

## Law

The Art of Appellate Advocacy

Call me Schmulowitz

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Today's article is not, as some of you no doubt incorrectly guessed based on its title, the tale of a Jewish sea captain's obsessive pursuit of a large white gefilte fish. I am confident that this yet-to-be story will one day be a true classic, especially the part about how the captain's insatiable thirst for revenge wreaks havoc when the crew enrages the creature after attacking it with a flurry of harpoons disguised as gigantic matzoh balls, but my editor got cold feet after mumbling something about Moby Dick and copyright infringement, so this article is not about the final, mad voyages of Captain Ahab.

Nor is today's article about what my last name would have been had my father not capitulated to my mother's adamant demand that he change his if he knew what was good for him or had any hope of getting her to marry him even if he didn't. My uncle's wife-to-be apparently insisted on the same type of prenuptial agreement that my mother did, which is why my father's brother's last name is also not Schmulowitz, but that's enough about that subject, too, since neither brother took his wife's family name and it will take way too much time to explain how Harry and Sadie Schmulowitz had two sons who are now named, respectively, Baida and Shore.

### **On to the argument section**

No, as convinced as I'm sure you were from the title of today's article that it was going to be about either a huge kosher fish terrorizing the high seas or a somewhat baffling family history, it will be about neither. Rather, in the interest of complying with federal law and not exacerbating my own ancestral confusion, and in keeping with the spirit of this column's faithful devotion to the art of appellate advocacy, today's article is about a few critical checklist items to consider when writing and editing the argument section of an appellate brief.

Checklist item #19: Argue from the beginning. An argument does not begin in any manner that remotely resembles the way in which you would tell someone a story or the origins of

your family name. No matter how fascinating you think your case is, you will get nowhere really fast if you start off with a discussion of the mesmerizing legal principles that supposedly govern the outcome of your appeal. You will get nowhere even faster and will definitely be doing no one any favors by beginning your argument with a synopsis of those principles that takes the reader back to the Magna Carta, Mount Sinai, or wherever their point of origin may be.

So much for my “do not” advice. Now for the “do”: The single most effective way to begin your argument is by — drum roll, please — arguing.

Now, some of you might be thinking, “Duh! Isn’t that obvious?” It may be to some, but you would be shocked, surprised, and otherwise amazed at the large number of briefs out there whose authors use the same approach as those judges whose judicial opinions have a section immediately following the facts of the case that is labeled, literally, “Discussion.” If you are one of those lawyers who begins your argument with the equivalent of a “Discussion,” do yourself and, more importantly, your client a favor and change your ways at once.

Judges can write opinions that do this because they’re not advocates but rather disinterested and neutral third parties who fulfill a completely different role in our legal system than lawyers do. I could write an entirely separate column about what that role is, which I will once I retire from the practice of law but will refrain from doing so now, thank you.

Whatever your views are about what the role of judges may be, our mission as lawyers is to convince these impartial arbiters that life as we know it will end if they don’t rule in favor of our client and that this would be a very bad thing for humanity, not to mention humpback whales and global warming. So please argue from the beginning and leave the discussion to the judiciary.

Checklist item #20: Argue your case from the beginning. The number one way in which to avoid falling into the trap of discussing abstract and vague legal propositions at the start of your argument is to begin it by advocating your case. Don’t be shy — tell the reader at the outset that “Reversal is required,” if you represent the appellant or petitioner, or that “This Court should affirm the trial court’s decision,” if you represent the appellee or the respondent, and then follow up immediately with the core substantive reason why the appellate court should do what you asking it to do.

Your brief will be much more effective if you discuss your case rather than general legal principles because well-settled rules and doctrines don’t meaning anything when discussed in isolation. Use those principles to support your argument why you should win, but use your case as the vehicle for explaining how firmly established law compels such a result. Make your case the focus of the argument, not the law.

Checklist item #21: Give context. One of the most important parts of any argument is an introduction that gives the reader a contextual framework for understanding the basic elements of the writer’s position. This introduction, however, is not a summary of your

argument because, assuming that you have listened to anything substantive I've had to say in this column, such as last month's checklist item #16, your brief will have already provided that summary in the preceding section. What I'm talking about here is an opening paragraph that provides a central structure so that the reader has a concrete grasp of your argument.

That structure is easy to create. If your party lost in the trial court, you need to succinctly identify the mistake that the lower court committed and then give the fundamental reason why that error requires reversal. Do the reverse if you represent the winning side by stating what the trial court did with respect to the specific issue raised on appeal and why the court's resolution of that issue was correct and should not be disturbed.

Next month, I'll have more about this and other items to think about when writing and editing this section of an appellate brief. Unless, of course, I get that copyright thing squared away or some questions about my family tree answered. Because if either of these happens, have I got a story for you.

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