Appellate Practice

SHUTTERSTOCK

For Disability Appeals, The Devil Is In the Details

BY ROBERT J. ROCK

There can be many reasons why a work-related medical disability claim is denied by the New York State Workers' Compensation Board, but there are a few common reasons why denial is provided. These include a finding that the injury was not caused by the type of work involved, it did not take place during normal working hours, or it did not rise to the standard set for disability.

People who work in physically demanding jobs (i.e., construction workers, delivery drivers, mechanics, electricians, carpenters, landscapers, etc.) are particularly prone to injuries, some of which can be debilitating. Back injuries, shoulder strains and joint damage are commonplace. Yet, it can be very difficult for an employee to prove that their injury is work related because a direct causal link needs to be established.

For instance, an auto parts store employee is stacking tires in the back when his back gives out. The employee has been working at the store for 10 years without so much as a twinge before the injury takes place. The doctor finds a bulging disc in the employee's back during a CT scan, which sidelines the employee for several weeks. The employee applies for medical disability, but his claim is denied because he is unable to prove the bulging disc was directly related to his work. His employer's insurance company claims he may have had a pre-existing condition that made him susceptible to such an injury.

The pre-existing condition defense is a common argument in medical disability claims. Unless the injury was due to an on-the-job accident, it is nearly impossible to achieve a consensus relating to the injury's origin. The employee's doctor may believe the injury was sustained through repetitious motion throughout the workday over many years, but an independent medical expert can point to lifestyle choices (i.e., lack of additional physical activity, overeating, etc.) as a factor.

There is also the question of whether the injury is, in fact, debilitating. Employees will argue that the daily pain they endure as a result of their injuries prevents them from performing their tasks as they had successfully done in the past. However, a medical expert may counter that argument by stating the injury itself is not a disability. For example, someone who develops tennis elbow from repetitious motion over years of working at a beer distribution center might claim it prevents them from doing their job. However, since tennis elbow is treatable through medication and physical therapy, a doctor or an examiner could conclude that, though limiting, it does not rise to the level of disability.

> Ultimately, **painting the clearest medical picture possible** and creating a narrative that establishes the **job as the cause of the injury** will go a long way towards granting worker's compensation on appeal.

Then, there is the timing issue. Employees who are injured while arriving or leaving their work sites have attempted to claim workers' compensation, only to be rejected by the state Workers' Compensation Board and/or the courts. Likewise, for workers who have been injured during lunch breaks and have filed claims, the vast majority of those are rejected. In these instances, the prevailing argument is that the injury did not take place on site during the employee's stated working hours. Therefore, it is not a work-related injury.

So, how can attorneys help their clients overcome these arguments and win their disability appeals? It comes down to gathering the right documentation from the client to counter what the employer and/or insurer are stating, and establishing the narrative of the job causing the injury.

In order to prove an injury is debilitating, there has to be indisputable medical evidence that the employee's condition is so severe that they are unable perform the basic tasks of their job. X-rays, CT scans and MRIs can provide conclusive proof of the injury's existence and its severity, as well as its progress over a period of weeks, months or years. Tying the injury to the employee's job makes it a worker's compensation case.

Even when there is indisputable medical proof of a medical condition, an employer can take issue with the narrative. In the *Matter of Robert Manocchio v. ABB Combustion Engineering*, 150 A.D.3d 1343 (2017), Manocchio had been diagnosed in May 1999 with pleural plaque consistent with exposure to asbestos after it turned up in a chest X-ray. Manocchio had been a boilermaker at various companies for more than 30 years—a fact his company used to suggest that his previous work could have also contributed to his condition, and those companies should share in paying worker's compensation. However, Manocchio had received a previous chest X-ray in 1992 that did not show the presence of pleural plaque, and there was no evidence that he experienced symptoms until he was diagnosed in 1999. Both the Workers' Compensation Board and the state Supreme Court's Appellate Division ruled that ABB Combustion Engineering was solely responsible for paying Manocchio worker's compensation.

That Manocchio won his initial appeal and subsequent appeals by ABB Combustion Engineering shows the power that conclusive medical evidence has in these matters. However, it doesn't always ensure a claimant gets the benefits he or she is seeking.

In the matter of *James Curcio v. Sherwood 370 Management*, 147 A.D.3d 1186 (2017), a building engineer sustained work-related injuries to his back and neck, and the Workers' Compensation Judge ruled that the injuries were severe enough to constitute a permanent total disability classification. However, the full Workers' Compensation Board ruled, on administrative appeal, that Curcio only had a permanent partial disability and a loss of wage-earning capacity of 90 percent.

