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The Art of Appellate Advocacy
Throwing caution to the wind
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The title of today's article, which is ostensibly about a key ingredient that every appellate brief should contain, is based on the unquestionably sound advice I twice received, and disregarded both times, when I was told not to run the Boston marathon last month.

The advice first came from an unlikely and unexpected source: the managing partner of my firm, who called me on my cell phone the evening before the race at 6:30 p.m., as I was standing in soaking wet shoes in a cold, unrelenting, wind-driven rain with several thousand other misguided souls, who, like myself, were waiting to enter Boston's Government Center for the pre-race pasta dinner the Boston Athletic Association offers all registered runners and their families and friends.

This was the eighth such pasta dinner I had attended but the first that was accompanied by bad weather, which, to make up for the good conditions I had enjoyed the seven previous times I ran this marathon, became a Nor'easter the likes of which even native New Englanders announced they had never seen, including the Channel 7 weather guy whose forecast I watched 12 hours later on the morning of the race.

I can't remember the last time I had so much fun watching a weather forecast. Particularly the part when he told viewers as he stood near the starting line in Hopkinton, Mass., that he was being pummeled by 40 to 50 mile-per-hour gusts of wind coming out of the northeast — the direction in which I would be running in less than four hours; that he never understood why people ran this race in the first place, and that you had to be a complete idiot to be running this one.

My firm's managing partner apparently has the newest version of TiVo that records shows before they even hit the airwaves because, when he called me 12 hours before this weather broadcast, he told me pretty much the same thing the Channel 7 weather guy said, but without the mocking tone — more like the way a person speaks when trying to convince someone not to jump off the ledge of a very tall building. I was touched by his concern for my health and welfare, and was especially moved when he said he would have called telling me not to risk my life even if we didn't have a jury trial in a case we were working on

together that was scheduled for the following week.

The second piece of advice not to run came from a much more likely and expected source, but you obviously aren't aware of how well insured I am if you guessed that the source was my wife, who pooh-poohed my concerns about drowning as she practically kicked me out of the house the day before the race so I wouldn't miss my flight, telling me "Nor'easter Shnor'easter, a little rain never hurt anyone" and that my plane ticket was non-refundable so I might as well use it.

No, the advice not to run came from someone whose interest in my physical well-being has been an unshakeable constant since the day I was born. I'm talking about my mother, who told me that running the Boston marathon in such weather would be dangerous because, according to her dentist's dental assistant, the wind could damage my lungs. I advised her that she needed a new dental assistant. And that a new daughter-in-law wouldn't be a bad idea either.

Although I ignored the advice I was given, as did 20,347 other Boston marathon finishers who likely received similar advice from their mothers, non-beneficiary spouses and other loved ones, you will truly be throwing caution to the wind if you disregard the following advice when writing your appellate brief.

Checklist item # 16: Make sure your brief includes a summary of argument. This advice is easy to follow if you are writing a federal appellate brief Rule 28(a)(8) of the Federal Rules of Appellate Procedure states that every brief "must contain" a summary of argument setting forth "a succinct, clear, and accurate statement of the arguments made in the body of the brief." For reasons I do not understand, there is no counterpart to this rule in the Maryland Rules. I find this baffling in light of the critical role that a summary of argument fulfills for all judges, not just the federal judiciary.

A properly written summary of argument provides a concise, substantive, and meaningful overview of the brief's arguments. This directly advances the important goals of expediting the judges' understanding of the legal issues they are being asked to resolve, enhancing their appreciation of your exceptional legal prose, and facilitating their ability to conclude that you are right and your opponent is wrong. Or just plain wrong, as I like to say when I'm feeling really smug and full of myself. So do yourself and the judges a favor and include a summary of argument that immediately precedes the argument section of the brief.

Checklist item # 17: Think argument headings. Avoid fluff and abstract generalities and summarize concrete information that is specific to your case so that the reader has a firm grasp of your argument. Although Federal Rule 28(a)(8) states that the summary of argument "should not merely repeat the argument headings" — no part of the brief, for that matter, should ever be repeated — argument headings should serve as a guide in writing the summary of argument because headings, like the summary, are designed to apprise the judges of the core arguments set forth in the brief.

A major difference is that an argument heading should be no more than three or four lines, while a summary of argument should, as a general rule, consist of a full paragraph for each major issue in your case that merits treatment as a separate question presented in your brief.

Checklist item # 18: Use the summary to check your argument. The summary of argument should be an accurate reflection of the contents and organization of your argument. If it is, but the summary does not make sense or flow properly, then you need to revise the substance or structure of your argument, or possibly both.

You are free to decide, of course, to follow my running lead and ignore my brief-writing advice. That would be perfectly fine with me. Idiocy loves company.

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