Obtaining an Edge in Appellate Advocacy

Y. David Scharf and Judge David B. Saxe discuss ways to improve the chances of success for attorneys in appellate practice, including the “court attorney’s report.”

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courtroom

Attorneys involved in appellate practice are constantly on the lookout for ways to improve their chances of success.

Better brief writing comes to mind initially. That is not surprising—it is widely accepted that the most critical factor than influences an attorney's likelihood of success on appeal is the quality of the appellate brief.

Courses on legal writing abound. Larger law firm's often hire experts on legal writing to run boot camps for their associates and even for partners interested in being able to produce better appellate briefs. Articles offering advice and tips on preparing and writing effective appellate briefs are numerous—although most just re-hash what has been said in the past.

There are numerous pointers that can be culled from the many articles and treatises that have investigated this subject. Many often boil down to the admonition to be brief and to be clear.

Other valuable pointers argue for the utilization of the statement of facts to shape the reader's opinion of what the outcome should be. It is said that an appellate panel should feel good about ruling in favor of your client. Your introduction, the preliminary statement, should be compelling and contain the unadorned rationale of why your position should succeed.

We add that a good brief must catch the reader's attention early on by advancing the concept of brief writing as story telling—an effective brief tells a story that should capture a reader's attention at the outset and not let go. And, there are many, many other suggestions on brief preparation that are worthwhile.

Secondly, there is an abundance of material in law journals offering advice to the appellate practitioner regarding

favored approaches to oral argument. A few quick points: in their opening statements, successful appellate advocates get to the point of their argument immediately by identifying the key issues that will be discussed.

Be prepared to address your weakest points as well. Practice by preparing questions in advance that are likely to come from the bench asking you to respond to these areas of weakness. Keep going over your responses until they are as polished as possible.

Don't be afraid to answer a question with an "I don't know," but try not to do it more than once during your argument. When a judge interrupts the flow of your argument with a question, STOP talking. That's what judges do. Don't tell a judge that you will be able to respond to the question later in your presentation. And a response to a questioning judge that you are unable to answer the question because you were not the trial counsel, is a no-no! And, of course, there are many other significant pieces of advice that a practitioner should consider.

We offer a different approach that we believe can initially provide the appellant's counsel a slight edge, if time and resources permit. This approach, or better yet, procedure, requires the appellate lawyer to have someone in the firm, previously unconnected with the matter, prepare a writing that mimics the bench memo or court attorney's report prepared by staff at the Appellate Division, First and Second Department, and we are certain elsewhere. At the First Department this writing is called a court attorney's report or simply the "report."

Many appellate courts have law departments where capable attorneys are required to produce detailed and analytical

reports on current appeals.

In the First Department, a staff attorney is provided with the record and briefs for an up-coming appeal and then produces a bench memo or detailed report that is furnished to the panel members in advance of oral argument.

The report will contain a neutral recitation of the facts, the relevant law and the contentions of each side. The court attorney's application of the law to the stated facts will lead to the detour producing the recommended disposition of the appeal that will be eventually furnished to the panel of judges assigned to that appeal.

The report will be carefully reviewed by supervisory staff at the court for accuracy of the discussion of the legal issues, completeness (did the staff attorney fail to analyze a legal issued raised or do so only perfunctorily) and, most importantly, for the proprietary of the recommendation.

As noted, in the First Department, the court attorney is required to make such a suggested recommendation for an appeal based upon the analysis provided. In some circumstances that recommendation may be overruled by the courts attorney's supervisor in an "override" that usually appears on the front page of the court attorney's report above the court attorney's recommendation, often with a brief explanation.

While the court attorney's report is just that—a report or staff bench memo, and never takes the place of the independent analysis of the judges sitting on that panel, it is generally given appropriate respect by panel members. Many judges read the report before delving into the briefs and the record, to give themselves an initial impression of the appeal.

Especially on complex cases the court attorney reports are often prepared by the more senior, experienced law personnel. Supervisory staff in the court's Law Department are generally familiar with staff court attorneys' knowledge and ability, mostly in specific areas of law and their ability to quickly analyze voluminous and complex records.

Obviously, the report prepared by the court attorney in the Appellate Division relies on the briefs of both the appellant and respondent and, of course, the decision of the motion court and independent research done by that court attorney. If the process we are recommending is to be utilized, the private bench memo or report would have to rely on the motion court briefs.

What we recommend to the appellant's counsel is that consideration be given to having someone on staff prepare such a report or bench memo as if it was being prepared for a panel of judges instead of for the team of lawyers representing the appellant.

If done correctly and objectively, you will quickly see precisely what the appellate judges are going to read and if the analysis and resulting recommendation go against your client's position, you will, at least have the opportunity to create a writing that puts forth, as best as possible your positions on the various issues raised and with an opportunity to parry the points that go against your position in a way that gives you the best chances of presenting your position.

In short, operating in this fashion, may give you a fighting chance, by giving you a window into the thought processes going on with the judges who will decide your appeal.

Even if you forego preparing your own bench memo in advance of writing your brief, preparing one *after* the appellate brief for both combatants are served, may still be of enormous help in structuring and preparing for the pitfalls of oral argument ahead. To be essentially forewarned about introductory skepticism from the bench including hostile questions, may provide you with opportunities to even the playing field.

We can see certain drawbacks to what we are proposing—in the first instance, for example, the added expense of producing this replica of the court attorney's report. But with certain appeals, with much on the line, the ability to place yourself within the thought process of those who will decide the appeal may provide a tiny edge that can make the effort worthwhile. We are aware that most appeals wind up being affirmed but in those close cases what may seem counter-intuitive or to put it bluntly, a waste of time, may prove to be a life-line.

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