Curcio filed an appeal in State Supreme Court in 2017. At trial, Curcio's doctor said Curcio was permanently, totally disabled, but the claimant was also able to take care of himself and drive himself to medical appointments. An independent medical examiner additionally testified that Curcio could work at a desk job with his injury, as long as he changed sitting positions frequently. Therefore, the court upheld the Board's adjusted ruling.

Here, we see an example of how clear medical evidence doesn't always work in the claimant's favor. » Page 11

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The Supreme Court's Continuing War Over Legislative History

BY REX S. HEINKE, JESSICA M. WEISEL AND DOUGLASS B. MAYNARD

When the U.S. Supreme Court issued its opinion in *Digital Realty Trust v. Somers*, – U.S. –, 200 L. Ed. 2d 15 (2018), the main focus was on the court's unanimous conclusion that whistleblower protections under the Dodd-Frank Act extend only to employees who report violations to the Securities and Exchange Commission.

Buried in the two concurring opinions, however, was an entirely separate and important debate about the use of legislative history to interpret statutes. While not the first attack on the use of legislative history by conservative justices, the concurrences in *Digital Realty Trust* suggest a growing divide between the Justices that will lead to further battle over how the court will interpret statutes in the future.

In *Digital Realty Trust*, the majority relied largely on the plain language of Dodd-Frank's whistleblower provisions, but then cited a Senate Report as evidence of the statute's purpose and design. 200 L. Ed 2d at 28-29. A concurrence authored by Justice Clarence Thomas and joined by Justices Samuel Alito and Neil Gorsuch, however, dismissed the use of the report to discern "the supposed 'purpose' of" Dodd-Frank. Id. at 35. Justice Thomas's concurrence prompted a rebuttal concurrence from Justice Sonia Sotomayor, joined by Justice Stephen Breyer.

Justice Thomas's concurrence is intriguing for several reasons. First, it signals his willingness to take up Justice Antonin Scalia's mantle as the court's primary critic of the use of legislative history materials. For many years, Justice Scalia led this charge, sometimes alone and sometimes joined by Justices Thomas and Alito. See, e.g., *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, L.P.A.*, 559 U.S. 573, 608-10 (2010) (concurrence by Justice » Page 11

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Don't Wait for the Appeal to Bring in Appellate Counsel

BY ANDREW SILVERMAN AND MATT SHAHABIAN

Clients' views of specialized appellate counsel have evolved rapidly over the last several decades. Not long ago, clients stuck with their trial counsel on appeal, win or lose below. But now clients—and the trial lawyers representing them—recognize that using "appellate specialists" for appeals is the best practice.

Particularly in must-win cases, savvy clients appreciate the importance of bringing in separate counsel for the appeal, especially after a loss but even after a win. Top-notch brief writing, a focus on big-picture legal issues and legal trends, a legal strategy revamped as a result of a fresh look at the case, and a deep understanding of how appellate judges think and what arguments are most likely to move them are just some of the many benefits that sophisticated general counsel have come to expect from appellate counsel on appeal.

To be sure, appellate counsel often work miracles, resuscitating on appeal cases that have long been dead and buried. But why wait for the appeal? It is far easier to preserve a win on appeal, than to overturn a loss. And sometimes not even the best appellate counsel can save a case that has already gone horribly awry. Yet comparatively few clients have made it a practice to bring in appellate counsel long before the case ever heads to appeal. For a host of reasons, embedding appellate counsel early on trial teams, especially in the run-up to and during trial, can improve your chances of winning not just on appeal but in the trial court and at the negotiating table. Just some of the benefits of appellate attorneys on trial teams are discussed below.

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Writing briefs. This comes as no surprise. Appellate specialists are brief writers by trade; it's what we do. Including expert brief writers in trial teams will enhance the quality of the briefing, whether on dispositive motions, motions in limine, or mid- or post-trial motions. In addition, with appellate lawyers handling the briefing, the trial team can focus on fact-gathering, fact-development, and trial prep. Appellate specialists are also highly attuned to preservation issues. Having appellate counsel run the briefing will ensure those arguments are clearly made and preserved on the record. And, as an added bonus, involving appellate folks in the briefing early in the case enhances efficiency by getting the appellate team up to speed and integrated with the trial team in advance of an appeal.

Keeping track of the big picture. Trials are hectic. In the run-up to trial, adding appellate counsel brings in not only another set of hands, but another set of eyes and ears that can focus on the big picture, rather than the day-by-day minutia. In the courtroom, appellate counsel can focus on important discrete issues, such as pivotal legal and evidentiary questions, whether the elements of proof have been satisfied, and preservation. Out of the courtroom, while trial counsel is frantically prepping for tomorrow, the appellate team can work on pocket briefs, mid-trial motions, and post-trial briefing. The appellate team can also keep a running list of each side's potential appellate issues, both in preparation for appeal and to gauge potential appellate risk when it comes to settlement discussions.

