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Effective Appellate Advocacy in the Court of Appeals of Maryland

Alfred L. Scanlan

EFFECTIVE APPELLATE ADVOCACY IN THE COURT OF APPEALS OF MARYLAND

By ALFRED L. SCANLAN*

Many attorneys believe that one who possesses the skills of the trial lawyer automatically possesses the attributes which mark the effective appellate advocate. Every putative Clarence Darrow of the trial bar unblushingly assumes that he is also a Daniel Webster on appeal. The Chief Judge of the Maryland Court of Appeals has, however, expressed a contrary opinion: "Effective appellate advocacy is a specialized facet of law practice. It must be learned by instruction and advice by those skilled in it and by practice. Today, every lawyer thinks he is capable and competent of effective appellate advocacy and many are not."[1]

This article will discuss how the quality of appellate advocacy in the Maryland Court of Appeals might be improved.[2] Specifically, it will discuss some of the pertinent requirements of the appellate rules and suggest ways in which the prosecution or defense of an appeal might be improved through more incisive brief writing and more persuasive argument.

Of course, many lawyers who possess the talents of a successful trial counsel are blessed with the attributes which distinguish a forceful and convincing appellate advocate. This article will be of little interest to those so singularly endowed. Hopefully, it will be of some assistance to those about to embark on their legal careers and to those members of the bar who are infrequently called upon either to appeal or to oppose an appeal. Of necessity, some of the observations may wound the professional pride with which many practicing lawyers seem congenitally afflicted.

I. TAKING AN APPEAL

A. Is It Worth It? The first question that confronts the attorney for the losing side below is whether the game is worth the candle. He must decide whether it is sound professional judgment to recommend that the client invest more, economically and emotionally, by carrying his case to an appellate court.[3] Unlike the situation in the Supreme

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* Partner, Shea & Gardner, Washington, D.C. Member, Maryland, District of Columbia and Indiana bars. A.B., 1941, Columbia College; LL.B., 1946, LL.M., 1947, George Washington University. James Raymond Fellow, University of Chicago, 1948.

1. Letter from Judge Hall Hammond, Chief Judge, Court of Appeals of Maryland, to the author, Sept. 13, 1968.

2. The article is confined to treatment of appeals to the Maryland Court of Appeals, and thus necessarily excludes the criminal appeals which now flow to the Court of Special Appeals. However, most of the general observations made herein should have applicability to criminal as well as to civil appeals.

3. Counsel for the winning side does not have to make this often difficult decision. Having been victorious below, few, if any, counsel would ever recommend to a winning client that he risk the fruits of his victory by not defending an appeal brought by the other side.

Court of the United States, where a majority of the cases which the Court hears on the merits are reversed, the odds in favor of affirmance of a lower court decision by the Maryland Court of Appeals have averaged about sixty-five per cent during the last five years.[4]

If the decision is to appeal, and the stakes are high enough, trial counsel may wish to consider engaging appellate counsel to assist in the preparation and argument of the appeal. In the great majority of cases, it is probably best for trial counsel to argue the appeal, since he presumably possesses an intimate, detailed knowledge of the record which he helped create. On the other hand, there are cases where the client's interests are better served by bringing a fresh approach to the case in the form of a detached analysis by an experienced advocate who was not a participant in the original proceedings.[5]

B. Filing the Appeal. Once the decision to appeal has been made, the first, obvious and cardinal duty of the appellate advocate is to read with care and attention the rules of the Court of Appeals. The most persuasive brief, if filed late, may prove to be an expensive and professionally embarrassing exercise in futility.[6] Equally pointless is the appeal that is dismissed for failure to have the record transmitted on time from the court below to the Court of Appeals[7] or the appeal that will not be heard because of counsel's failure to file a timely order for appeal under the mistaken notion that a motion for rehearing or a motion for a new trial automatically extended the time for taking the appeal.[8]

An appeal to the Court of Appeals is initiated by filing a concise order for appeal with the clerk of the lower court[9] within thirty days of the judgment from which the appeal is taken.[10] The thirty day requirement is mandatory. Thus, if the order for appeal is not filed within the allotted time, the appeal must be dismissed, since courts lack the

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4. In the 1963 term, 69.9% of the cases were affirmed; in 1964, 73.0%; in 1965, 61.9%; in 1966, 62.5%; in 1967, 62.3%. Letter from James H. Norris, Jr., Chief Deputy Clerk, Court of Appeals of Maryland, to the author, Oct. 1, 1968.

