

**VIEWS FROM THE BENCH ON BRIEF WRITING
AND ORAL ADVOCACY**

**Hon. Eugene M. Fahey
Justice Supreme Court
Appellate Division - Fourth Dept.**

BRIEFS

Teach the reader how to decide in your favor.

1. Know the limits - 22 NYCRR 1000.4 (f)
 - 70 pages appellant/respondent
 - 35 pages reply/surreply
 2. Record on Appeal - If it isn't right, the brief cannot be effective.
 - A. Be sure it is complete - We need all proceedings. The appellant suffers when the record is incomplete. Try not to repeat exhibits.
 - B. Effective use of record - The most common problems are incorrect references in the brief and unviewable exhibits from excessive copying.
 3. The three audiences
 - staff attorneys
 - panel of judges
 - reporting chambers, judge and law clerk
 4. How are they read?
 - when
 - case specific - complexity of issues/size of record
 - what is read first (i.e. response)
 5. Decision making process - Ideally, at the A.D., it is one of "prolonged indecision."
 - goals differ from trial court to A.D.
 6. Judges look for threshold questions.
 - jurisdiction
 - procedure
 - misapplication of the relative burdens
 - preservation of the issues on appeal
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7. Table of Contents - It is your outline. Follow it.
8. Put the most important issues up front.
9. Always file a reply brief - Keep it short.
10. Use official cites - It is what we have in our chambers (and the rules require it).
11. Ending should say precisely what is wanted.

Remember: A clear and honest recitation of the facts is good advocacy.

ORAL ARGUMENT

Make the judge want to decide in your favor

- seldom waive
 - positions do change
1. The Golden Age - the ancient art of rhetoric. Daniel Webster, Trustee of Dartmouth College.
 - argument over 3 days
 - Webster opening took 4 hours
 - meaning of contract clause
 2. Currently - "Maximum heat in minimum time." You are lucky if you get 15 minutes per side.
 - A. Fourth Department calendar structure -
 - 20-25 cases per panel
 - 10-12 panels over a two week term
 - along with disciplinary hearings, motions, finalizing memorandums and opinions
 3. "Carpe Diem"
 - oral argument is the time to seize the moment
 - may be the only time when the group of judges is physically together as a 5 member panel
 - effective argument lingers into the panel discussion
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4. Preparation

A. Outline the Ideal.

- jurisdiction
- procedural history
- facts/law
- by issue
- closing

What usually happens when the case is dull and unimportant, the judges let the lawyers ramble, but upon seeing this say “unless the court has questions, I will rest on my brief.”

- strive for clarity

B. Expect the reality.

- “hot”
- where judges have read/thought about cases
- strive for a conversation with the judges on your main issues
- be aware that the questions to you are often a conversations between the judges
- number references - we don’t memorize your briefs by point numbers

5. Goals - Increase understanding, eliminate misunderstandings.

- judge’s goal - “get it right”
- lawyer’s goal - “win”

6. Performance style affects reputation - credibility = effectiveness. Key virtue is intellectual honesty.

| Appellant | v. | Respondent |
|---|----|---|
| - inflict damage on trial court/jury decision | | - the art of listening - respond - if appellant has had little effect, say little in response |

Argue from the correct side of the "v." The style changes.

7. How effective is oral argument?

Statistics were kept from the years 1982-83 for Eighth Circuit judges.
Did oral argument change their perspective opinions?

| <u>Range</u> | |
|--------------------|--------------------|
| High | Low |
| Judge Bright - 37% | Judge Arnold - 19% |

(Frank M. Coffin, *On Appeal: Courts, Lawyering and Judging*, at 135
[W.W. Norton & Company 1994])

8. Conference by panel - after oral argument.

- A. When initial decisions are made.
- B. Effective oral argument is the first stage of conferencing among the judges. Questions to attorneys are sometimes arguments addressed to concerns that other panel members may have.
- C. Confidential notes among the panel members.

9. Understand your judges - Who is on the panel?

- A. Read the dissents. They are a window into each judge's strongly held opinions.
 - B. Recognize particular issue expertise by an individual judge - Fourth Department opinion/memorandum writing versus other Departments.
 - C. Oral advocacy is the heart of the Court's relationship with the bar. It is where each side establishes their professional relationship.
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