Crafting jury instructions. There might be no more challenging element to trial preparation than jury instructions. The goal of jury instruction briefing is to influence the court's ultimate instructions, ideally persuading the court to adopt your proposed instructions, and, barring that, preserving critical instruction issues for appeal. There is a fine and critical distinction between appearing biased and proposing instructions that advocate without a hint of overt partisanship. Appellate lawyers, by trade and training, can craft proposed instructions that often appear more even-handed than their trial counsel counterparts, who have lived and breathed the case for years. At the charging conference, when preservation is the paramount, appellate lawyers will more easily be able to stand their ground against a bullying judge without the fear that trial counsel might have of judicial retribution in front of the jury at trial.

Sending a message. In addition to standing up to the judge, giving appellate counsel a prominent role during trial proceedings can signal to the judge just how important the case is to the client. No one wants to be told they erred, most of all trial judges by way of an appellate opinion reversing them. Having appellate counsel on the team brings home that reality to a trial judge by signaling that the party is serious and contemplating appellate review, if necessary. The very presence of appellate counsel may well give the trial judge a moment of pause. Meanwhile, oppos- » Page 11

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Inside

10 **Practicing Before the Federal Circuit Court Of Appeals**
BY GIANNA CRICCO-LIZZA AND RALPH A. DENGLER

11 **The Respondent's Role in the Appellate Process**
BY WILLIAM B. STOCK

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Practicing Before the **Federal Circuit Court of Appeals**

COURTESY OF U. S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT.

BY GIANNA CRICCO-LIZZA AND RALPH A. DENGLER

The Court of Appeals for the Federal Circuit, unlike the 12 other Circuit Courts of Appeals, hears cases from across the nation, where the subject matter falls within its legislative mandate, including patents and several other important areas of the law. See 28 U.S. Code §1295. A case may be appealed to the Federal Circuit from any district court, as well as other special courts and some administrative agencies, including the Patent Trial and Appeal Board and the Trademark Trial and Appeal Board. See id.

The judges of the Federal Circuit are appointed by the President, upon advice and consent of the Senate and they serve for life. See U.S. Const. art. II, §2; art. III, §2. There are 12 judges in active service, as well as some eligible senior judges handling fewer cases. The current chief judge is Sharon Prost.

Federal Appellate Rules and Federal Circuit Rules

The Federal Rules of Appellate Procedure apply to appeals before the Federal Circuit, along with the Federal Circuit Rules. In practice, the Federal Circuit Rules should be consulted, as any changes or inapplicable provisions in the Federal Rules of Appellate Procedure are indicated in that version, and govern.

The forewarned appellate litigator should maintain familiarity with the applicable provisions of these rules relating to how a case moves to the Federal Circuit to ensure no procedural hurdles go unmet. Moreover, the rules provide detailed instructions regarding the Federal Circuit's esoteric requirements on font, spacing, word count, appendix creation, motion practice, and many other important steps. At each stage, the practitioner should consult both the Federal Rules of Appellate Procedure and the Federal Circuit Rules to ensure that all submissions will satisfy both sets of rules.

Initiating an Appeal

All appeals begin with a Notice of Appeal being filed in the tribunal below, within the applicable deadline. For most district court cases, this is within 30 days of entry of final judgment. See 29 U.S.C. §2107; Fed. R. App. Proc. 4; Fed. Cir. R. 4. Once the appeal is docketed in the Federal Circuit, counsel for both parties must file their entry of appearance (see Form 8) and certificate of interest (see Form 9) within 14 days of docketing. Counsel should file a docketing statement within 14 days of docketing. The Clerk's office uses this statement to determine whether the case should be referred for mediation. See Form 26.

Briefs and Appendix

The appellant's brief is due 60 days after docketing. Fed. Cir. R. 31(a)(1)(A). The appellee must serve its initial brief within 40 days after the appellant's brief is served. Fed. Cir. R. 31(a)(2). The reply brief is due within 14 days after service of the appellee's brief. Fed. R. App. Proc. 31(a)(1). It is not unusual for appellants and appellees to request modest extensions to these deadlines, and they are liberally granted. As noted, the Federal Circuit Rules prescribe preferred cover and binding, as well as print size of briefs, word count, footnotes, and other requirements. The appellant's and appellee's opening briefs are limited to no more than 14,000 words and the appellant's reply brief must contain no more than 7,000 words. Fed. Cir. R. 32(a). Counsel must file a certificate of compliance with type-volume limitation, typeface requirements, and type style requirements pursuant to Federal Circuit Rule 32(a). See Form 19.

