrives in the appellative court, or to fix the exact date or the exact place where a given occurrence happened out of which the questions of fact and law evolve.

For instance, instead of reciting "This is an appeal from a judgment at Trial Term, Kings County, entered at such a term, &c." the better way to get the situation quickly before the minds of the court and to identify the matters you wish to discuss, is to say in a given instance: "A jury has assessed the defendant so much for certain injuries claimed by the plaintiff, a woman; she was knocked down by defendant's automobile and defendant is claiming (1) that the undisputed facts show no negligence or breach of duty on the part of the defendant; or (2) show negligence as matter of law on the part of the plaintiff; or (3) that there was prejudicial error in the admission or rejection of evidence"-and then go right to those questions. You will not that this has eliminated whether the judgment was at Trial Term in Kings, Queens or Richmond County, and the element of what part of town the accident happened, what time it was, what day of the week it was, what day of the month it was, and various details of that sort which are or ought to be in the brief in appropriate forms, but are not needful for oral presentation.

And when you proceed with the discussion of the law it is not good practice, if you are relying upon a particular case or cases, to refer to the case of Jones v. Smith (215 A.D. 426, at p;. 443) and then interrupt yourself and say

"No, it is 434," because none of this is essential to oral argument. It is sufficient to say that you are relying upon the Jones case which you have cited, which held thus and so, and you may then proceed to apply its doctrine to your case.

Do not indulge in the similar objectionable practice of reading on oral argument excerpts from an opinion. Develop the ability to summarize accurately in your own language the holding of a particular case.

If you do not believe that you can bring home the high points and controlling features in your case on an oral argument, then oral argument is no supplemental help to the briefs, and if it is not that, you should not indulge in it. And on oral argument do not attempt to discuss points, that you may have in your brief, that do not lend themselves to oral argument where some of the points do lend themselves to oral argument. For instance, where you have a point of law on rulings on evidence or error in a charge, oral argument may be helpful, but oral argument on weight of evidence, except in a most summary fashion, is not helpful. In such an event it is sufficient to say that on the other points you rest on your brief.

This discriminating manner of presentation as between points which lend themselves to oral argument and those which do not, makes a favorable impression for your cause upon the court. Favorable impressions are more conducive to successful results than an impression that you do not know how to distinguish between relative values attaching to your several points or the degree of effectiveness that attaches to one or the other in the differing manner of presentation.

Intermediate Appeals

When you are confronted with a problem of whether or not an appeal should be prosecuted, always resolve the doubt in an intermediate matter against prosecuting the appeal.

You seldom accomplish anything on an appeal from an order granting alimony and counsel fee. Go to trial and get findings of fact favorable to your client, and if your evidence warrants favorable findings and you do not get them, then appeal from the judgment on a record containing the evidence and the findings.

Most practice appeals involving pleadings are futile. Lawyers who have cut their eye-teeth avoid them because their practical effect is to educate your adversary to your client's disadvantage.

The same observation is true as to appeals from orders granting or denying temporary injunctions. Go to trial and get the evidence and your findings. Then you have something on which to work to some purpose. Of course there are exceptional instances where the right to a temporary injunction stands or falls on undisputed facts and its issuance is a question of law; then an appeal from an intermediate order, if you have the right end of the controversy, is a desirable thing. The same is true if an alimony and counsel fee order is granted or denied in a grossly improvident manner, so as to present a mere question of law. Such instances are very rare.

An appellate court will strain to avoid disturbing the discretion of the Special Term, even though it be exercised in a way which members of that court would not have exercised it if one of them were sitting as Special Term. The reason for this attitude is that the best time to have a review, if any is needed, is when the judgment comes up with the evidence and time findings. Of course all this presupposes a record warranting an appeal. This assumes you have properly saved grievances to entitle you to ask relief on appeal.

An appellate court at all times is seeking a just result arrived at in accord with established precedents or doctrines. To be sure, in an exceptional case the Appellate Division will upset what appears to be an unjust result arising from error, even though no savings objections were made or exceptions were properly taken, but this power is sparingly exercised.

Correspondingly a just result will not be disturbed, even though there be error in the record duly objected or excepted to, if it fairly appears that error did not prejudicially affect the result.

Aptitude for Oral Argument

I have not referred to anything about personal aptitude in the oral presentation of appeals. That is something you must decide yourself. If you lack the power of persuasive presentation then you are not fitted to make an oral argument. The power can be developed. The indispensable ingredients in its development are intellectual honesty and unremitting industry. Resourcefulness is born of unsparing diligence in working out and classifying your facts and your law, and a determination to be absolutely frank on the logical consequences which flow from your reasoning as applied to them. You will not get anywhere with an appellate court unless you are candid in your presentation. You must keep in mind that the men to whom you are talking have as a daily diet questions of fact and propositions of law corresponding to those upon which you are only intermittently working; they

therefore are keen in assaying the soundness of your contentions and in grasping the local consequences of what you urge. They necessarily have a very intimate acquaintance with the decisions affecting the questions you are arguing, and may perhaps have written one of those unreported opinions or reports to which I have alluded, analyzing all the authorities on the questions which you have presented as novel, because they appeal to you as being novel, although possibly not novel to others.

If you give reasonable attention to these sundry observations you will make an effective presentation in written or oral word of the points you deem favorable to your client. If you do that you will have brought home an understanding of your side of the cause and have performed your ful duty. After that the decision rests in hands beyond your control. You will then have done your best-angels can do no more.

The Record

In preparing records on appeal much unnecessary matter is printed. Recourse is too infrequently had to the short form of record available in many instances, where only one phase of the facts is pertinent either on the points of law or fact urged. Much money could be saved litigants by intelligently complying with the practice indicated in Capone v. Matteo Realty Corp'n (241 A.D. 845) and People v. Foote (241 A.D. 846). While I am citing those cases, you might note a case covering practice in the Court of Appeals where what should or should not be done is stated succinctly. In Stevens v. O'Neill (169 N.Y. 375).

Conclusion

At the risk of being commonplace I have confined myself to a few of the practical phases affecting the presentation of an appeal. Some of them will seem to be so obvious as not to have warranted reference, yet the frequency with which they are violated to the detriment of clients and causes, shows that insufficient consideration is given to them. Experienced lawyers are offenders respecting them as frequently as neophytes.

I am hopeful that the foregoing will be a helpful stimulus to you of the Bar to a degree proportionate to my good intentions, rather than to its intrinsic worth.

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