

## Law

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The Art of Appellate Advocacy

Waiting for a cat

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Those of you who read this column may recall that it was about this time last year when, in honor and celebration of my daughter's long-overdue departure for college, I began compiling a checklist of items for lawyers to think about while writing and editing appellate briefs.

I suppose I should feel a little sheepish that I have yet to finish that checklist, particularly because I take great pride in finalizing briefs well ahead of their filing deadlines and completing other writing assignments quickly. But my ability to bring an end to the list sooner than some folks (including my editor) probably would have preferred has been somewhat impeded because, as four years of writing this column have shown, I take even greater pride in discussing other subjects which are either family-related, semi-topical in a timely rather than newsworthy way, or, when the stars align just right, both.

One such subject is my son, a true work in progress who one day may very well become either the President of the United States, as the managing partner of my firm once predicted, or a formidable force to reckon with in the courtroom, as confirmed by an incident which occurred in his first week back to school. All Sam needs to do to be on his way to be the next Clarence Darrow is get his degree. From high school.

Like other child prodigies, Sam's ingenuity became apparent at any early age when he decided that Goldie and Clara were okay as far as goldfish were concerned, but what he really wanted was a cat. The typical 3-year-old, after learning that his dad was highly allergic to pets of the feline variety, would probably accept, albeit reluctantly, that he would have to wait until he was grown up to get a kitty. But not Sam, who immediately saw one of those loopholes that in hindsight was so obvious but at the time completely eluded the rest of us. So Sam shared it with his slower-witted relatives by excitedly announcing, "I have a great idea! We can get a cat when Dad dies!"

Sam has shown similar flashes of inventiveness over the years, but like Albert Einstein and Peter Agre, a neighbor who got a D in high school in the same subject for which he

won the 2003 Nobel Prize in Chemistry, Sam has had his share of high school challenges, including an involuntary Ferris Bueller-like day off during his first week back from summer vacation.

I viewed this feat as somewhat remarkable, not because no one gets suspended during the first week of school, or so I thought, but because by the time my son finished explaining the “incident” to his mother and me, he had convinced us that he was the victim and that the teacher responsible for his suspension was completely in the wrong. We weren’t the only ones he convinced. By the time Sam had finished discussing the matter with the teacher after he returned to school, the teacher profusely apologized for not handling the matter properly.

If this doesn’t impress you, I don’t know what will. When’s the last time a judge told you he or she was sorry after ruling against your client?

### **Include the standard of review**

Ever since my son accomplished this high school equivalent of a judgment notwithstanding the verdict, I made a commitment to myself to complete this checklist by no later than the year 2016 so that it will be ready for Sam if and when he becomes a lawyer. I’ve saved all of my articles for him, including my last piece on checklist items to consider in writing and editing the argument section of the brief, but in case you missed that one, the three items I discussed are:

Argue from the beginning (checklist item #19); Argue your case from the beginning (checklist item #20); and Give context (checklist item #21).

Now that I’ve refreshed everyone’s recollection about the first three checklist items for writing a persuasive argument, here’s another one that should not be overlooked.

Checklist item #22: Make the standard of review part of the argument. For some strange reason, the Maryland rules do not require, as do the rules governing briefs filed in the federal appellate courts and a number of state appellate courts, a separate section setting forth the standard of review that applies to the trial court decision that has been appealed. In fact, the Maryland rules are completely silent about the need to say anything at all about the applicable standard of review.

This is odd, and unfortunate, because the standard of review is a critical part of the appellate process and plays a key role not only in the way appeals are decided, but also in how they are briefed. The governing standard of review determines whether the appellant has either the luxury of arguing that the trial court erred as a matter of law, or the significantly more onerous burden of showing that the court abused its discretion or was clearly erroneous in deciding the case in the manner that it did.

All Maryland appellate briefs should address the standard of review, but there is no need to do so in a separate section or even in a separate paragraph. Use the standard of review affirmatively as part of the argument and as a means of giving structure to your position.

For example, instead of beginning the argument with a rote recitation of the clearly erroneous standard, argue from the beginning (checklist item #19) by telling the reader that the trial court decision should be affirmed because the court did not clearly err in finding that Jones made fraudulent representations to deceive your client into buying

swampland in Louisiana.

Use that type of sentence to set up a crisp discussion of the clearly erroneous standard by arguing that the trial court's factual findings should be affirmed because they are supported by a preponderance of evidence in the record, and rest on the testimony of several witnesses whose credibility played a pivotal role in the trial court's conclusion that Jones would sell snake oil to 95-year-old-widows if he could get away with it.

There are other aspects of the clearly erroneous standard of review that might be worth mentioning, but the point here is to make them part of the argument rather than a separate section or paragraph that stands alone and does nothing.

I intend to discuss a few more key checklist items in my next article so that I can hopefully wrap up the list in the not-so-distant future. But before I make any more commitments, I probably should ask my son whether he knows something I don't. Because he just walked in the door with a five-pound bag of kitty litter.

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