5. All appellate advocates are, of course, necessarily the prisoners of the record made in the trial court. On occasion, however, the shackles of a printed record may be more easily shed or explained away by an attorney whose view of the case and understanding of the record are unencumbered by personal participation in its formation.

6. MD. R. P. 835(b)(6) permits the Court of Appeals to dismiss an appeal where the appellant has not filed his brief within the prescribed time. The requirements of this rule can be invoked by the court on its own motion. MD. R. P. 835(a)(2); *e.g.*, Butler v. Reed-Avery Co., 186 Md. 686, 48 A.2d 436 (1946) (dictum).

7. *See* MD. R. P. 835(b)(4); *e.g.*, Castelberg v. Hamburger, 133 Md. 42, 104 A. 473 (1918).

8. *See, e.g.*, Brown v. State, 237 Md. 492, 505, 207 A.2d 103, 111 (1965) (dictum-motion for new trial); Lancaster v. Gardiner, 225 Md. 260, 170 A.2d 181 (1961) (motion for rehearing); Smith v. Barnhardt, 225 Md. 391, 170 A.2d 766 (1961) (motion for new trial).

9. MD. R. P. 811(a).

10. MD. R. P. 812(a). The day on which the judgment was entered is excluded from the computation of the 30 day period. Calvert v. Williams, 34 Md. 672 (1871). So is any period of time during which the decree has been suspended by the lower court. Herbert v. Rowles, 30 Md. 271 (1869). The time begins to run when the judgment is finally entered, not from the time an oral opinion may have been given from the bench. Kennedy v. Foley, 240 Md. 615, 214 A.2d 815 (1965).

power or discretion to allow an appeal which is not filed within the prescribed time.[11]

The strict, mandatory nature of the thirty day rule for filing an order for appeal appears justified. An order for appeal is a simple document to prepare and usually consists of no more than a single sentence. Even in the case of the indecisive, economically pressed client, it is difficult to conceive of circumstances that should excuse a failure to file an order for appeal on time, since an order for appeal can be filed without incurring any final commitment to pursue an expensive appeal. A minimum of seventy and a maximum of 130 days can elapse before the appellant is obliged to file his brief and the printed record extract in the Court of Appeals.[12] Actually, the most common mistake encountered under the rules is the filing of a premature appeal, *i.e.,* one taken before the entry of a final, appealable order or judgment.[13] The premature appeal, unlike the tardy appeal, usually is not an irretrievable error on the part of counsel, whatever embarrassment to the lawyer and extra expense to the client it may cause. However, the premature appeal can be fatal in a situation where a final order has been handed down subsequent to the entry of the initial, non-appealable order and no timely appeal is taken from this second, appealable order.[14]

C. Transmitting the Record. Rule 825(a) requires that the record of the proceedings below be transmitted by the clerk of the lower court to the Court of Appeals within thirty days after the order for appeal is filed. The trial court may shorten or extend the time for transmitting the record, if its order is made before the expiration of the period for transmitting the record as originally prescribed.[15] Occasionally, counsel have mistakenly operated under the notion that the mere filing of a petition or application for extension of time within the thirty day period is sufficient to protect the appeal from dismissal on the ground of untimeliness.[16] In fact, Rule 825(b) was amended in 1963 for the express purpose of making it clear that the lower court may only extend the time if the order to that effect is signed *before* the expiration of the original thirty day period. It is also important to remember that the lower court may *not* extend the time for transmitting the record to a day *more* than ninety days from the date the order of appeal is filed. Every term produces appeals that become casualties under this rule.

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11. *See* Riviere v. Quinlan, 210 Md. 76, 122 A.2d 332 (1956); *cf.* Steiner v. Harding, 88 Md. 343, 41 A. 799 (1898).

12. MD. R. P. 825(a) requires the record to be transmitted within 30 days of the filing of the order for appeal in the court below. MD. R. P. 825(a) & (b) permit this period to be extended by the trial court. However, it cannot run more than 90 days from the date of filing the original order for appeal. MD. R. P. 825(b). Therefore, since Rule 830 requires the appellant to file his brief and the printed record extract within 40 days after the filing of the record in the Court of Appeals, the time for filing the brief will fall 70 to 130 days after the order for appeal.

