



**EFFECTIVE APPELLATE ADVOCACY IN THE
COMMONWEALTH COURT OF PENNSYLVANIA**

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ABOUT THE COMMONWEALTH COURT

The Commonwealth Court is one of Pennsylvania's two statewide intermediate appellate courts. This court, which was established in 1968, is unlike any other state court in the nation. Its jurisdiction generally is limited to legal matters involving state and local government and regulatory agencies. Litigation typically focuses on such subjects as banking, insurance, and utility regulation and laws affecting taxation, land use, elections, labor practices, and workers' and unemployment compensation. Commonwealth Court also acts as a court of original jurisdiction, or a trial court, when lawsuits are filed by or against the Commonwealth.

The Commonwealth Court is made up of nine judges who serve ten-year terms. The president judge is chosen by his or her colleagues for a five-year term. The court generally decides cases in three-judge panels and sits in Philadelphia, Harrisburg, and Pittsburgh.

RULE PRIMER

"You have to learn the rules of the game. And then you have to play better than anyone else." ~ Albert Einstein

Judges might not keep scorecards (well, some may), but they know the rules applicable to the proceedings before them. Like a deer on the side of the road, rule violations attract a judge's attention and can become a distraction. Of course, not all rule infractions are created equal. While a judge may forgive a tinge of argument in the "statement of the case" (prohibited by Pa. R.A.P. 2117(b)), the failure of a party appellant to preserve a particular issue in its statement of errors complained of on appeal will preclude the party from arguing that issue before the Commonwealth Court (Pa. R.A.P. 1925(b)(4)(vii)).

Needless to say, an effective appellate advocate is familiar with the applicable rules of procedure and avoids the pitfalls of a rule violation.

Generally

Familiarize yourself with the Pennsylvania Rules of Appellate Procedure and the Internal Operating Procedures of the Commonwealth Court, which can be found in Title 42 of Purdon's Pennsylvania Consolidated Statutes Annotated and the Pennsylvania Code (210 Pa. Code. Ch. 67). A Pennsylvania appellate practitioner would also be well-served by having at his or her disposal a copy of G. Darlington, K. McKeon, D. Schuckers & K. Brown, PENNSYLVANIA APPELLATE PRACTICE (West 2011).

Certified Record

An appellate court is not a fact-finding body; only items filed with the trial court or the agency can be considered by the Commonwealth Court on appeal. In other words, if it is not in the record created before the tribunal below do not cite to or refer to it in your brief on appeal.

Counsel is responsible for reviewing for accuracy and completeness the certified record when transmitted to the appellate court. Corrections and disputes as to the contents of the certified record should be resolved in accordance with Pa. R.A.P. 1926, on appeal from a lower court, and in accordance with Pa. R.A.P. 1951(b), on petition for review of an order of a government unit other than the courts.

Petition for Review

To appeal most final decisions (“adjudications”) of state agencies, a bare bones notice of appeal will not do. Instead, the appellant, referred to as a petitioner, must file a Petition for Review with the Commonwealth Court. The requirements for the Petition for Review are found in Chapter 15 of the Rules of Appellate Procedure.

In general, a petition for review requires more specific allegations of error than required by a standard notice of appeal. Beware of using boilerplate language—*i.e.*, “the Commonwealth Court should reverse the agency because the agency’s factual findings are not supported by substantial evidence.” Such general language is insufficient to preserve an issue for appellate review.

A petition for review’s caption should name as respondent only the government unit, unless the agency is “disinterested” and will not defend its decision. Pa. R.A.P. 1513(b). Where the agency is disinterested, the real party in interest should be named as the respondent in the caption. Persons who participated in the administrative proceedings must be given notice of the filing, as they may intervene as a matter of right. Pa. R.A.P. 1531(a).

Protective Cross Appeals

Once a party aggrieved by the final lower court or agency order appeals, any other party is authorized to file a cross-appeal, whether by a timely-filed notice of cross-appeal (Pa. R.A.P. 903(b)) in appeals from a lower court or a timely-filed cross-petition for review (Pa. R.A.P. 1512(a)(2)) in appeals from an agency.

