

Law

The Art of Appellate Advocacy: Things that go bump in the night

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Being roused from a deep sleep by a phone call at midnight is always confusing, rarely pleasant, and particularly harrowing when the caller is your teenager who should be at home safe and sound rather than out and about in the throes of a crisis.

The first time I received such a call occurred a couple of summers ago when my son, who was just a few weeks shy of his 15th birthday, said he no longer wanted to spend the night with his friend and could I please pick him up, not from the friend's house where he told us he would be, but from a place he helpfully described as being by the edge of a cornfield next to a church near a cemetery where the friend's friend had driven the three of them and one or two others, all of whom apparently were having a much better time than Sam was on this impromptu reenactment of Mr. Toad's wild ride.

Apparently sensing that this wasn't enough to fully wake me from the coma I emerged from just moments before and that I needed perhaps a little more excitement in my actionless-packed life, Sam also informed me that he had just one bar left on his cell phone, so I really needed to get him right away. Don't even bother asking me how Sam's mother and I found him by the side of that cornfield thirty minutes later. Unless you were a migratory bird in a prior life and had flown thousands of miles to return to the same spot year after year, you just wouldn't understand.

You'll probably be surprised to learn that Sam was also responsible for making the second midnight call I alluded to a moment ago, although the reason for this call would not be a shocker if you had read my last article and knew that he just obtained his driver's license. I didn't even hear the phone ring for this call because I was so sound asleep, as apparently was his mother when she answered it, said "Alright, honey," and hung up and returned to bed after he told her he had just had an accident and needed to leave a note for the neighbor whose parked car he sideswiped on his way home to beat the twelve o'clock curfew that's a condition of his newly acquired license.

A time for closure

It would be a real reach to even suggest that today's column is as jarring or dramatic as getting a call at midnight. In truth, it would be a stretch to say that about any of my articles — I've lost track of how many former insomniacs have profusely thanked me for recommending that they read my column at bedtime.

But, if you're one of the two or three readers who has actually managed to stay awake while wading through the brief-writing checklist that I began back in the day when men were men, penny candy cost just that, and My Space was where your neighbor's car absolutely did not belong, you'll probably be somewhat taken aback to hear that this is my last column about the list of items to think about when writing and editing your appellate brief.

Sure, there's lots more that I could add to the list. But once the list hit checklist item #33, I knew it was time for closure when my editor, who has let me write about marriage, high school reunions, being called a poopyhead, and basically anything else that has entered my consciousness over these last two years, started giving me suggestions for future columns addressing other subjects.

Before exploring new frontiers, however, I thought it important to wrap up this phase of *The Art of Appellate Advocacy*, so, for all of you newcomers, latecomers, and former insomniacs, here is the entire checklist:

1. Always advocate in every section of the brief.
2. Make sure your brief has a theme.
3. Remember throughout the brief who your audience is.
4. Be succinct in writing the statement of the case.
5. Be focused in establishing in the statement of the case the context for the rest of the brief and letting the judges know as early as possible what the heart of the case is about, from your biased but fair perspective.
6. Be complete and make sure your brief, even if written for the appellee or respondent, contains a statement of the case.
7. Identify for the reader in the question presented the essence of what your argument is about.
8. The question should emphasize the proper focus by directing the reader's attention to the core point of disagreement between the parties.

9. Keep the number of questions to a minimum.
10. Use the statement of facts to create favorable reader expectations.
11. Keep the statement of facts interesting by telling a story.
12. Discuss relevant statutory, regulatory, and contractual provisions in the statement of facts.
13. Virtually every brief, even if written for the appellee or respondent, should have a complete statement of facts.
14. Deal with, don't hide, bad facts.
15. Include at the end of the statement of facts a summary of the key parts of the court decision that has been appealed.
16. Make sure your brief includes a summary of argument.
17. Think argument headings in writing the summary of argument.
18. Use the summary to check your argument.
19. Argue from the beginning of the argument.
20. Argue your case from the beginning.
21. Give context for the argument.
22. Make the standard of review part of the argument.
23. Avoid the temptation to argue the other side's case rather than your own.
24. Avoid the temptation to plunge into the details of your argument with paragraphs that lack informative topic sentences.
25. Avoid the temptation to discuss cases without providing sufficient context.
26. Use SHMIRAC, not IRAC, as in shmush the Issue, Rule, Application and Conclusion elements of the latter.
27. Make sure your topic sentences have a direct connection with the sentence or the paragraph that precedes them.

28. Don't use long indented quotes.
29. Don't inundate the reader with footnotes.
30. Use cases to advance your argument.
31. Use applicable case quotes as part of the argument.
32. Use cases to mine core elements of your argument.
33. Use explanatory parentheticals to develop the point of the sentence they follow and to avoid a repetitious case-by-case discussion.

One last tip

So that's it for the checklist. I hope that the advice I've given has been helpful, but if there's one tip that you shouldn't ignore it's this: Consider getting your kid, regardless of his or her age, a personal driver. It may be cheaper in the long run, and you'll definitely sleep a whole lot better if you do.

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