13. Letter from James H. Norris, Jr., *supra* note 4.

14. Hawkins v. General Motors Acceptance Corp., 250 Md. 146, 242 A.2d 120 (1968). *See* Merlands Club, Inc. v. Messall, 238 Md. 359, 208 A.2d 687 (1965), *noted in* 26 MD. L. REV. 94 (1966).

15. MD. R. P. 825(b).

16. Letter from James H. Norris, Jr., *supra* note 4.

The cases spell out what Rule 825(b) may not make precisely clear: it is counsel's obligation, and not that of the clerk of the lower court, to see to it that the record is transmitted in time. If the record is not transmitted within the time allowed, the appeal will be dismissed.[17] Rule 825(d) will excuse tardy transmission of the record if it appears to the Court of Appeals that the delay was occasioned "by the neglect, omission or inability of the clerk of the lower court, the court stenographer or appellee . . .," but the burden of showing such excusable neglect rests with the appellant.[18]

Therefore, it is imperative for appellant's counsel to order promptly, unequivocally and precisely, any transcript of testimony to be included in the record, so that any delay in receiving the transcript will not be attributable to his neglect. The author suggests that counsel should always confirm his order of the transcript by a letter to the reporter and send a copy of that letter to the clerk of the lower court. The record will then be clear that he was not tardy in ordering the transcript of testimony in the first instance. Furthermore, he should always inspect the record in the lower court prior to its transmission to the Court of Appeals[19] to insure that the record is both accurate and complete and that no exhibits or volumes of the transcript of testimony are omitted. The transmission of less than the full record does not comply with the rule. Where there are material omissions in the record, the appeal will not be entertained.[20]

Frequently, appeals are dismissed for the omission of relevant portions of the record, usually either the entire transcript or portions of the transcript of testimony taken in the trial court. There is really no excuse for such omissions. After all, if delays are encountered in the clerk's office, or on the part of the court reporter, the trial court can extend the time upon prompt application for such an order by appellant's counsel. However, a stipulation by appellee's counsel extending the time for transmitting the record will not serve to release appellant's counsel from his duty to transmit the record within the time prescribed.[21] Perhaps the fact that the Court of Appeals has dismissed an appeal where the record arrived there only one day late[22] will best impress counsel with the danger of procrastination.

II. PREPARING TO WRITE THE BRIEF

A. The Printed Record Extract. Once the record from the court below has been transmitted to the Court of Appeals, appellant's counsel has forty days from that date within which to file his brief and

17. Horsey v. Woodward, 124 Md. 361, 93 A. 9 (1914); *See* Steiner v. Harding, 88 Md. 343, 346–47, 41 A. 799, 800 (1898).

18. MD. R. P. 825(d). Proof of neglect is usually offered in the form of affidavits. *E.g.,* Miller v. Mencken, 124 Md. 673, 93 A. 219 (1915). A certificate from a friendly clerk that the delay was not the appellant's fault will not suffice. North Cent. Ry. v. Rutledge, 48 Md. 262 (1878).

19. Letter from James H. Norris, Jr., *supra* note 4.

20. *See* Hohensee v. Hohensee, 214 Md. 284, 134 A.2d 82 (1957); Goldston v. Karukas, 180 Md. 232, 23 A.2d 691 (1942).