Though a party appellee may have prevailed below, the party may have lost a battle or two along the journey to the favorable result. Historically, there had been confusion as to whether, in that circumstance, the appellee must file a protective

cross-appeal in order to seek appellate review of those unfavorable rulings. The Note to Pa. R.A.P. 511 provides that an appellee should not be required to file a cross-appeal, as long as the final judgment granted appellee the relief it sought. The Pennsylvania Supreme Court's decision in *Basile v. H&R Block, Inc.*, 601 Pa. 392, 973 A.2d 417 (2009), went a long way in resolving any lingering confusion. Referring to the Note to Pa. R.A.P. 511, the Supreme Court held that "a party adversely affected by earlier rulings in a case is *not required* to file a protective cross-appeal if that same party ultimately wins a judgment in its favor; the winner is not an 'aggrieved party.'" *Id.* at 398, 973 A.2d at 491 (emphasis in original).

Though not required to file a protective cross-appeal, the appellee may still include in its brief on appeal argument with respect to errors by the trial court or agency which, if accepted by the appellate court, may negate any success that the appellant has with the appellate court on the issues in its appeal. Also, appellees should keep in mind that the Commonwealth Court, like other appellate courts, may affirm on any ground apparent in the record. See *Victoria Gardens Condominium Ass'n v. Kennett Twp. of Chester Cnty.*, 23 A.3d 1098 (Pa. Cmwlth. 2009).

Timeliness

In general, whether petitioning for review of a determination of a government agency or appealing a final order of a trial court, you must lodge your appeal within thirty (30) days after the entry date of the order from which the appeal is taken, although there are some exceptions. See Pa. R.A.P. 903 (appeals from lower courts), 1512 (appeals from governmental determinations). Cross-petitions and cross-appeals must be filed within 14 days of the filing of the petition for review or notice of appeal. Note that a court can not enlarge the time for filing a petition for review or notice of appeal. Pa. R.A.P. 105(b).

With respect to the petition for review, the exception to the general rule is certain classes of statutory appeals from governmental determinations. For example, an appeal from a final determination by an agency under the Procurement Code must be filed within fifteen (15) days of the date of mailing of the order. 62 Pa. C.S. § 1711.1(g). Accordingly, an appellate practitioner should not assume that his or her appeal from a governmental determination falls within the general rule. In addition to consulting the Rules of Appellate Procedure, the practitioner should also review the governing statute and associated regulations.

An appeal is filed upon receipt by the appellate court. If, however, you choose to file your petition for review of a governmental determination by mail, the date of mailing will be considered the filing date *if* the date appears on United States Postal Service (USPS) Form 3817. Pa. R.A.P. 1514(a). There is no exception to

the “filing upon receipt” rule for delivery services other than USPS (*i.e.*, UPS, Federal Express, etc.).

Waiver

Be aware of the numerous procedural steps in the appeal process where waiver can occur, such as:

- *Statement of Errors Complained of on Appeal*—see Pa. R.A.P. 1925(b)(4).
- *Statement of Questions Presented in Brief*—see Pa. R.A.P. 2116(a) (“No question will be considered unless it is stated in the statement of questions involved or is fairly suggested thereby.”).
- *Argument in Brief*—see Pa. R.A.P. 2119; *Purple Orchid, Inc. v. Pa. State Police*, 572 Pa. 171, 176–77, 813 A.2d 801, 804 (2002) (holding issue waived by failure to address and develop in appellate brief).

APPELLATE ADVOCACY GENERALLY

“Words - so innocent and powerless as they are, as standing in a dictionary, how potent for good and evil they become in the hands of one who knows how to combine them.” ~ Nathaniel Hawthorne

Appellate advocacy includes two important components—written advocacy and oral advocacy. In the Commonwealth Court, oral argument is not a matter of right. Pursuant to the Court’s internal operating procedures (IOP §§ 232, 241, 242), the Court decides which cases shall be submitted for oral argument before a three-judge panel of the Court or the Court en banc (seven of the Court’s nine commissioned judges). Other cases are submitted on briefs (*i.e.*, without oral argument). Parties may also request that their appeal be submitted to the Court for disposition on the briefs.

Of the 1,295 majority opinions issued by the Court in 2011, only 277 (or approximately 21%) of those opinions followed oral argument (either panel or en banc).

Accordingly, effective client representation in both the Commonwealth Court’s original jurisdiction must begin, and in most cases ends, with effective written advocacy. Effective oral advocacy comes into play in those instances where the party is given the added opportunity to persuade the Court through oral argument.

