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Petitions and Briefs in the Supreme Court of Virginia and the Court of Appeals of Virginia: Technical Pitfalls to Avoid

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Proceedings in appellate courts are very different from those in trial courts and each one of the appellate courts has their own set of rules and internal operating procedures. If you do not follow the rules carefully, you may lose the chance to have your appeal considered. The role of Counsel Press' appellate counsel and appellate consultants is to advise and shield our clients from all potential pitfalls.

In this article, we go over some of the most common errors we see in petitions and briefs to the Supreme Court of Virginia and the Court of Appeals of Virginia. We will also cover some of the rule amendments that the Supreme Court of Virginia introduced on May 16, 2014, allowing previously fatal procedural errors to be corrected. Although some of the points below may seem fundamental, these guidelines are vital components to your filings.

Common Errors in Petitions and Briefs

1. *Assignments of Error* – failure to cite to the record where the error was preserved.
2. *Insufficient Assignments* of Error – per rules. "An assignment of error which does not address the findings or rulings in the trial court or other tribunal from which

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an appeal is taken, or which merely states that the judgment or award is contrary to the law and the evidence is not sufficient. If the assignments of error are insufficient, the petition for appeal shall be dismissed."

3. *Statement of Facts* – failure to include record page cites.
4. *In a Petition to the Supreme Court from the Court of Appeals* – failure to address findings in the Court of Appeals in the Assignments of Error and only address the trial court's error. After May 16, 2014, it is now sufficient to state that the trial court erred, as long as the Court of Appeals ruled on the specific merits and the error assigned is identical to what was assigned in the Court of Appeals. This was a common error before the rule change, and a fatal one.
5. *In a Petition to the Court of Appeals* – phrasing the Assignments of Error in question format. In 2010, the rule changed and Questions Presented are no longer allowed. The Assignments of Error must be in the form of an affirmative statement.

Common Errors in Briefs in Opposition and Appellee Briefs

1. *Failure to include the Standard of Review* – it is not sufficient to simply state that you agree with the appellant's Standard of Review. You must state what the Standard of Review is.
2. *Failure to include record page cites in the Statement of Facts* – this is an optional section for an appellee, but, if you include the section, you must include the record cites.

What else changed in rules on May 16?

One change is that the preservation reference is not considered a part of the Assignments of Error, so it is a curable defect.

Other changes have allowed for certain technicalities, such as failure to use a separate heading or to include a preservation reference, to be corrected by the issuance of a show cause rather than dismissal and the possibility of having the Court report the dismissal to the Virginia State Bar. Many more cases will now be allowed to proceed on the merits and not be dismissed on technicalities.

Please contact me with any questions regarding preparing and filing any appeal. Counsel Press provides a full spectrum of appellate services. Through our local offices, we offer unparalleled in-depth expertise in all state and federal appellate courts nationwide. Our office in Richmond focuses on rule-compliant appellate filings in state courts in Virginia, West Virginia and South Carolina, as well as the Fourth Circuit and the Eleventh Circuit.

Appellate Tips: 15 Critical Steps to Effective Brief Writing

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The appellate brief is unquestionably the most important element in an appeal – presuming the record has been properly preserved and prepared. In fact, at a symposium on appellate business, one of the judges from the New York Court of Appeals stated: "I think briefs are 95-percent of all cases. The brief is the deal." Judges read the briefs. But, they may not grant you oral argument or give you much time to speak even if you do argue. Thus, your written advocacy skills are of paramount importance to victory.

Through its award-winning CP Legal Research Group, Counsel Press has assisted thousands of attorneys with their briefs, including brief review, brief re-crafting and brief writing. The purpose of this article is to share our extensive knowledge in this field and to provide appellate practitioners with guidelines for effective brief writing.

Step #1 – Prepare to Write.

Before you even start to write, you must do a few things to prepare. Master the facts and know your record, both your client's version of the events and your adversary's. Identify the strengths and weaknesses of each. Answer these questions to know that you are prepared to write: (1) Why did the litigation arise in the first place? (2) Upon what facts was the judgment or order appealed from apparently based? (3) If stated, what was the reason for the lower court's decision? and, if you are the appellant, (4) What are the errors that warrant reversal? Know the standard of review applicable to each issue to strategically present the facts in the best light possible.