21. Powell v. Curtis, 78 Md. 499, 28 A. 390 (1894).

22. Horseman v. Furbush, 124 Md. 581, 93 A. 149 (1915).

the printed extract or appendix containing "such parts of the record as may reasonably be necessary for the determination of the questions presented by the appeal . . . ."[23] As in every step of the appeal process, counsel should study those provisions of the rules which prescribe what must be included in the printed extract of the record.[24] He should also bear in mind the admonition of Rule 828(c) that, "wherever possible, the parties shall by stipulation agree on the parts of the record to be included in the printed extract." In this respect, the Maryland Rules follow the prevailing modern practice of curtailing the expense of printing the entire record below by placing upon the appellant the lesser burden of having printed, either as a separate volume or as an appendix to his brief, only such portions of the record as may reasonably be necessary for the court to decide the issues raised on appeal. However, the printed record extract, in the author's opinion, has not proved as economical as may have been originally contemplated. Appellant's counsel, out of an abundance of caution, more often than not designates for printing substantially more of the record than is necessary for intelligent judicial resolution of the issues. Counsel for the appellee usually responds in kind with an overly inclusive designation of portions of the record that he wishes included in the extract. It is true that the rules raise some deterrent to promiscuous and unnecessary designations of the portions of the record to be included in the printed extract or appendix. Rule 882(a), for example, permits the costs of printing unnecessary matter in the printed extract or appendix to be assessed against the party who requested it. This sanction, however, is a mild one and not invoked too frequently. As a consequence, lawyers commonly are unable to resist the temptation to print much more of the record than is necessary. This occurs primarily because both counsel for the appellant and counsel for the appellee do not write their briefs until *after* the portions of the printed record extract have been designated and, in some cases, after the extract has been sent to the printer. Until a brief has been finally put to bed, no careful attorney can be certain that he has included in the record every item to which he wishes to refer in his brief. I believe that there is a sensible, less expensive and satisfactory solution to this problem. I suggest that the rules of the Maryland Court of Appeals might be revised to follow a practice formerly observed in the United States Court of Appeals for the Ninth Circuit and, in certain cases, in the Eighth and Tenth Circuits, under which appeals are heard on the original record with only a very limited number of additional, informal copies, usually made by electrostatic process, being required.[25] In this era of electronic reproduction it usually would be less expensive to require the appellant to file three or four copies of the record than

23. MD. R. P. 828(b).
24. *See* MD. R. P. 828(b).
25. Ward, *The Federal Rules of Appellate Procedure*, 54 A.B.A.J. 661, 663 (1968). The Federal Rules of Appellate Procedure, which became effective July 1, 1968, while adopting the single appendix method similar to the practice in the Maryland Court of Appeals, nevertheless authorize each United States Circuit Court of Appeals to dispense with the appendix altogether and permit appeals to be heard on the original record.

to require a printed record extract or appendix. Another alternative would be to adopt the practice embodied in the Federal Rules of Appellate Procedure which permits the printed extract or appendix to be filed within twenty-one days *after* both briefs have been submitted, rather than at the time the appellant's brief is filed.[26] This procedure permits counsel to write his brief and identify the basic issues before he must commit himself as to the parts of the record to be extracted.[27]

B. Mastering the Record. The appellate advocate, whether or not he handled the case in the court below, must read the entire record with care. He should personally, or by some attorney acting under his supervision, index the entire record, including the exhibits. I recommend that the appellate advocate first prepare a consecutive index of the record. Next, a cross or topical index should be prepared. If this is done, counsel, when writing his statement of facts, will have quick access to all the record references pertaining to a particular point or topic without having to thumb through the consecutive index or the record itself.

There are several easy ways to prepare a topical or cross index. If the record is not lengthy, and the relevant topics represent fairly well defined areas of evidence fixed in the mind of counsel, the topical index can be put together simultaneously with the preparation of the consecutive index. Another alternative, probably the most preferable if time and stenographic assistance permit, is to prepare the consecutive index in duplicate and then note the topics in the margin of the carbon copy. Later, counsel can have his secretary collect all of the record references marked for particular topics and put together a topical index.[28]

A careful reading and thorough indexing of the record in the manner suggested is the only sure way the appellate advocate can fully learn the facts of his case as they exist for purposes of the appeal, even with respect to litigation in which he was chief trial counsel.[29] The attorney who has digested the record with care is in a better position to designate the portions of the record which he wishes printed in the extract or appendix without omitting important record references or including irrelevant and unnecessary ones. He can then more easily prepare a lucid, succinct, orderly but moving statement of facts. The crutch provided by a thorough cross-index of the record will prove most reassuring in the preparation and presentation of counsel's oral argument, especially in a case argued some four or five months after he has written the brief.

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26. FED. R. APP. P. 30(c).

27. Ward, *The Federal Rules of Appellate Procedure,* 54 A.B.A.J. 661, 664 (1968).

28. F. WIENER, EFFECTIVE APPELLATE ADVOCACY 103 (1950). This author, however, has usually prepared the two indexes, consecutive and topical, simultaneously, even in cases where the record was somewhat extensive.

