Brief Perspectives

By Judge Gary E. Shapiro, Postal Service Board of Contract Appeals and Edward M. Shapiro, Esq.[1]

Introduction by Judge Shapiro

This article was inspired by a BCA judges panel presentation involving brief writing before the Boards, which I moderated during the October, 2011 annual conference of the Board of Contract Appeals Bar Association, Inc.[2] Following the panel discussion, it occurred to me that an article on the subject could be useful to attorneys who practice at the Boards. I then thought that after sharing my view from the bench on effective techniques in preparing post-hearing briefs, reactions to those views from a trial attorney would provide an interesting contrast. To ensure that such reactions would be unfettered, I turned to my brother, an experienced trial lawyer who does not practice before the Boards, and who, by long experience, I knew would not hesitate to disagree with me.

Judge Shapiro: I consider the purpose of a post-hearing brief to be assisting the Board to reach the conclusion that your position is correct and should be accepted. The post-hearing brief is your opportunity to speak directly to the judge. Keep that in mind while preparing it. Indeed, briefs may be even more important in Board practice than in other courts. A Board trial is heard by a single presiding judge, but the decision itself is made by a panel. The other panelists are limited, inherently, to reading the record – which includes your briefs. When I review a draft decision from another judge – I read the briefs first. Make it count.

One concept that should be considered as a sacrosanct rule is not to mislead the judge under any circumstances. It is critical for lawyers to maintain their credibility, both for the case at hand and for the future. Being intellectually honest in your briefs should be your guide. Examples might include identifying a fact as undisputed, where it is contested by your opponent, or stating that there is no contrary precedent, where that is not undeniably accurate. (Consider a slightly milder approach: Research failed to disclose applicable precedent to the contrary.)

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[1] Judge Gary E. Shapiro was appointed as a PSBCA judge in 2008. He presently serves as vice-president of BCABA, Inc. Judge Shapiro's views here expressed should be considered his personal views, and not those of the Postal Service Board of Contract Appeals, the Postal Service, or any other Board or judge. Edward M. Shapiro is a commercial law trial attorney, licensed in New York and New Jersey, with concentrations in construction and real estate disputes.

[2] I wish to thank the panelists, Judges Patricia J. Sheridan, CBCA, Mark A. Melnick, ASBCA, and Monica Parchment, DCCAB, for their thoughtful contributions to the panel discussion, ultimately resulting in this article.

If contrary precedent exists, even if from a non-binding forum, such as the Court of Federal Claims or a district court, identify it, and deal with it directly. You should never assume that your judge will not become aware of contrary precedent if you leave it out. Your opponent will point it out, or we will find it ourselves. Either way, your credibility has been harmed affecting the perceived persuasiveness of your brief.

Similarly, if a contrary version of a key fact exists, address it and explain why the version you espouse is more worthy of belief. This is far better than ignoring the contrary fact. Your opponent will not ignore it, and will point out your failure to have considered it.

Response by Attorney Shapiro: Judge Shapiro has invited me to disagree with him, and I must oblige. As a trial attorney, your primary responsibility is to your client, and the post-hearing brief presents a unique opportunity for advocacy. From counsel's perspective, the purpose of the post-hearing brief is to persuade the Court to rule in your client's favor. While your brief should not mislead the Court, as doing so risks undermining your credibility (boding poorly for your client) and could violate ethical obligations, you should be presenting the issues from one side only. Your goal is to appear objective, while advancing your client's position through artful emphasis of facts, organization, and persuasive argument. For example, when framing the issues, do not overly slant them in your favor; the appearance of neutrality helps to pass the intellectual honesty precept referenced by Judge Shapiro.

Strive to keep your brief as succinct as possible, avoiding rhetoric, irrelevant detail, and unnecessary repetition. When citing authority, avoid string citations; cite the leading case or one binding on your forum and move on. I disagree with Judge Shapiro's belief that contrary authority from a non-binding forum should be identified and distinguished. If a problematic decision is not precedent for your case, there is no ethical obligation to cite it. Identifying such a decision, which may not have otherwise been found by your adversary or the Court, adds superfluous length to your brief, takes focus away from your argument, and might create an unnecessary obstacle.

Judge Shapiro: Be sure to address issues that are important to the judge. Try to anticipate the judge's concerns and deal with them directly. Like counsel, judges have various styles. Some are more directive than others. Pay attention for direct guidance, or for more subtle clues to identify issues that matter to the judge. Some judges may tell you expressly about issues that are troubling or important to them. For others, you need to be alert for hints, such as a question the judge asked during a hearing or conference. Again, while judicial styles differ, I see no problem with counsel asking affirmatively whether there are any issues that the judge specifically would like to see addressed. There is no

guarantee that this will result in direct guidance from the judge, but it may, and I see no harm in asking.