Step #2 – Keep it Simple.

This doesn't mean that your writing should be unsophisticated, nor that the issues and facts presented cannot be complex. Rather, it means that the brief should read like it was *not* written by a lawyer. Be concise and avoid repetition whenever possible. Focus on the points that need to be addressed and don't add "fluff." Appellate judges dislike unnecessarily long briefs!

Step #3 – Use Short Descriptive Sentences.

The optimum length of a sentence is 20 words or less. It is not always practical in legal writing, but the goal is: short words, sentences and paragraphs. Short sentences aid in comprehension, increase clarity and give your words weight. Streamlined, efficient sentences allow a clear picture of what is being conveyed. Sharp, bright sentences decrease confusion and possible misinterpretation. Think of famous quotations

throughout history. How many are long-winded, lengthy sentences? (Note – not one sentence you've read in these steps so far exceeds 20 words.)

Step #4 – Use Proper or Descriptive Names, Not Designations.

Using legal designations to identify parties is the surest way to stop readers in their tracks. The most abused example of this principle is the use of appellant/appellee or respondent. Despite the fact that most courts specifically request descriptive references or names, authors often insist on using these designations. Worse yet, they frequently mix designations throughout their briefs. For example, referring to the same party as "plaintiff" in some places and "appellant" in others. The reader must then figure out who exactly is being talked about. The last thing you want is a confused, frustrated reader determining your appeal. So, use specific terms or names, such as "the contractor," "the driver," "the passenger," "the doctor," "Smith," "Jones," "the Port Authority," *etc*. Real people or entities are involved in the appeal, so treat them as such in your brief.

Step #5 – Avoid Writing in a Passive Voice.

Many writers use it unconsciously and incorrectly. Not only will using a passive voice increase document length, overuse may detract from your desired perception. To many readers, a non-judicious use of a passive voice signals a less-than-proficient author. If you are up against a word count, you can often save several hundred words by eliminating the passive voice. An active voice is easier to read and more forceful, authoritative and persuasive. (Note – this paragraph was written in an active voice.) Consider these two examples: "The car the plaintiff was driving in, which was red, was traveling at a rate of 45 miles per hour when it was struck by the defendant." (Passive). "Mr. Jones was driving his red car 45 miles per hour when Mr. Smith hit it." (Active).

Step #6 – Avoid "Lawyerisms."

Choose concrete or familiar words over legal terms of art or "lawyerisms." Among familiar words, choose the simpler term, such as "explain" over "elucidate," "show" over "evince" or "guess" over "hypothesize." Among Latin words, consider choosing a more accessible English phrase unless the term of art is important. A good example is choosing "among other things" over "*inter alia*." There is no real difference between the meanings other than one is in Latin. Your brief is not the place to show off your extensive vocabulary. Your reader won't be happy if he/she has to stop reading to look up definitions.

Step #7 – Write Your Questions/Issues Presented Persuasively and in a Way That Leads the Reader to Draw Your Desired Conclusion.

Framing the issue is likely the most critical part of the brief. The party that convinces the court to frame the issue the way it wants the issue framed is more likely to prevail. Framing the issue can also have significant impact on the applicable standard of review. Present the question in a way that makes the answer obvious ***and*** is the answer you want. Compare the following issues presented from an appeal granting summary judgment: A) "Whether the lower court erred in granting summary judgment where material issues of fact exist" and B) "Whether the lower court

erred in granting summary judgment where there was no definitive determination as to: (i) how long a food spill was present in the aisle at ACME's supermarket, (ii) whether any ACME employee had actual notice of the spill and (iii) if the spill actually caused Ms. Smith's injury."

Step #8 – Present the Facts Accurately, But Persuasively, and Don't Hide From Negative Facts.