29. Mastery of the record is the obligation both of appellant's counsel and appellee's counsel, and the suggestions made in this article regarding indexing of the record are applicable to both.

III. WRITING THE BRIEF

A. Its Importance. In the Maryland Court of Appeals, where the judges do read the briefs prior to argument,[30] the brief is the medium through which a judge first becomes acquainted with an advocate's side of the case. If, upon reading the brief, a judge is at least tentatively moved to see the case as counsel has drawn it, the odds are substantially better that his vote will be favorable.

The rules of the Court of Appeals lay down some requirements as to the form and content of briefs submitted by appellant and appellee.[31] Reference has already been made in this article to cases where an appeal was dismissed for failure to comply with the prescribed requirements of the rules of the Court of Appeals. To these examples may be added those decisions in which the Court of Appeals has refused to consider a question that was not raised in an appellant's brief.[32] Even constitutional rights have been held to have been waived through the failure to complain of their denial in an appellant's brief.[33]

B. Statement of the Case and Questions Presented. Before beginning to write the brief, an appellate advocate should have read, indexed and mastered the record and completed his basic legal research. Only at this point can he begin writing the brief with assurance that he has the case in hand. The best practice is to write the statement of facts first, certainly before beginning the section of the brief dealing with the argument. However, Rule 831(c)(2) requires a "Statement of the Case — Questions Presented" section to precede the statement of facts. In practice it is better not to compose even this introductory section of the brief until the statement of facts has been written.

As Rule 831(c)(2) states, the statement of the case should be "brief," and the questions presented should be "succinct." Insofar as the statement of the case is concerned, the court is interested primarily in learning the general nature of the appeal that has been brought to it, the jurisdictional and procedural forms which it took in the court below and the manner in which it arose on appeal. Rarely are there circumstances justifying a statement of the case more than a page or two in length. Many lawyers mistakenly attempt to use the statement of the case as a preliminary statement of the facts and summary of argument. That is not its purpose, and the advocate who misuses it for those ends not only abuses the rules but, more importantly, may suggest to the court a certain lack of confidence in a case that must be twice told.

My major bit of advice with respect to the questions presented is to abandon weak contentions. Failure to discard unconvincing is-

30. Letter from Judge Hall Hammond, *supra* note 1.

31. *See* MD. R. P. 831.

32. *E.g.*, Comptroller v. Aerial Products, Inc., 210 Md. 627, 124 A.2d 805 (1956); *cf.* MD. R. P. 846(f).

33. *E.g.*, Hyde v. State, 228 Md. 209, 179 A.2d 421 (1962); *cf.* Yakus v. United States, 321 U.S. 414, 444–45 (1944).

sues may jeopardize the substantial questions that have been raised. An appealing question can be smothered if surrounded by a residue of attenuated issues which the court is also asked to decide. An advocate must take the greatest pains to state the questions fairly, yet phrase them in a manner that constitutes an "appealing formulation of the questions presented on the appeal,"[34] appealing, that is, in the sense that the court will be impelled to answer the question in the way which the author of the question wants it answered.[35] This is not always an easy trick, but with practice it is not too difficult to compose a question presented which is pregnant with the answer the brief writer desires the court to give. An "appealing formulation" should, however, always state the questions presented fairly, not as a thinly disguised summary of argument. Counsel should save his advocate's zeal for argument and keep it out of the statement of the case, the questions presented and the statement of facts. The preferable form of stating the question is to use a sentence beginning with "whether." An alternative form, especially appropriate where a question beginning with the word "whether" necessarily would stretch out into a complex, prolix sentence, is to state briefly the salient facts of the issue and then add a short sentence beginning with "whether" which poses in short form the issue raised by the facts just recited.

C. Stating the Facts. It is in the statement of facts that the appellate advocate must tell the story of his case. He must do this not only as lucidly and succinctly as possible but also in a manner so compelling as to implant in the mind of the reader the lingering notion that the equities of the dispute are in his client's favor. There is no single form or technique which is always best to follow in stating the facts. Cases, like stories, vary. Some are best described in narrative style and in fairly close chronological order; others are more effectively stated by presenting the major relevant facts before the minor and less relevant details. The author prefers to follow a chronological order where possible without offending the demands of lucidity; judges and lawyers, perhaps more than most, appreciate such a presentation.