Response by Attorney Shapiro: Expanding upon the excellent advice Judge Shapiro gives here, if the judge reveals criticism of your adversary's position, pick up on the point in your brief and drive it home. In one matter in which I represented tenants of a rent stabilized apartment in Manhattan, I moved to dismiss a non-primary residence eviction proceeding on jurisdictional grounds. The issue turned on whether the landlord's predicate notice (which correctly identified the Manhattan apartment sought to be recovered) was jurisdictionally defective because its envelope misstated the Manhattan apartment number. At oral argument, the landlord's attorney said "we got lucky" because the Postal Service forwarded the envelope to the tenants' other home in Spencertown, where the tenant signed for it. When this statement was made, I saw the judge's body language change; he perked up and wrote himself a note. In my post-argument brief, I quoted adversary counsel's "we got lucky" verbiage and argued that notice is a matter of due process, not getting lucky. The language from my brief was used verbatim by the judge in his decision dismissing the proceeding.[3]

Judge Shapiro: While lawyers and Board judges concentrate on familiar government contract concepts and arguments presented, counsel often lose sight of a basic motivator for judges. Judges want to be fair. We want our decisions to serve justice. Judges may reach a result that may seem inequitable where the law requires it – but we do not like it and will look more extensively for an alternative. Given this most basic of judicial motivations, it seems to me that in addition to presenting the facts as favorably and honestly as you can and arguing the appropriate legal principles, a well-crafted post-hearing brief also might seek to persuade the judge directly that ruling in your favor is the most fair result. Appealing to a judge's sense of fairness directly most certainly is not out of bounds in my opinion, and I believe it should be included in most post-hearing briefs.

Response by Attorney Shapiro: Judge Shapiro provides more quality advice here. I expand on it by opining that it is helpful to explain how your client's position makes sense from a policy perspective. Even if you can cite to favorable precedent, it is more effective to explain why the judge should follow the precedent, than simply to tell the judge that he must do so.

Judge Shapiro: As specialty tribunals with expertise in the subject matter, Board judges already are familiar with most legal issues that come before us. Therefore, we are more dependent on the lawyers for factual explanations. Depict the facts in your briefs honestly and accurately, but with an emphasis and

[3] *Regency Towers LLC v. Bernard Landou and Richard Leonard*, 10 Misc. 3d 994, 807 N.Y.S.2d 863 (Civ. Ct., N.Y. Co. 2006).

in a context that tells the story of what happened in a way that presents your client as sympathetically as possible.

I cannot emphasize enough that it is essential that you cite sources for every assertion of fact. We will check all such citations to the record to ensure they are accurately presented. Judges dislike going through the record ourselves to determine whether a proposed fact you wish us to find is indeed supported. It is your job to lead us to the piece of evidence in the record that supports the fact you ask us to find. The post-hearing brief is your opportunity to persuade the judge that the facts as you present them are what really happened. A record citation for every single assertion goes a long way to achieving that goal. Consider carefully the adjectives and adverbs you use to modify facts. Do not include them if they can be viewed as altering the meaning of the fact you seek to establish.

Response by Attorney Shapiro: In the Statement of Facts, you should endeavor to appear objective and employ advocacy through the emphasis of certain facts. The Statement of Facts should never have an argumentative tone. It is essential to cite the record accurately and not out of context; otherwise, you risk loss of credibility. Facts can be tedious to read, so it is best to avoid compound sentences and keep your statements concise. For cases involving long complex fact patterns, consider limiting certain facts to general statements and expanding those statements with more detail in your argument. It is appropriate to do so as long as you provide record citations within the argument section.

The Statement of Facts is usually where you define short-hand terms you will use throughout your brief. Briefs read easier when meaningful defined terms are used. As it is critical to keep the parties clear, instead of using acronyms or procedural identifiers (e.g., Plaintiff, Claimant, Appellant, etc.), I prefer defining parties by descriptive words such as Owner, Tenant, Driver, Passenger, etc. Descriptive words should also be used to define things, tangible or otherwise (e.g., it is better to use “Owner’s Checking Account” than “Account 15283439”). For occurrences or conduct, consider using a little advocacy in crafting your definitions. For example, you might define the five things your client relied upon to justify termination of a contractor as the “Contractor’s Improper Acts” instead of the “November 2011 Occurrences.” Be very careful though not to be overzealous in this regard; defining the five things as “Carrier’s Immoral and Unconscionable Crimes” would likely reflect poorly on the author.

Judge Shapiro: In presenting your legal arguments, address all key issues without ignoring obvious weaknesses in those arguments. Do not avoid potentially compelling counterpoints of your opponent. While this may sound obvious, be certain not simply to recite a litany of the law; apply the legal principles to the facts.

Try to cite to mandatory authority where multiple sources are available for a legal proposition. Keep in mind the hierarchy of case sources in Board practice. My view of that hierarchy in descending order of priority, assuming no Supreme Court precedent: Federal Circuit/Court of Claims; the Board you are before; the other Boards; Court of Federal Claims/Claims Court; other sources such as district courts.

