

Law

• The Art of Appellate Advocacy: Milestones and tombstones

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The problem with milestones is that there are only so many you can have in your life before the last one arrives bearing your name in granite. I became acutely aware of this sobering reality by experiencing two milestones in the last few weeks when I celebrated a birthday marking the end of yet another decade and the beginning of what probably will be not many more, and when I added a new driver to the family's GEICO policy.

The first of these would be reason enough for taking stock of my life and making sure all of my affairs are in order, although I can't complain too much about officially qualifying for the unofficial Wells Liquors' Senior Citizen's Discount, which I first learned about years ago when a teenage store clerk, believing that I was significantly older than I actually was due to my grey hair and a running-related limp that she apparently had mistaken as a sign of decay, explained to me that the 10 percent deduction on my receipt was what the liquor store does on Wednesdays, "you know, for older guys like you who are in their 50s."

This discount couldn't be more timely because the other milestone that life sprung on me when my son passed his driver's license test made me realize, even before GEICO told me that the new premium will cost somewhere between the average mortgage payment for a four-bedroom brownstone in Manhattan and the GNP of a small developing country, that my blood pressure is way too high to endure many more milestones in my life, whether they're my own or a loved one's.

Even money

Armed with the increasing realization that my loved ones might be sharing the next milestone in my life with each other but without the guest of honor, and that surviving the stress of having a new teenage driver in the household — especially this teenage driver — is at best a 50-50 proposition, I am now committed to completing in the very near future the checklist of items to think about when writing and editing your brief. So, before my time runs out, here are today's brief-writing tips.

Checklist item #30: Use cases to advance your argument. There are various ways to do this, but all share the same goal — that you are writing to persuade the reader with substantive reasoning that you are right and that the judges will be right, too, if they rule in your favor. Cases are a means of accomplishing that goal and should be used to support, strengthen, and solidify your reasons. This may sound obvious, but too often lawyers inadvertently make cases the de facto focus of the argument by failing to use them as a part of the critical framework. Context is essential (checklist item #25). Here are different approaches for using cases to develop context and advance your argument.

Checklist item #31: Use applicable case quotes as part of the argument. I'll be the first to admit that on occasion I suffer from EQD — Excessive Quote Disorder — but quoting cases accurately, properly, and judiciously can be a very effective way of advancing your argument. Consider how the following topic sentence uses a quote from a case:

Judgment should be entered in favor of Dr. Jones because Mrs. Smith failed to establish “the course of action that a reasonably prudent physician with the defendant’s specialty would have taken under the same or similar circumstances.” *Jefferson v. Anne Arundel Medical Center*, 499 Md. 88, 94 (2012).

This is not just a good example of SHMIRAC (checklist item #26) because it simultaneously identifies and applies the governing legal rule, but it also illustrates how to use a case so that it is part of the argument rather than the focus of the discussion. Quoting instead of paraphrasing cases can also get a lot more bang for the buck because it lets the reader know that it’s a court which said whatever it is that you just said, and not just you, the lawyer. Not that there’s anything wrong with lawyers, but there’s a lot to gain by adding judicial co-authors to your brief.

Checklist item #32: Use cases to mine core elements of your argument. There’s also a lot to gain by succinctly discussing the key portions of similar cases to drive home the central parts of your argument. Set up those cases with a topic sentence which argues the chief point to be expanded upon by your ensuing discussion, as the following example illustrates:

The contribution claim against Dr. Jones is barred by the plain language of the release because, as a number of courts have held, “the language of the document evinces an intent to waive all claims, including any right to contribution.” *Glenn v. Donovan*, 659 A.2d 66, 77 (Vt. 1995). Addressing a release which “clearly and unambiguously releases defendants ‘from any and all claims,’” the Supreme Court of Vermont held that such a release barred a contribution claim that the plaintiff filed against one of the defendants....

Discussing a similar release of “any and all claims whatsoever,” the Supreme Court of South Carolina held The Supreme Court of Indiana likewise rejected a party’s argument that his release did not include contribution claims, stating....

These and other cases confirm that judgment should be entered in favor of Dr. Jones because Mrs. Smith’s contribution claim is barred by the unambiguous provisions of the

release. See, e.g., *Edwards v. Stone*, 695 P.2d 46, 53 (Ore. 2003) (holding that the release of “all claims” includes a claim for contribution);

If this discussion were not truncated due to space limits, the ellipses would be filled in with additional information about each case relating to the main idea that contribution claims are not exempt from broadly worded releases.

Checklist item #33: Use explanatory parentheticals to develop the point of the preceding sentence and to avoid a repetitious case-by-case discussion. The case in the preceding example, *Edwards v. Stone*, illustrates two important functions that a parenthetical serves.

First, it can be used to strengthen the text with additional information about the issue being discussed. Second, it packages that information succinctly so that even if the parenthetical contains a quote consisting of more than one sentence, the textual discussion does not subject the reader to an endless discussion of cases.

That’s enough checklist items for today, but I expect to wrap up the list soon because I sense that the end is near. Perhaps in more ways than one.

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