I cannot emphasize too strongly the critical necessity of stating the facts in the most comprehensible and moving style of which an attorney may be capable. The Maryland Court of Appeals, like appellate courts throughout the nation, desires to do justice and achieve equity in particular cases, if that is possible without repudiating the applicable precedents and stretching statutory law too far. It is in the statement of facts that the competing equities will be first presented to the court. The appellate advocate should not subvert the important role served by the statement of facts by "a tedious recitation of in-

34. F. WIENER, EFFECTIVE APPELLATE ADVOCACY 74 (1950).

35. Careful formulation of the questions presented is perhaps even more important in cases where the jurisdiction of a court, like the Supreme Court of the United States, is discretionary and an advocate is attempting to get the court to hear a case in the first instance. *Id.*

significant and peripheral facts."[36] He should at all costs avoid either arguing or editorializing in the statement of facts. To argue or to editorialize is to imply that counsel is concerned that the facts, as such, are too weak to support his argument. Above all he should never omit or gloss over facts which may be unfavorable to his case. The attorney who does so invites a slashing attack in his opponent's brief or oral argument or, worse yet, provokes a penetrating and embarrassing inquiry from a judge who perceives that the hole in the story represents a deliberate omission born of an inability to explain away a pertinent fact. The appellate advocate should, most certainly, shun any discussion of the personalities of the parties, witnesses or opposing counsel in his statement of facts. Some of these general warnings may, on occasion, be ignored in the preparation of briefs or memoranda in the trial courts, where the resort to personalities and restrained professional invective constitute temptations which are sometimes very difficult to resist in the heat of a courtroom battle. Never, however, should the appellate advocate permit himself the dangerous luxury of misusing the statement of facts as an opportunity to argue his case, insult the opposing side or characterize the quality of testimony.

The author has two more pedestrian suggestions regarding preparation of a statement of facts. First, subheadings should be used where possible, especially if the statement of facts is to run more than two pages in length. Subheadings help the court grasp the relevance of the particular topic which follows. Second, the statement of facts should be, pursuant to Maryland Rule 831(c)(3), sprinkled with liberal references to the record. The court can, then, more easily check counsel's story to ascertain that he is "telling it like it is" and not as he would have preferred it to be.

An advocate will find that, if he resists writing the rest of his brief until he has been satisfied that his statement of facts accurately portrays the case and furnishes the factual basis on which he can construct appealing arguments of law, not only will the final draft of the statement of facts be improved, but the persuasive quality of his entire brief will be strengthened.

D. Argument. Not surprisingly, the Maryland Rules do not call for any particular form of argument to be observed in the brief.[37] Variety in argument is infinite. There are, however, some essentials that are common to most, if not all, effective written arguments.

First, a lawyer should not start to write his argument until his legal research has been thoroughly completed. The Chief Judge of the Court of Appeals complains, for example, that "often a pertinent if not controlling decision is overlooked" in an appellate brief.[38] Such omissions are unpardonable and rarely should occur if an attorney has done his research properly. On the other hand, there is no need

36. Letter from Judge Hall Hammond, *supra* note 1.

37. MD. R. P. 831(c)(4) merely calls for "argument in support of the position of the appellant [or appellee]." *See generally* MD. R. P. 846.

38. Letter from Judge Hall Hammond, *supra* note 1.

to clutter the brief with excessive citations, especially when used to support relatively undisputed propositions of law.[39]

Next, before composing his argument, the appellate advocate should think about his case, carefully re-read the draft of his statement of facts, and review again the precise ruling or rulings below which he seeks to attack or sustain on appeal. In argument, counsel should resist the temptation to raise weak points; if such points have some minimum appeal, he may relegate them to the end of his argument or, perhaps, to a footnote. The strongest contentions should be set forth first, where they are most likely to capture the early and complete attention of the judges. Furthermore, among strong arguments there are some that are more judicially appealing than others. For example, in the appeal of a zoning decision, compelling substantive arguments regarding the illegality of a decision upholding the action of a zoning board usually will not survive application of the "fairly debatable" standard for review.[40] In contrast, an equally appealing argument directed at the failure of an administrative body to observe procedural prerequisites usually will have more than an even chance of persuading judges, dedicated, as most lawyers are, to the traditional notions of procedural fairness.[41]

Appellate counsel should not conjecture, opine, wonder or summarize in argument; rather, he should argue! He is not writing a law review article; he is arguing a cause. He should state his cause with all the conviction that the relevant facts and the applicable law permit. Moreover, in argument, unlike the statement of facts, the facts may be argued, commented upon and editorialized, subject only to the restrictions imposed by the record and by professional good taste. The appellate advocate, therefore, should argue the facts; he should use them to illustrate the materiality and soundness of the legal propositions he asserts.

