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Third Department – NYSDA CLE
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FERTILE GROUNDS: DEVELOPING SUCCESSFUL APPELLATE ISSUES

I. RECOGNIZE UNSUCCESSFUL ISSUES

A. Some appeals will not result in a brief.
Many assigned appeals do not present successful issues.
Clients should be counseled about withdrawing moot appeals.
Issues involving risks may not be advanced absent a written waiver.

B. Brief the appeal whenever appropriate.
Avoid *Anders* briefs.
Identify and brief non-frivolous issues.
Do polished briefs though issues are likely to be rejected.
Client is entitled to competent representation and appellate review on the merits.

II. FIND SUCCESSFUL ISSUES

A. Know the law.
Study law via CLEs, new appeals decisions, *Law Journal*.
Knowing the law helps in recognizing valid issues.
Before writing brief, do record review, issue ID, research, and analysis.

B. Review the record.
Review challenged decisions and orders, summations and verdict.
Read record page by page from beginning to end.
Digest record to ID issues, do facts, answer questions, prepare for argument.
Obtain documents deserving judicial notice.

C. Identify threshold issues.
Look for erroneous threshold rulings.
Examples include denials of motion to dismiss or suppress or challenge for cause.

D. Identify issues regarding inadequate evidence.
In a criminal cases, see if evidence was legally sufficient and issue was preserved.
Decide if record presents a weight of evidence argument.
See People v. Danielson, 9 NY3d 342.

In Family Court cases, determine if decision has sound and substantial basis.
Find issues that transcend credibility findings.
These include distortion of record in findings or unsound interpretation.
Note dichotomy between appellate deference/rationalization v. broad review powers.

E. Identify evidentiary error issues.

Determine if rulings were improper.

See if they were fully preserved. *See* CPLR 4017; CPL 470.05(2)

If not, determine if court's interest of justice jurisdiction should be invoked.

Errors must affect a substantial right. *See* CPLR 2002; CPL 470.05(1).

See also *People v. Crimmins*, 36 NY2d 230; *People v. Williams*, 25 NY3d 185.

Identify other legal errors, such as misinterpretation of statute.

F. Review the sentence or disposition.

Determine if result was legal.

If result was legal, determine if argument about fairness can be presented.

G. Think outside the box.

Feel free to reject weak issues pursued by trial counsel.

Find mode of proceeding errors. *See* *People v. Patterson*, 39 NY2d 288.

For respondent, it is permitted to argue result was right, reasoning was wrong.

III. RESEARCH THE LAW

A. Do extensive legal research.

First list potential issues and salient proof as to each.

Review statutes, Court of Appeals, Third Department, other Departments, treatises.

Gain full understanding of relevant bodies of law.

Recognize that not all decisions can be harmonized; identify outliers.

B. Be selective, strategic, and analytical.

Identify best cases to analogize, necessary ones to distinguish.

Determine if persuasive argument could be made to change the law.

Gain sense of elements to be emphasized in statement of facts to support argument.

Think out argument before beginning to write facts.

IV. WRITE THE FACTS

A. Keep in mind purpose of facts.

End result should be clear, compelling presentation of all relevant facts.

Do not save facts to present for first time in argument.

Facts must be driven by issues to be presented in argument section.

Facts should be scrupulously honest.
However, advocacy includes emphasis of good facts, mitigation of bad facts.

B. Transform the draft into a narrative.
First prepare a summary of all relevant aspects of record.
For every fact, cite the record.
Then rearrange facts in logical and compelling way.
Often chronological narrative of underlying events is best.
Sometimes proof can be divided by themes or topics in dispute.
Avoid witness march—it is primitive, dull, and redundant!
Skillful statements of facts will set up argument.

V. WRITE THE ARGUMENT

A. Do the basics.
Set forth standard or review and burdens of proof.
Lay out controlling substantive law.
Present strongest points first, unless weaker points seek greater relief.

B. Select key cases.
Carefully choose best few cases to support your argument.
Provide detailed discussion and draw persuasive parallels.
Do not repeat all facts; crystallize vital ones.
Distinguish adverse cases, honestly point out differences.

C. The respondent's brief should be strong statement for affirmance.
Feel free to reframe issues.
Brief should not be counterpunch to appellant's arguments.

VI. EDIT THE BRIEF

A. Turn brief into cohesive whole.
Combine facts on key topics to strengthen emphasis, achieve concise result.
Combine related points.
For example, have one point regarding several errors and show cumulative impact.

B. Make brief easy to read.
No matter how complex the idea, the prose should not be dense or hard to fathom.
Ideas should unfold logically and lucidly.
Consider summary at beginning of brief to prepare reader for what follows.
Add subheads.
Add conclusion that sums up all points in case and relief sought.