In cases that will be heard by a three-judge panel, such as appeals in patent cases, the parties must send six paper copies of the briefs to the court within five business days of the court's acceptance of the electronic brief. Fed. Cir. R. 25(c)(1)(A). For petitions for panel rehearing, petitions for en banc hearing or rehearing, a combined petition, or for briefing in an en banc case, other rules apply. Fed. Cir. R. 25(c)(C)-(F).

For motion practice, no paper copies are required for briefs filed electronically. See, e.g., Fed. Cir. R. 27(j) (paper copies of any motion, response or reply not required if motion filed by counsel through CM/ECF, but if motion filed by a pro se party, then one paper copy must be filed); Fed. Cir. R. 18(b)(1) (motion for stay pending review); Fed. Cir. R. 8(b)(2) (motion for stay or injunction pending appeal).

Within seven days after the last brief is filed, the appellant must prepare and file six paper copies of the appendix, which provides relevant materials from the proceeding below, and serve one copy on counsel for each party separately represented. See Fed. R. App. Proc. 30(a)(3); Fed. Cir. R. 30(a)(4). The Federal Circuit Rules provide specific instructions on what should and should not be included in the appendix, and prohibit indiscriminate citation to blocks of record pages. Fed. Cir. R. 30. It is not uncommon for the clerk to reject an appendix and require that it be resubmitted in compliance with this provision. The Rules also instruct how the Appendix should be arranged and paginated. Fed. Cir. R. 30(c). The Rules encourage parties to agree on the contents of the Appendix and provide a mechanism for designation in the absence of agreement. Fed. Cir. R. 30(b). If confidential material must be included in the briefs, the Rules permit two versions of the Appendix to be filed to protect confidentiality. Fed. Cir. R. 30(h).

While the appellate panel receives all elements of the record that are necessary to review the briefs, appellate judges have a very different focus than the district court judge holds below. Thus, the briefing must hone in on key points, such as the applicable standard of review, what errors were made below and what impact those errors had on the final result, and what relief the law and justice requires. While a scattershot approach to the appeal might feel more comforting for litigants because it ensures that any ground for relief is presented, it is not appreciated by judges who must sift through the arguments to determine which, if any, warrants reversal. Moreover, too many arguments in the brief will make it difficult to adequately address the more important or dispositive arguments.

> Practice before the Federal Circuit has its own **specific and unique rules.** Practitioners will best serve their clients through mastery of the rules and familiarity with the court's workings.

Oral Argument

The court determines how much time will be permitted for oral argument, which is typically 15 minutes per side. The appellant is permitted to divide its time between main argument and rebuttal, but appellees may not. The court also has provided a Notice to Counsel for Oral Argument that provides instructions on checking in before the argument, how the names of the panel are provided to the litigants, and what the lights on the digital clock on the podium indicate. See U.S. Court of Appeals for the Federal Circuit, Notice to Counsel for Oral Argument.

The normal, respectful decorum expected in any courtroom applies similarly in the Federal Circuit, and is set forth by the court on the Federal Circuit's website. See U.S. Court of Appeals for the Federal Circuit, Notice on Courtroom Decorum. The Federal Circuit typically hears oral argument during the first week of each month, and access to the courtroom is open to the public, upon proper identification and security screening. Each panel is unique: The judges on a particular panel often will ask questions about the arguments, and regardless, will be well versed on the briefs. It is recommended that counsel be fully prepared for the argument by not only planning an explanation of the issues on appeal, but also by practicing how to succinctly and directly answer the questions expected and to pinpoint factual citations to the Appendix. Observing different panels in action also is highly recommended, or at least listening to the publicly available audio transcripts.

After the case has been argued, it will be submitted to the court. A decision will typically be issued about four to six months later.

Rehearing Mechanics

A party may request rehearing by the panel or en banc (or a combination of the two), within 30 days of entry of judgment. Fed. Cir. R. 40(e). A request for en banc hearing must include a statement of counsel that indicates, based on counsel's professional judgment, that the panel's decision is contrary to specific decisions by the Supreme Court or requires an answer to one or more precedent-setting questions of exceptional importance. See Fed. Cir. R. 35(b). If the court so desires, it may invite a response from the other party, which must be provided within 14 days. See Fed. R. App. Proc. 40(a)(3).