Argumentative headings can summarize in a sentence the basic point a lawyer hopes to make in the pages which immediately follow. For instance, it will advance a case more to introduce an argument by a heading which reads "The Board of Appeals Exercises Quasi-Judicial Functions and Consequently Improperly Denied Appellant's Timely Request For Cross-Examination of Adverse Witnesses" than to introduce the same section of argument by a heading which says merely, "The Board Improperly Denied Cross-Examination." In the former heading, the nature of the Board, the question of timeliness and the type of witness are identified and, thus, the magnitude of the error in denying cross-examination is brought to the attention of the court even before it begins to read argument on the point. If a lawyer can establish the several premises of his argument in the heading, he is in a much better position to carry the proposition.

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39. "The applicable law should be presented without too much quoting and the really pertinent authorities duly emphasized." Letter from Judge Hall Hammond, *supra* note 1.

40. *See, e.g.*, Mayor & City Council v. Borinsky, 239 Md. 611, 212 A.2d 508 (1965).

41. *See, e.g.*, Town of Somerset v. Montgomery County Board of Appeals, 245 Md. 52, 225 A.2d 294 (1966).

A short summary of the argument can facilitate the court's comprehension of the brief. Some courts, including the Supreme Court of the United States,[42] expressly require a summary of argument. The Maryland Court of Appeals does not. Still, there is nothing in the rules prohibiting it. In a brief of any extended length the author recommends that counsel provide a brief summary of the arguments which he intends to present and the principal authorities upon which he will rely. There is one note of caution, however. The summary of argument should always be written last, after counsel has finished composing the actual argument. In that way, the summary will accurately reflect the argument which follows and will not "go off on a tack — or a frolic — of its own."[43]

There is a special piece of advice for counsel for an appellee. He should not fall into the trap of letting his adversary stake out the area of conflict and, in effect, shape the appellee's brief. Counsel for the appellee should not merely present a point by point refutation of the appellant's brief. Rather, he should write his own argument in his own way, emphasizing the positive features of his case; he should not merely respond to the infirmities inherent in the other side's position. Perhaps the best way for appellee's counsel to preserve his independence in composing his brief is to write, or at least outline, his brief before he has received the appellant's brief.

Finally, there is the question of whether appellant's counsel should file a reply brief, as permitted by Rule 831(e). The best answer is that a "reply brief is helpful only to answer an issue newly raised by appellee or a motion to dismiss."[44] A reply brief, like a motion for reconsideration, is not particularly favored by the courts. While it may assuage a client who insists his attorney always have the last word, its utility as an effective instrument of appellate advocacy is quite restricted.

IV. ORAL ARGUMENT

A. Importance of Oral Argument. Undoubtedly, there are many appeals that simply cannot prevail, whatever the skill of the advocates who present them. Similarly, there are rulings won in the lower courts which even the most inexperienced and unprepared of lawyers could not possibly fritter away on appeal. However, in the majority of cases which come before the Maryland Court of Appeals oral argument may often tip the scale. The court "places great reliance on oral argument — and not infrequently changes its impression or conclusion reached from reading the briefs."[45] Therefore, except in the rare case where he possesses that confidence which can only arise in a case which simply cannot be lost on appeal, counsel should not submit; he should argue orally.[46]

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42. S. CT. R. P. 40(1)(f).
43. F. WIENER, EFFECTIVE APPELLATE ADVOCACY 134 (1950).
44. Letter from Judge Hall Hammond, *supra* note 1.
45. *Id.*
46. The Court of Appeals recently amended its rules to limit oral argument, in the absence of special permission, to a half hour a side. MD. R. P. 846(a). Accordingly,

B. Some Techniques of Oral Argument. As with brief writing, there is no one effective style to follow in oral argument. Even more than in brief writing, a lawyer's manner of oral argument usually reflects his personality. Dean Acheson's argument before the Supreme Court was urbane and sophisticated; that of Thurmond Arnold was equally articulate but more bombastic. Charles Fahy, as Solicitor General of the United States, argued many successful cases before the Supreme Court, yet rarely raised his voice much above an audible whisper. Each employed a totally different, yet equally effective, style. An advocate must choose the style which best suits his particular personality and talent.