The statement of facts section of your brief must be accurate and should not contain argument. That does not mean, however, you cannot legitimately shade the facts to favor your client through word choice. Your client and your client's witnesses and experts "testify," "state," "confirm," "demonstrate," "establish," "conclude," "corroborate," "opine" or "estimate." The opposing party and its witnesses and experts "claim," "speculate," "guess," "contend," "purport" or "allege." Similarly, the words used to identify the persons involved are important. Examples: "victim" vs. "complainant"; "infant" vs. "toddler," *etc*. This holds true with using designations in lieu of names, as well. Because accuracy is important, you should not hide from negative facts or omit them from your recitation. You can, however, minimize bad facts by bracketing or coupling them with favorable facts, using transitions like "although" or "while."

Step #9 – Avoid Dates Unless They Are Critical.

Courts review thousands of documents a year. There are few things more mind-numbing than reading a list of dates and what occurred on those dates. Also, depending on your desired presentation, a chronology may not present the facts in the best light for your client. Unless dates or particular times of actions are significant (*i.e.,* statute of limitations or default) or are integral to your theory of liability or defense, consider simply using words or phrases that orient the reader to the chronology. Examples: "after," "afterward," "after that," "at first," "at this time," "before," "beginning with," "beyond," "during," "earlier," "ending with," "eventually," "finally," "following," "from then on," "in the meantime," "last," "later," "meanwhile," "next," "now," "prior to," "since," "soon," "subsequently," "then," "until" or "while." If the dates are significant, consider creating a table, list, bullet points or timeline, if permitted by the court, of the milestone dates. Include a concise statement of the relevant occurrences on each significant date.

Step #10 – Avoid Emotional Appeals, But Humanize Your Story.

Emotional appeals are improper, disfavored and should be avoided. Reason is paramount, and appellate courts generally resent overt emotional appeals. However, you should humanize your facts and tell a story. This is another reason why names or descriptive adjectives are preferred over designations, when identifying the parties. You can legitimately and

Focus on the points that need to be addressed and don't add "fluff." Appellate judges dislike unnecessarily long briefs!

properly generate sympathy for your client or outrage against the opposing party's conduct without resorting to emotional appeals.

Step #11 – Your Argument Should Be in Outline Form.

You should have a point heading for each individual issue which stands alone, meaning that if you prevail on that issue, then you should win the appeal, regardless of the results on the remaining issues. Your situation may not always be this neat and clean, but you should strive for it in your argument. If it does not stand alone, then it should probably be a subheading under one of your main headings.

Less is more on the main issues. Try to keep the number down, if possible. But, remember the rules of outlining – if you have a "Point I," you must also have at least a "Point II." If your sub-points have an "A," they must also at least have a "B." If you are a bit rusty on the "formal rules of outlining," plug the preceding quote into your favorite Internet search engine and you are sure to get results that will help you.

Step #12 – Your Point Headings Should Be Mini-Summaries of the Argument That Is About to Follow.

The point headings and subheadings should be succinct, argumentative statements applying a specific legal principle to the facts of the case. Uninformative headings, while brief, are generally disfavored. Each heading and subheading should have a "because" in it. "THE SEARCH WAS UNLAWFUL." This tells the court nothing. Compare it to "THE SEARCH WAS UNLAWFUL BECAUSE THE POLICE OFFICERS RANSACKED THE HOUSE AND RUMMAGED THROUGH THE DEFENDANT'S PERSONAL BELONGINGS WITHOUT A WARRANT."

Step #13 – Avoid Repetition, Platitudes, Clichés, Long Quotes and Personal Attacks.

Avoid repetition, although you should frequently restate the desired conclusion without browbeating the court. Avoid platitudes and clichés – think of what you really want to say and say it. Don't rely on trite or overused expressions. Avoid lengthy quotations, unless they're particularly relevant. Quotations cannot replace explanation of the law or application of the law to the facts. Avoid personal attacks on the opposing party, opposing counsel and the lower court judge. There is no quicker way to antagonize the appellate court than to personally attack or disparage the lower court judge. Remember, these judges often sat in lower courts. If you impugn the integrity of their brethren, they may subconsciously (or consciously) become defensive. Even where the appeal raises bias, conflicts of interest or improper conduct, make your point without attacking a judge

personally.

