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Commentary: Raising the Bar - Before you write that brief

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12Next »..Building a winning appeal is a bit like constructing a house. You start with a vision, but before you can realize it, the foundation and frame must be created with meticulous care.

The brief, with its bracing intellectual argument, lies at the heart of a persuasive appeal. Nevertheless, there are several hurdles the successful lawyer must clear before approaching that all- important point.

Last week, I discussed the necessity of preserving the appealable issues at the trial court level and meeting preliminary deadlines. The appeal's foundation also consists of a properly prepared record extract, from which the court can identify the sources for your argument, and a strong grasp of the court's standard of review.

The Record Extract (state appellate courts) or Joint Appendix (4th U.S. Circuit Court of Appeals) in civil cases should contain the pertinent material in the record that you rely upon in your brief. The court will rely upon the extract or appendix and be spared the time to seek the actual record containing transcripts and exhibits.

The record extract

Once the briefing schedule is provided, you should be preparing to write your brief and prepare the record extract that accompanies it (Maryland Rule of Procedure 8-501 or Federal Rule of Appellate Procedure 30). Federal Rule of Appellate Procedure 32 and its attendant local rules provide detailed requirements as to the form and content of the briefs.

The record extract must contain the judgment appealed from; the opinion or jury instructions of the trial court; and other parts of the record designated by the parties. For example, pertinent testimony and exhibits must also be included.

The appellant's counsel is responsible for creating the extract in consultation with the appellee's counsel. One technique to expedite the process of deciding which portions of testimony to include is for appellant's counsel to underline in red the portions of the transcript testimony he or she desires. Then the appellee's lawyer can cross-designate in blue.

The rules describe how to proceed if a disagreement arises about the content of the record extract. Certainly, avoid including extraneous material. You may want to consider filing a deferred record extract, which the rules permit. Under this approach, the extract is filed after the briefs.

The resulting record extract you file should contain all the important parts of the record to which you refer in your brief and subsequent oral argument.

The standard of review

A key step to take before preparing the brief is to carefully review the record to identify the issues to raise on appeal and the standard of review the court will likely apply.

If you did not try the case, it may be helpful to talk to trial counsel and obtain his or her insight.

In formulating the issues or questions to be presented to the court, you must consider the standard of review that the appellate court will use.

For example, in deciding a motion for summary judgment, the trial court decides issues of law, not fact. If you are appealing from the granting of a motion for summary judgment, the standard of appellate review will be *de novo*. On the other hand, if you appeal from an adverse ruling relating to your right to examine a witness, the standard of review may be abuse of discretion. A challenge to the trial court's findings of fact will only be sustained if the appellate court determines that the findings were clearly erroneous.

Bear in mind that your appreciation of the standard of review is essential not only because the appellate courts will be focusing on the standard, but also because your understanding of it will aid you in developing your argument. If the court is using an abuse of discretion standard and you are arguing that the trial judge was clearly erroneous, you may be missing the point to the detriment of your client. In fact, in briefs filed in the 4th Circuit, there is a specific requirement that you identify the standard of review after you state the questions presented.

Having a strong appreciation for the likely standard of review will serve you well as you turn your attention to composing the brief. Next, we'll discuss the challenge of articulating the statement of the case, the questions presented, the statement of facts and the argument itself - the heart and soul of appellate advocacy.

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