Once the court has finally determined the appeal, the mandate issues—either seven days from denial of rehearing or 37 days if no request for rehearing is filed. See Fed. Cir. R. 41(b). The appeal has then ended unless a petition for writ of certiorari is filed with the Supreme Court of the United States.

Conclusion

Practice before the Federal Circuit has its own specific and unique rules. Practitioners will best serve their clients through mastery of the rules and familiarity with the court's workings.

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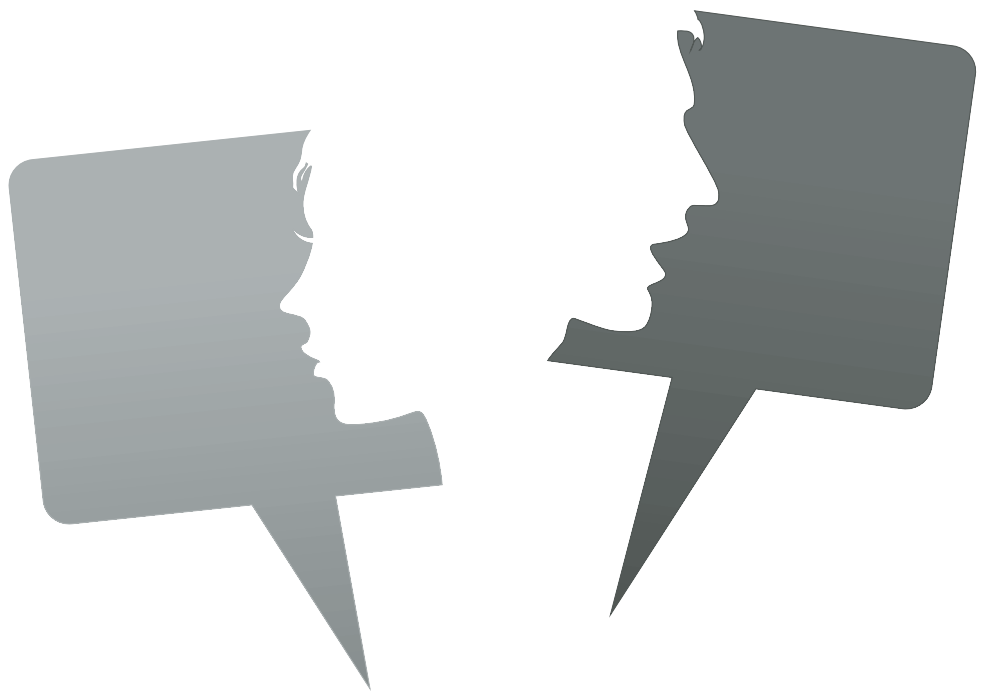
The **Respondent's Role** in the **Appellate Process**

BY WILLIAM B. STOCK

The respondent's role in the appellate process is not merely passive and should be proactive. A respondent may affirmatively take many steps during the appellate process that can enhance the respondent's chances of success on the appeal.



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While an appellant's objective is to try to persuade the appellate court that the judgment or order appealed from was incorrectly decided and should be reversed, the respondent's ultimate objective is to affirmatively demonstrate that the judgment or order appealed from should be affirmed.

The appellate process actually begins before the notice of appeal is served and filed. Under most circumstances, the respondent is the triumphant party at the lower court level and will serve the appealable paper with a notice of entry to "start the clock" running on the appellant's time to serve a notice of appeal. (CPLR 5513[a]). It is critical to state in the notice of entry the correct entry date of the order or judgment, failure to do so results in the time to serve a notice of appeal never beginning to run. See *Reynolds v. Dustman,* 1 N.Y.3d 559, 560 (2003); *Nagin v. Long Island Sav. Bank*, 94 A.D.2d 710 (2d Dept. 1983).

When a notice of appeal is received, the respondent's first step is to determine whether it has been timely served within 30 days, plus five for mailing, from the date of service of the order or judgment with notice of entry. CPLR 5513. Attention should be paid to notices of entry are e-filed, since the additional five-day rule may not be applicable.

The next step is to determine whether the judgment or order appealed from is actually appealable. For example, an order granting a default judgment is not appealable, the remedy being a motion to vacate the default and then appeal the order that denies that motion. See *State Employees Federal Credit Union v. Starke*, 73 A.D.2d 836 (3d Dept. 2000). In addition, the only appealable paper is an order or judgment. Decisions, including transcripts of those rendered from the bench which is not so-ordered, are not appealable and will be dismissed on appeal.

Additionally, the appellant must be aggrieved by the appealable paper to have standing to prosecute the appeal. (CPLR 5511). If these requirements are not met, the respondent should consider making a motion in the appellate court to dismiss the notice of appeal.

