CHAPTER 5

APPELLATE BRIEF WRITING

5.1 INTRODUCTION

Attorneys appearing before appellate courts for the first time sometimes view appeals as a contest of smarts in which one side is trying to outwit the other. But the goal of an appeal is to fit a case into a pre-existing set of rules, or to fashion a new rule, in front of judges who are often generalists. To that end, successful appellate brief writing is about clear communication on core principles. To succeed as an appellate lawyer, one must be able to digest and organize material, present facts credibly and consistently with favorable legal principles, locate and synthesize prevailing law, and persuade through clear and forceful language.

This chapter presents some general principles of brief writing as they have been derived from experience and from articles and treatises (referenced in the bibliography[1] or cited in the text). Its core is the work of Frank Friedman, now a judge on the Virginia Court of Appeals. It has been updated to add the views of a recent appellate law clerk who is now versed in private practice and a former government official who was tasked with overseeing appellate attorneys.[2] For emphasis and organization, these principles have been grouped as the Top Ten Rules of Brief Writing. This chapter also makes reference to the Rules of the Supreme Court of Virginia (or "Rules") and the Federal Rules of Appellate Practice ("FRAP").

The need for effective brief writing is not, of course, limited to appellate courts. Virtually every case today requires one or more briefs at the trial stage. Most of the principles of appellate brief writing will, therefore, also be applicable in trial courts and administrative tribunals.

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[1] *See* Appendix 5-4.

[2] For three excellent examples of appellant's opening brief on appeal to the Supreme Court of Virginia, see Appendices 5-1, 5-2, and 5-3 to this chapter.

5.2 RULE ONE: APPEAL WITH PURPOSE

5.201 Selecting the Case to Appeal—Error Correction Versus Waxing Poetic About How You Think The Case Should've Been Resolved.

A. You Can't Reverse Them All. An unfavorable jury verdict or a trial court's ruling based on factual findings is very difficult to overturn except on matters of law. Not every poor trial result can be altered by appeal.[3] Typically appellate courts reverse to correct an error by the lower court or because there is a point of law that the appellate court needs to clarify. Think about your case with this frame of mind.

B. Carefully Consider the Cost Involved. Particularly now that many cases can be appealed of right in Virginia, it is tempting to reflexively appeal.[4] But appeals are often costly and slow. Counsel should consider whether a victory on appeal would actually win the client something worth the cost, time, and risk.

C. Avoid Appellate Catharsis. An attorney who has lost at trial should not bring an appeal just to convince the client that the case was well-tried and that the trial court or jury made a mistake. Nor should the attorney appeal merely to vent about an unfavorable trial court result. Appeals are not vehicles for attorneys to wax poetic about why they think the case should have gone their way—appeals are the tools with which appellate courts refine our system of laws or (less often) correct errors. If the case does not have either of these elements, it is likely not a good candidate for appeal.

D. Exception for Criminal Cases. Criminal appeals are the exception to this rule of discernment. While attorneys should generally invoke their discretion when determining whether to appeal, in a criminal appeal counsel must file a notice of appeal whenever asked to do so by the client, even if the appeal, in counsel's estimation, would be entirely without merit.[5] In this situation, the rules now require the filing by counsel for the defendant of

[3] William J. Bauer, *The Appeal*, The Docket, Vol. 11, No. 2 (Spring 1987).

[4] Perhaps the biggest change in Virginia appeals happened in 2021, when the General Assembly changed which cases had an appeal of right to the Court of Appeals of Virginia. Effective January 1, 2022, all Virginia civil cases have an appeal of right to Virginia's intermediate court of appeal. *See* 2021 Va. Acts. ch. 489; Va. Code § 17.1-405(A)(3).

[5] *Roe v. Flores-Ortega*, 528 U.S. 470 (2000).

(i) either a petition for appeal[6] (for an appeal to the Supreme Court of Virginia) or an opening brief[7] (for an appeal to the Court of Appeals of Virginia) that refers to anything in the record that might arguably support the appeal and that gives counsel's professional evaluation of the merits of the appeal, (ii) a motion for leave to withdraw as counsel, and (iii) a motion for an extension of time to allow the appellant to file either a supplemental petition for appeal[8] (for an appeal to the Supreme Court of Virginia) or a supplemental brief[9] (for an appeal to the Court of Appeals of Virginia). Both the petition for appeal (or opening brief) and the motion to withdraw should specifically cite to *Anders v. California*.[10]

5.202 Rethink the Case.

A. Adopt a Panoramic Vision. If you are the appellant, your initial approach to the case has already failed once. You should step back and take a broader perspective of your case and the issues it presents. Learn from the result below; if a certain argument lacked persuasion, try to think of more convincing ways to present it. Although you cannot raise issues on appeal to which objection has not been made below (unless you can convincingly argue that "plain error" occurred), you may be able to develop a new approach or theory that will strengthen your position.

B. Conduct Further Research. Research and re-analyze. Briefing schedules tend to be fairly short—thus, it is critical that there be attention to additional research before that clock starts to run.

C. "Brainstorm" the Case. It is often helpful to get one or more lawyers involved who did not participate in the trial. A thorough discussion of the facts and issues in the case will often result in a productive cross-pollination of ideas.

D. Know the Proper Standard of Review.

1. In General. The appellate court uses different standards of review depending on whether the review involves questions of law, questions

[6] Rule 5:17(h).

[7] Rule 5A:20(i).

[8] Rule 5:17(h).

[9] Rule 5A:20(i).

[10] 386 U.S. 738 (1967). As to procedures for *Anders* appeals, see Rule 5:17(h) and Rule 5A:20(i).

of fact, mixed questions of law and fact, discretionary rulings, or agency decisions.