Step #14 – Write Conclusions That Ask for Something Specific.

The conclusion of a document is often overlooked or given little attention. Make a concise statement of the relief sought from the appellate court. Tell the court exactly what you want it to do. The most common oversight is to ask the court to reverse the judgment or order appealed from, but not specify what you want done with the case after reversal. Consider seeking relief in the alternative, where appropriate. Example: Reverse the order granting the motion to dismiss and reinstate complaint. In the alternative, grant leave to amend any perceived defects.

Step # 15 – Edit, Edit, Edit.

The importance of editing cannot be overstated! You need to edit your brief before submitting it. If you edit your own work soon after completion, however, inevitably you will "read" what is in your mind, not what is on the paper. You need to set aside your work for a sufficient amount of time or have a second set of eyes review it. Some suggestions for effective editing include: setting the document aside, at least overnight, before editing, having an editing service review the brief, having a colleague, who is unfamiliar with the case, read it, reading it out loud or reading it backward.

(Contact CP Legal Research Group at any time for assistance with any stage of your brief writing – 888-427-5748.)

Maryland Appeals: Latest Changes to Rules & Procedures

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Appellate Practitioners to Take Note of Title 8 Changes – Effective January 1, 2014

Each year, Maryland's Standing Committee on Rules of Practice and Procedure offers several proposed changes to the Court of Appeals, which then reviews those suggestions and issues an order adopting many of them. Those changes frequently address rules that wouldn't directly impact the appellate practitioner, but, in the latest Rule Order (181), there are several changes to Title 8 that the counsel should note. That rule order with redlined changes can be found at: http://www.courts.state.md.us/rules/rodocs/181ro.pdf.

Two areas of particular note are a significant change to the requirements of a Petition for a Writ of Certiorari and an overhaul of the rules regarding *amicus curiae* practice.

Your Petition for a Writ of Certiorari will now have to be significantly shorter. Md. 8-303(b)(1) was changed to reduce the number of pages allowed from 25 to 15 while also adding the requirement that the petition includes "a particularized statement of why review of [the] issues by the Court of Appeals is desirable and in the public interest."

More extensive changes were

made to the rules governing an *amicus curiae* briefing. Particularly, the order adopts major revisions to Rule 8-511. Many of those changes clarify *amicus* practice and also bring the Maryland rules more in line with many other jurisdictions and FRAP. The timing for some *amicus* filings has been changed and a new limited reply is allowed by the Appellee to address any matters raised by the *amicus*.

Implementation of New Md. R. 1-322.2 Deferred from July 1 to September 1, 2014

Last year, Md. R. 1-322.1 formalized the requirement for counsel to redact personal identifier information "in any electronic or paper filing with a court." The Maryland Court of Appeals also issued new Md. R. 1-322.2 that would require a Certificate of Compliance with Md. R. 1-322.1, in every filing, and the signed certification should be part of the document or attached to it. The original effective date of Md. R. 1-322.2 was set for July 1, 2014. However, on June 17, following strong opposition from district and circuit court clerks, the Maryland Court of Appeals issued an order deferring the effective date until September 1, 2014.

Moreover, the Rules Committee met on June 19 to consider possible amendments or clarifications to the scope of rules 1-322.1 and 1-322.2. According to a report in *The Daily Record,* the Rules Committee voted to repeal 1-322.2. The Committee's recommendations will go to the Court of Appeals for a final decision on the certification requirements. The Court of Appeals is expected to vote in July or August on the committee's recommended repeal.

There are other changes that clarify or update existing rules to bring them more in line with current practices and procedures. Please feel free to contact Counsel Press at any time with any questions on filing an appeal within the Maryland Court of Special Appeals and/or the Court of Appeals. Our Washington, DC office focuses on rule-compliant appellate filings in the Maryland, DC and Virginia state and district courts, as well as the D.C. Court of Appeals, 4th Circuit Court of Appeals and Federal Circuit Court of Appeals.