Should the respondent decide not to challenge the notice of appeal, a timely notice of cross-appeal might be the next move.

The appellant may limit the scope of the appeal in the notice of appeal which may bar raising other issues. However, an appellate court may affirm a decision for different reasons than the trial court. Also, an appeal from a final order or judgment will bring up prior non-final orders that necessarily affected the final order or judgment. CPLR 5501(a)(1).

> The respondent's role in the appellate process is not merely passive and **should be proactive.**

Appellate courts have their own deadlines for perfecting an appeal. Respondent's counsel should be familiar with them. If the appellant has not timely perfected the appeal, the respondent may wish to move to dismiss it for failure to timely perfect.

The respondent will eventually receive an appellant's brief and record on appeal. When reviewing them, it is the better practice to read the record first in order to form your opinions about the appeal and to determine if the appellant has misstated or distorted facts in his brief. Misstatements and distortions should be addressed in the respondent's brief.

The respondent must make certain that the record contains all of the documents mandated by the CPLR and court rules and that nothing is missing or improperly added. Appellate review is limited to the record made before the lower court and the appellate court will generally not consider documents that are outside the record. If the record is improper, the respondent should immediately ask the appellant's counsel for a correction. If one is not forthcoming, the respondent may want to make a motion to strike.

The Corn From the Chaff

The order or judgment appealed from must be carefully analyzed. If the appellant has not addressed an important part of the decision, the respondent's brief should point this out.

The respondent should read past any invective and ad hominem attacks made in an appellant's brief. Judges dislike personal attacks and it is best to dismiss such bluster in a single sentence. Focus instead on the core of the appellant's legal arguments.

All arguments in an appellant brief must be addressed. Failure to address an argument may be deemed a concession to it. The better practice is to address the appellant's arguments in order and head-on and not put the more difficult arguments at the end of the brief.

Cases cited by the appellant must be read, analyzed and, of course, Shepardized and distinguished. With the advent of electronic research, there is a tendency to quote favorable language from cases without being fully aware that there is harmful language in the very same case. Favorable language should be quoted.

The appellate court's rules for a respondent's brief must be examined and complied with. There are many guides to writing an effective and persuasive respondent's brief. Let it only be said that the ultimate objective of a respondent's brief is to persuade the appellate court that the order appealed from was correctly decided and that the appellant's arguments are without merit. Affirmative relief should not be requested unless a notice of cross-appeal was served and filed.

Appellant's counsel frequently raise new arguments in their briefs for the first time on appeal, attempting to avoid the impact of unsuccessful arguments below. Appellate courts will generally not consider such arguments. There are certain exceptions to this rule such as the exception that a new argument can be raised for the first time on appeal if it is a conclusive argument that appears on the face of the record, does not inject new facts in the record and could not have been avoided by the respondent had it been raised in the court below. See *Vanship Holdings Ltd. v. Energy Infrastructure v. Energy Infrastructure Acquisition*, 65 A.D.3d 405, 408-09 (1st Dept. 2009)

Similarly, the respondent must determine if an issue raised on appeal was preserved in the court below. An example: Was an objection timely made at trial?

Here a word about appellate motion practice. Motion practice can be a tactical device to dismiss procedurally defective appeals and to streamline the appellant's substantive arguments that need to be addressed in the respondent's brief.

Oral Argument

The respondent's role at oral argument mirrors the respondent's role in writing the brief. The focus is to persuade the appellate tribunal that the lower court's order was correctly decided and should not be disturbed. An effective oral argument requires mastery of the briefs and record. An appellant's single distortion of the record pointed out by an alert respondent can go a long way towards defeating an appeal.

The respondent should always take advantage of oral argument since it presents a final opportunity to persuade the appellate court that the order appealed from should be affirmed. An effective oral argument also requires mastering the record and briefs.

The maxim "less is more" may be apt during oral argument. If the appellate bench has asked questions that clearly indicate it has not been persuaded by the appellant's arguments, then the respondent may be best advised to say little during argument and rest on his brief unless the panel has any questions. By way of anecdote, a powerful oral argument consisted of a respondent, after an appellant had virtually immolated himself before the bench, saying three words: "I waive argument."

A proactive respondent who utilizes the appellate court's rules and procedures and submits a well-written, concise brief, can effectively challenge an appellant at virtually every step of the appeals process and thereby enhance the chances of prevailing on appeal.