There are, however, some rules common to most oral arguments. An advocate should never read the brief as his oral argument. The attorney who does so insults the court, disserves his client and downgrades his profession. For the same reason, the advocate should never write out his argument. The temptation is then to read it. On the other hand, he should prepare and use notes. Notes enable him to follow his proposed order of argument and to return to it more smoothly following interruptions caused by questions emanating from the bench. A lawyer should not, however, be a slave to his outline in oral argument. If a question is put, he should answer it promptly, without worrying about the fact that the court is forcing him to deal with matters which he had intended to take up later in his argument. Questions from the bench indicate the judges' interest in a particular point. A lawyer should not evade or postpone the opportunity to satisfy that curiosity by answering, for example: "I intend to deal with that a little later on in my argument, your Honor."

The appellate advocate must develop the ability to make a succinct but effective opening to his oral argument. He who captures the court's attention early in his argument will usually hold it throughout the remainder of his statement. Counsel for the appellant should be able to convey the essence of his case during the first few minutes of his oral argument. On the other side, appellee's counsel should use his opening to recast the essential point of the case and dispel the contrary picture painted by his adversary. Both counsel should avoid rehashing their briefs and should "go for the jugular."[47] Oral argument "should be an exercise in persuasion — not an oral treatise."[48]

Finally, an attorney must be flexible in oral argument. For example, if during the course of his opponent's argument it has become apparent that the opponent has failed to convince the court, counsel for the appellee should resist the temptation to drive home points already grasped by the court, lest in doing so he betray a weakness which had not been perceived by the court in its rejection of opposing counsel's argument. Similarly, an appellate advocate should be flexible enough to change emphasis and shift oratorical gears when, for in-

counsel need not feel apologetic about trespassing on the court's time in arguing even the case which he is certain cannot be upset on appeal.

47. Letter from Judge Hall Hammond, *supra* note 1.

48. *Id.*

stance, it becomes apparent that the court is not greatly moved by what he thought was his major point, but is taken with a proposition that counsel had originally relegated to a secondary role. In extreme cases, a lawyer should have the courage to lay aside, or even abandon, all but one point if it becomes manifest that only that point is sinking in and that to waste time on the others would only sacrifice the sole ground on which the case might be saved.

V. CONCLUSION

The principal rules for handling an appeal in the Maryland Court of Appeals are these: (1) know the case; (2) read the rules carefully and follow them to the letter; (3) master the record before writing a word of the brief; (4) write the statement of facts first, accurately, fairly and favorably; (5) discard weak questions and unpersuasive arguments in the brief and polish strong arguments to a cutting edge; and (6) do not allow oral argument to be a mere restatement of the brief, but rather go for the jugular, hammering hard the persuasive points. Like other specialties of the law, the art of appellate advocacy must be learned empirically, through experience. The suggestions offered above may, however, provide a framework around which the individual talents of potential appellate advocates can develop.

The effective appellate advocate is not, as Socrates is reported to have said of the Sophists, the one who "makes the lesser cause appear the better"; nor is he, as Judah Benjamin, former Confederate statesman and later leader of the British appeal bar, was once characterized, "the best defender of forlorn hopes."[49] Rather, he is the advocate who successfully develops an ability to present a cause, be it persuasive or dubious and whether won or lost below, in its clearest, most forceful and most compelling light. If appellate counsel can develop that ability, they will be of greater assistance to the Maryland Court of Appeals, not only in deciding appeals correctly but also in distilling the arguments of learned counsel into opinions that will better illuminate the paths of the law marked out by judicial precedent. Thus, in the end, elevation of the quality of appellate advocacy in Maryland will not only redound to the distinction of its bar and its highest court, but, even more importantly, will contribute to the quality and growth of the jurisprudence of this state.

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49. MEADE, JUDAH P. BENJAMIN — CONFEDERATE STATESMAN 363 (1944).