BRIEF WRITING

*“I keep six honest serving men
They taught me all I knew;
Their names are What and Why and When
and How and Where and Who.”*
~ Rudyard Kipling

Appellate judges see many cases throughout the arc of their career. It should, therefore, come as no surprise to hear that the lawyers know the particulars of their case far better than the appellate judges before whom they appear. Thus, when proceeding to the appeal, the attorney who handled the matter at the trial or hearing level should step back and evaluate what, in many respects, is quite a different case on appeal.

An appeal is different for many reasons, most of which seem obvious—*i.e.*, new court, new rules, new judges. A successful lawyer is cognizant of these obvious and some not-so-obvious distinctions between trial and appellate practice. As a result, this lawyer, who has lived and breathed a case in the trenches of the original tribunal, can seamlessly transition to appellate mode.

The first meaningful opportunity to show an adept transition is the appellate brief:

- A successful appellate advocate will write to the intended audience—in this case, an *appellate* court judge.
- A successful appellate advocate will also confine himself or herself to the record of the trial court or agency proceedings below.
- A successful appellate advocate will also be adept at selecting which issues, from perhaps a much larger list of issues, are appropriately raised in the appellate setting. What seemed like a great issue or argument below may, as a result of the record on appeal and the trial court or agency opinion, have lost its luster. Arguing a large number of marginal issues dilutes the effectiveness of the strongest ones.
- While a creative word choice might be eye-catching, no lawyer has won an appellate argument because the lawyer used “omphalos” in lieu of “central point.”

For the Appellant

Review the certified record. This is what the appellate court must rely upon, and you may be shocked at how different it is from your memory of what happened. Make note of record references (a) supporting key facts on appeal and (b) showing

preservation of an issue for appeal. You will need both when preparing your brief. *See* Pa. R.A.P. 2117(a), (c); 2119(e).¹

Also, be certain that the certified record is complete and, if not, take the necessary steps to supplement it. By way of example, if you raised and preserved an issue only in a brief or memorandum of law before an administrative agency, be certain that the document is in the certified record. Though such filings will ordinarily be part of a record certified by a lower court, *see* Pa. R.A.P. 1921, it is not uncommon for an agency to exclude such documents from its certified record, *see* Pa. R.A.P. 1951.

Do not try to augment the record below by attaching materials to your brief. Be assured, it will not work.

Research. Do not presume that the law has remained static. In the process of preparing your appellate brief, update your research.

Do not ignore unfavorable precedent (the court will find it) or jurisdictional questions (the court will (likely) raise it).²

This is not the opportunity to argue the case anew. Be mindful that the appellate court is reviewing an existing decision for error. Use your brief to point out the errors below, not to pretend like the adverse decision never happened.

Statement of the Case. “The statement of the case shall not contain argument.” Pa. R.A.P. 2117(b). This portion of your brief *must* be balanced. There should be only one statement of the case (from appellant). *See* Pa. R.A.P. 2112 (omitting statement of case as requirement in appellee brief). As you prepare the statement, think about how you might react if you were the appellee’s counsel.

Do not confuse evidence with a finding of fact. Be candid in your statement of the facts as found by the lower court or agency. If you dispute a factual finding, note the evidence.

Standard and Scope of Review. This is not a write it and forget about it requirement. *See* Pa. R.A.P. 2111(a)(3). The standard and scope of review of review will dictate how the appellate court does its job. They, therefore, should guide you in how to prepare and organize your brief. Be mindful that different standards of review may apply depending on the nature of the issues on appeal.

¹ Failure to include record reference as required by Rules 2117(c) and 2119(e) happens all too frequently. Appellate practitioners are urged to abide by these rules. Otherwise, they run the risk that the Court might find that an issue has not been preserved for appellate review.

² Section 704 of the Judicial Code provides that the failure of an appellee to object to an appellate court’s jurisdiction *may* operate to perfect the appellate court’s jurisdiction.

Organization. Place your strongest issues up front. Write clearly and concisely. Address each issue separately (as a single question) and use headings to organize your arguments under each issue. There is nothing worse than a rambling document because it is difficult to follow, often repetitious, and internally inconsistent.

Statutes and Regulations. If your appeal involves a statute or regulation, include the text, even if only in a footnote. Judges read briefs everywhere—not just in the office where they have access to research materials.

Unreported Opinions. Familiarize yourself with Section 414 of the Commonwealth Court’s Internal Operating Procedures. Effective January 1, 2011, lawyers may now cite the Commonwealth Court’s unreported panel decisions (issued after January 15, 2008) for their persuasive value. If you choose to avail yourself of the rule, a good practice is to append a copy of the unreported panel decision to your brief.