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History

« Continued from page 9

Scalia alone); *Graham County Soil and Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, __ (2010) (same); *Lawson v. FMR*, 571 U.S. 429, 134 S. Ct. 1158, 1176-77 (2014) (Justice Scalia concurrence joined by Justice Thomas); *ABC v. Aereo*, 573 U.S. __, 134 S. Ct. 2498, 2515 (2014) (Justice Scalia concurrence joined by Justices Thomas and Alito). With Justice Gorsuch now siding with the critics of legislative history, future appointments to the court could result in a complete abandonment of legislative history as a means to discern congressional intent.

Second, this attack on legislative history leaves unanswered an important question: Precisely how should federal courts interpret statutes when the statutory language is susceptible to competing interpretations? Justice Thomas's concurrence claims the majority opinion should not have "venture[d] beyond the statutory text[,]" but few people would dispute that statutory language is not always clear and unambiguous. When statutes are unclear, to refuse to consider contemporaneous statements about the legislation would remove a critical source of information to determine legislative intent.

Third, Justice Thomas's decision to challenge the use of legislative history in *Digital Realty Trust* is striking because the sole legislative history source cited by the majority is a committee report. As Justice Sotomayor points out in her concurrence, committee reports are considered a "particularly reliable source to which we can look to ensure our fidelity to Congress' intended meaning." *Digital Realty Trust*, 200 L. Ed 2d at 33 (Sotomayor, J., concurring) (citing *Garcia v. United States*, 469 U. S. 70, 76 (1984)). Justice Sotomayor's concurrence cites numerous sources—from legal treatises to statements of members of Congress—about the important role committee reports play in informing other members of Congress about the content and purpose behind pending legislation.

Indeed, jurists and scholars have emphasized that committee reports are the most reliable of legislative history sources. In *Garcia*, then-Associate Justice William Rehnquist wrote that "we have repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which 'represen[t] the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation.'" *Garcia*, 469 U.S. at 76 (quoting *Zuber v. Allen*, 396 U. S. 168, 186 (1969)). In *Schwegmann Bros. v. Calvert Distillers*, Justice Jackson suggested that only committee reports should be consulted, because they "presumably are well considered and carefully prepared." 341 U.S. 384, 395 (1951) (Jackson, J., concurring). Similarly, Profs. William Eskridge and Philip Frickey listed committee reports as the most authoritative source of legislative history in their well-recognized hierarchy of sources. William N. Eskridge Jr., "The New Textualism," 37 UCLA L. REV. 621, 636 (1990).

By contrast, Justice Thomas's argument against the reliability of committee reports rests almost entirely on a single colloquy from the Senate debate on Dodd-Frank that delves into the authorship of the report. *Digital Realty Trust*, 200 L. Ed 2d at 35 n*. The primary point of the exchange was to suggest that the report cannot be a valid expression of legislative intent because it was not personally authored by a Senator, but instead by staff. Of course, the same could be said about many statutes.

Moreover, as Justice Thomas makes clear, his attack on the use of the committee report does not rest on its reliability or lack thereof. He states that the majority should not have relied upon it, "[e]ven assuming a majority of Congress read the Senate Report, agreed with it, and voted for Dodd-Frank with the same intent … ." Id. at 35. This plainly suggests that courts should reject any consideration of legislative history as a guide to statutory interpretation, regardless of the source's reliability.

Fourth, it seems odd that Justice Thomas chose *Digital Realty Trust* as his vehicle for attacking the use of legislative history. The majority opinion's analysis rests on the plain language of the statute and only uses the committee report to "corroborate" the court's reading of the statute. Id. at *28-29. All references to the report could have been removed from the majority opinion, so why raise the issue in this case?

Interestingly, in both his decision to attack the use of committee reports and to do so in a case where legislative history played little actual role in the decision, Justice Thomas's concurrence parallels a concurrence Justice Scalia authored in *Zedner v. United States*, 547 U.S. 489 (2006). As in *Digital Realty Trust*, the *Zedner* majority opinion cited to committee reports, but only to confirm a textual analysis of a statute. *Zedner* was authored by Justice Alito, who appears to have made an about-face on this issue.

Fifth, how is it possible to reconcile Justice Thomas's concurrence's attack with his reliance on contemporaneous writings in his constitutional jurisprudence? Justice Thomas has relied upon the Federalist Papers, the drafting history and reports of the Constitutional Convention, and statements made at state ratifying conventions to support his constitutional interpretations. See, e.g., *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2099 (2015) (Thomas, J., dissenting) (citing Federalist Nos. 70 and 72 and multiple statements made at state ratifying conventions); *Arizona v. Inter Tribal Council of Ariz.*, 570 U.S. 1, 133 S. Ct. 2247, 2263-64 (2013) (Thomas, J., dissenting) (citing repeatedly to Federalist No. 52); *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 133 S. Ct. 2552, 2569-70 (2013) (Thomas, J., concurring) (citing the drafting history and reports of the Constitutional Convention and multiple statements made at state ratifying conventions). Why such sources are reliable for constitutional, but not statutory, interpretation is a mystery.