2. Standards of Review.

a. Questions of Law. Questions of law are reviewed de novo. In a de novo review, the appellate court undertakes a fresh analysis of the issue without deference to the ruling below. Because an appellate court is just as capable of ruling on a question of law as the lower court or agency, there is no reason to defer to the ruling below.

b. Abuse of Discretion. A trial judge is accorded great deference in making decisions on matters involving the progress of a trial over which he or she is presiding. Such decisions generally are upheld unless they are deemed an "abuse of discretion." An abuse of discretion is often said to occur in three principal ways: (i) when a relevant factor that should have been given significant weight is not considered, (ii) when an irrelevant or improper factor is considered and given significant weight, and (iii) when all proper factors, and no improper ones, are considered, but the court, in weighing those factors, commits a clear error of judgment.[11] Additionally, a court by definition abuses its discretion when it makes an error of law.[12]

c. Questions of Fact. Because the finder of fact is present to weigh the credibility of evidence when it is presented, the factfinder's determinations are accorded great deference. The factfinder's determination will not be disturbed unless it is clearly erroneous or "plainly wrong or without evidence to support it."[13]

d. Mixed Questions of Law and Fact. Analyzing mixed questions of law and fact generally entails combining the deferential review standard applied to fact-finding with the de novo standard applied to legal conclusions. Notwithstanding the deference conferred upon the underlying factual findings, related legal questions are entitled to de novo review.

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[11] *See, e.g., Landrum v. Chippenham & Johnston-Willis Hosps., Inc.*, 282 Va. 346, 353, 717 S.E.2d 134, 137 (2011).

[12] *See, e.g., Arch Ins. Co. v. FVCbank*, ___ Va. ___, 881 S.E.2d 785, 791 (2022) (quoting *Helmick Family Farm, LLC v. Commissioner of Highways*, 297 Va. 777, 794, 832 S.E.2d 1, 10 (2019)).

[13] Va. Code § 8.01-680.

5.203 Appeal to Intermediate Court Versus Court of Last Resort.

A. In General. Different considerations come into play in appealing to an intermediate court (such as the Court of Appeals of Virginia or a United States Circuit Court of Appeals) as opposed to a court of last resort (such as the Supreme Court of Virginia or the United States Supreme Court).

B. Narrower Issues. Issues in a case before a court of last resort usually are defined much more narrowly. The court simply is not interested in the host of issues considered by a trial or intermediate court. Furthermore, a court of last resort can alter its own precedents. This means that, although prior authority cannot be ignored, counsel should place greater stress on persuading the court on grounds of reason and principle as well as existing authority.

C. Appeal of Right Versus Discretionary Appeal. If you have an appeal as a matter of right to an intermediate court of appeal, you do not need to convince the court that it ought to hear the appeal. By contrast, if you appeal to a court whose jurisdiction is discretionary, you must first petition the court and persuade a panel that the potential appeal involves a question worthy of further review. While appellate courts grant appeals for simple "error correction," the odds of having a petition granted increase if the case involves an issue of first impression or an issue upon which the lower courts have reached divergent positions.

5.204 Planning the Appeal.

A. Consider Whether Appellate Counsel Is Necessary. Sometimes a better result can be reached by the fresh approach of a lawyer whose only knowledge of the case comes from the printed record. After all, this is what the appellate judges will have. At a minimum, the lawyer who prepared and participated at the trial level must recognize that he or she is not thereby qualified automatically to handle the case on appeal. On the other hand, a lawyer coming into the case for the first time on appeal has a particularly steep learning curve. It is not uncommon for the appellate judges to inquire about some aspect of the trial, and it does not advance one's case to respond, "I'm sorry, your Honor, but I did not try this case and cannot answer that question."

B. Concentrate on the Pertinent.

1. Limit the Number of Assigned Errors. Do not assign ten or more errors and then discuss all of these issues and expect to receive a

friendly hearing from the appellate court. The judges recognize that only a limited number of issues (usually only one or two) will control the outcome of the appeal. Judicial "receptiveness declines as the number of assigned errors increases. Multiplicity of issues hints at lack of confidence in any one."[14]

2. Narrow the Issues. Narrow your issues by consolidating or abandoning some assignments of error. Shoot for the bull's eye. Avoid peripheral issues. Drop the trivial points.

C. Know Your Appellate Court. All lawyers make some effort to find out (through voir dire or otherwise) something about the members of a jury panel before whom they will try a case. Few do the same thing with regard to appellate judges. Read some of their recent opinions or speeches. What are their interests and backgrounds? What will cause a court member to react favorably? Through your research you should know the trends of the court and how fast those trends are moving (for example, is the court ready to overrule some established but outmoded doctrine).

5.205 Updating and Re-evaluating Research.

A. Update Research. Maintain a keen eye for post-trial decisions that touch on issues raised by your appeal. This applies to new opinions as well as to recently granted writs. Shepardize your cases before you file your brief and again before argument.

While the trial may have required a broad brush of research covering many topics, the appeal should focus on limited, specific issues. This provides an opportunity to delve into those topics more deeply.

B. Practical Points.

1. Key Cases. Do not try to find a mass of remote and attenuated authority. Concentrate on finding a few key cases.

2. Recent Authority. If you decide to cite an old case, try to balance it with a recent holding to show it is still respected law.

3. Research the Underlying Principle. If the law appears to be against you, find out the basic principle underlying the rule of law in

[14] Robert H. Jackson, *Advocacy Before the Supreme Court: Suggestions for Effective Case Presentations,* 37 A.B.A. J. 801 (1951); *Advocacy and the King's English* 216 (G. Rossman ed. 1960); *see infra* ¶ 5.6 (discussing limiting the number of issues for appeal).