Persuade. A trial court or administrative agency is focused on the matter before it. Appellate courts are both focused on the appeal before them and the next one. An effective appellate advocate knows this and takes it into account when preparing the brief on appeal.

Be certain that you convey to the Court what you want. And, be certain that the Court is able to grant you your wish.

Again, verify the strength (and validity) of the authority on which you rely. Be certain that your version of the events is supported by the certified record.

You will not necessarily lose an appeal because of bad grammar, misspellings, or missing punctuation. But good proofreading (by a third-party if available) will not only flush out these annoying defects, it can also lead to a better overall work product.

For the Appellee

Unless otherwise set forth below, follow the rules above.

Look for Defects. Scrutinize the record and the appellant’s brief. Check to see whether the court has jurisdiction; whether there is a final or otherwise appealable order; whether the appeal become moot; whether the appellant has standing; whether the appellant properly preserved the issues (waiver); whether the appellant complied with all the rules.

Counter-Statements. If dissatisfied with the appellant’s statement of the case or statement of the questions involved, you may include counter-statements in the appellee’s brief. Pa. R.A.P. 2112.

Alternative Grounds. If the agency or lower court had the correct result for the wrong reason, let the Court know in your brief.

Organization. The appellee is not required to address the issues in the order set forth in the appellant's brief, but it is helpful for the Court. Do not, however, defer to concerns over the Court's preference where you believe it is best for your client to reframe the issues on appeal, particularly where doing so provides the better path for your client to affirmance.

Persuade. If the case is ordinary, it is an easy affirm. Do not complicate it. If, however, the issues are ones of first impression or involve a complicated set of facts, acknowledge the challenge and embrace it.

ORAL ARGUMENT

"Talking is like playing on the harp; there is as much in laying the hands on the strings to stop their vibration as in twanging them to bring out their music."

~ Oliver Wendell Holmes

Except in extraordinary cases, an argued appeal in Commonwealth Court will be allotted either fifteen (15) minutes, for a three-judge panel, or thirty (30) minutes, if argued en banc. That time will be split evenly between each side (not each party).

Though this may seem generous, experienced appellate advocates know how quickly 7½ minutes or 15 minutes can pass in oral argument. This is particularly true in a "hot" court, such as the Commonwealth Court. So prepare well.

If you are the appellant and want to reserve some rebuttal time, you must ask for it at the outset of your argument.

If you discovered (probably because the appellee pointed it out) an error in your brief, acknowledge it, address it, and move on. Do not ignore it.

The judges have prepared for argument. They have read everything. Do not waste your time reciting the facts, unless you are challenging on appeal a factual finding for lack of substantial evidence, or laying out the procedural history.

Do not try to argue every issue on appeal. You have already done that in your brief. Identify the key issues in the case (favorable and unfavorable) and focus on those. Be strategic. Time will fly by.

If you are sharing your time with another lawyer (either co-counsel or counsel for another party on your side), inform the court up front and then be courteous. Do not eat up the time you reserved for your colleague.

Be nimble. Expect that the judges will interrupt your planned argument with questions. Anticipate them as much as possible and always address them directly. Then, find a way to lead the Court back to the points you want to emphasize.

At the same time, pay close attention to the questions from the judges. They may provide insight as to the concerns of particular judges or the Court as a whole. What time you have left may be better spent on those concerns, rather than your prepared speech. Do not lose sight of the fact that you have already briefed all of your arguments.

Additional tips—

- Try not to read your argument. As the lawyer, you should know the case better than the Court. Be confident.
- Be yourself (unless, of course, that might be detrimental to your client).
- Avoid distracting habits (*i.e.*, fiddling with hands, keys, pens, etc.) as much as possible.
- Do not interrupt the judges, even if they are interrupting you. If a judge interrupts you, it is likely because the judge realizes how little time is left, but has an important question for you.
- Be credible. Do not press weak or losing positions. But that does not mean you must concede where the judge's questions challenge your position on appeal. Oral argument is an opportunity for judges to press the outer limits of your arguments.
- Update your research again before oral argument.
- Do not disparage opposing counsel or the trial court or agency whose decision is on review.
- Remove distractions. The email or text message can wait until you are done.
- If you cannot answer a judge's question, say so and offer to provide a written response with leave of court. Again, be credible.
- Make eye contact with all of the judges (*see* note above about not reading your argument).
- There is no requirement that you use all of your time.