Ultimately, whether the reader supports or opposes judicial reliance on legislative history, the concurrences in *Digital Realty Trust* indicate that this debate is far from over.

Counsel

« Continued from page 9

ing counsel is likely to realize that the client is not an easy mark, willing to settle. Appellate consiglieres signal the client is prepared for a long, drawn-out war.

Perfecting the record for appeal. It goes without saying that if a piece of evidence wasn't admitted at trial, it cannot be used on appeal. But there are other, grayer shades of evidentiary issues where appellate lawyers can help. How can you make sure those beautiful demonstratives you spent thousands of dollars commissioning can be used on appeal? What must you do so that the transcript of video depositions played at trial, but not transcribed in the record, are nevertheless easily accessible to the court on appeal? How can you prove the prejudice from the mid-trial exclusion of critical evidence that you planned to offer? Appellate advocates know the answers to these questions.

Positioning appellate arguments. Courts of appeals review without deference legal determinations from the trial court and review with varying degrees of deference a judge's exercise of discretion, judicial fact-finding, and jury verdicts. Positioning arguments in the trial court in such a way as to make the decisions appear more legal and less discretionary or factual is critical to the success of those arguments on appeal. The failure to be attuned to how certain issues will be litigated on appeal could be the difference between winning an appeal and obtaining the most unsatisfying of all appellate decisions: one where the appellate court agrees with your argument but nevertheless rules against you due to the deferential standard of review.

Avoiding groupthink. The trial team is, and must be, focused on winning the trial. The appellate team, while cognizant of wining the trial, must also be focused on how to win the appeal. Sometimes what's right for trial isn't what's right for appeal. Trial teams often like general verdict forms so they can win one question and win the case. But a more particularized special verdict form is far better for appeal. Similarly, a trial team may not want to make a particular objection, knowing the judge is likely to deny it and the jury may well read something negative into the objection or the court's ruling. The appellate team might conclude such an objection is vital to an issue for appeal. Who is right is a question for the client, but these issues may never be teed up to the client if there isn't an appellate team involved to consider the issue from a different perspective.

One final thing to consider: While embedding appellate counsel in trial teams is an excellent first step, the benefits could well be muted if the appellate team's advice never gets to the client because trial and appellate lawyers from a single firm hash out the issue internally and propose only one course of action to the client. Using appellate counsel from another firm ensures that the issue will reach the client. To be sure, nobody wants unnecessary fighting among firms at trial, and so it is critical to pick appellate counsel that plays well with others, understands its role, and is deferential to the trial team and trial concerns when appropriate. But the benefits of independent appellate counsel are hard to overstate when the stakes are the highest.

Concededly adding additional lawyers to a matter is not a cost-free proposition, at least not on cases with hourly billing. But proper planning and staffing could alter the size of the trial team to reflect the role the appellate lawyers will play in briefing and strategic considerations. Early integration of appellate counsel also creates efficiencies when the case gets to appeal. And, embedding appellate counsel, with all the attendant benefits, may be the cheapest insurance policy for the case that a client can buy. It may be that involving appellate counsel may not make sense for *every* case, just for the ones a party wants to put itself in the best chance of winning—whether in the trial court or on appeal.

Disability

« Continued from page 9

Though it was obvious to the Workers' Compensation Board that Curcio's back and neck injuries prohibited him from continuing to work as a building engineer—a position he held for 27 years—it did not meet the standard for permanent total disability because he could still take care of himself and work in a different capacity.

It should be noted that there is a subtle but important financial distinction between permanent total disability and permanent partial disability. If the Workers' Compensation Judge's ruling had been sustained, Curcio would have received worker's compensation benefits through the rest of his life. Because the Board adjusted the decision to a permanent partial disability, his worker's compensation payments were capped at 500 weeks. The number of weeks depends on the percentage of loss of wage-earning capacity assigned by the Workers' Compensation Board. For example, someone with a loss of wage-earning capacity of 75 percent would get more weeks of worker's compensation than someone with a loss of wage-earning capacity of 50 percent.

Ultimately, painting the clearest medical picture possible and creating a narrative that establishes the job as the cause of the injury will go a long way towards granting worker's compensation on appeal. Attorneys should encourage their clients to maintain an up-to-date personal medical file to document the injury's origin and progression.