At times, a legal principle is stated in precedent in a helpful way fitting your argument, but in a decision with a holding that is harmful to you. In such circumstances, I believe it to be preferable to cite a different case. By relying on a decision whose ultimate holding is adverse, you provide your opponent the golden opportunity to respond by invoking the very case on which you rely, and arguing that the adverse holding supports your opponent's ultimate position. You are then placed in the uncomfortable position of arguing in a reply brief why the very case on which you asked the judge to rely really is distinguishable.

Response by Attorney Shapiro: Judge Shapiro's directive to include in the initial brief anticipated counterpoints seems desirable from the judicial perspective, since the Court strives to reach a correct and fair decision. To that end, full disclosure and consideration of applicable legal considerations on both sides is beneficial. However, for trial counsel, the extent to which your brief should address anticipated counterarguments as opposed to saving them for reply (assuming you have the right to reply) is a strategic decision, which sometimes turns on your assessment of adversary counsel. Most times, I choose to wait for my opponent to articulate his arguments before responding to them, while being mindful of what those arguments may be, and careful not to say anything he could use in presenting them. I lean this way primarily to avoid the risk of introducing potential problems with my client's case which opposing counsel may not otherwise raise, and to allow my reply brief to be an impactful final submission. However, I sometimes make preemptory attacks on my adversary's anticipated arguments when I am almost certain that he will raise a particular argument, or when I have assessed opposing counsel as having weak litigation skills and feel that I could lure him into presenting his positions from a defensive posture.

I concur with Judge Shapiro's advice regarding citation to authority. In addition, it is always helpful to research whether the presiding judge has rendered past opinions on your issues; if you find such a document, identify it as your judge's decision, quote the favorable language, and model presentation of your argument after it. You should always cite authority using proper blue book format and avoid long string cites. If your case involves statutory construction, quote the statute before introducing your interpretive case law, and to the extent it helps your case, include discussion of statutory scheme and commentary as well as legislative history.

Judge Shapiro: Advising about writing style is difficult. Judges recognize that lawyers have differing styles, and a variety of approaches can be effective. My experience though, suggests that at least for me, briefs utilizing the following stylistic suggestions are more likely to be persuasive.

Many briefs are too long and often seem to be disorganized. You are free, of course, to pursue alternative arguments, but identify them as such. Often, I see alternative arguments presented without such identification, and it makes the brief appear to be internally inconsistent. I urge you to think about and outline a logical chain of argument before writing. Generally, it is best to present your strongest arguments first. Once a brief is drafted initially, your first editing tool should be the delete button. Cutting extraneous materials adds to clarity. In this regard, pursuing obviously losing arguments detracts from the advocacy of the remainder of the brief. Refusing to concede a point where that point does not really matter undermines your credibility. Conceding points is so rare in briefs before me that I find it refreshing when I see it. Do not present any argument that matters in a footnote. If it is at all important, include it in the body of the brief.

Argue the case - not your feelings. Do not make this a personal matter. Avoid sniping at your opposition or showing any disrespect to your opponent or to opposing counsel. Doing so seems petty to me, and detracts from the effectiveness of your advocacy. Avoid sarcasm or purposely insincere compliments in your briefs – this tactic almost never translates well and in my opinion, has no legitimate place in formal writing. For the same reasons, avoid colloquialisms. Humor is difficult to use effectively in a formal written product like a post-hearing brief. If you are not very skilled at it, play it straight. I also think it is better practice to avoid legalese and latin phrases where possible.

Also, again keeping in mind that through your brief you are speaking directly to the judge, avoid issues that are not before the Board – like discovery disputes that were not raised previously. Complaining in your brief that had your opponent been more cooperative in responding to discovery requests, you would have been able to prove or disprove a point – (while it may cause you to feel better) can result in me thinking that you are being petty and appear desperate. By the post-hearing brief, it is far too late to raise such issues.

In my experience, case quotations are vastly overused. Avoid long quotations entirely, paraphrase case holdings, and use short quotations sparingly and only for emphasis. Try to avoid the commonplace adverb “clearly” or its synonyms where used without citation. When I read a brief that says something is clear without citing to a case or to the record, I am inclined to believe the opposite – that the point is not clear. Otherwise, the author would have cited something.

In a case in which conflicting testimony presents issues of credibility, address directly why the judge should consider your witness more credible, perhaps even

in a separate section of the brief. While credibility issues are not uncommon in Board practice, arguments in briefs about relative credibility of witnesses are rare.

Sophisticated brief writers recognize that the active voice is more powerful than the passive voice. Use the active voice routinely and try to use the passive voice intentionally only. While this may seem like odd advice coming from a judge, as judicial opinions are notorious for overusing the passive voice, the active voice simply is more persuasive. Consider which is more persuasive:

> It is contended that when the contracting officer issued his decision, it did not represent his independent judgment but was the judgment of a superior procurement official. --- passive
>
> The contracting officer's decision was compelled by a superior procurement official. The contracting officer's decision was not independent as required. --- active

Many cases involve mathematical calculations. Simplify these as much as possible and be sure to explain all calculations. Judges often review briefs with unexplained calculations or with calculations which change. This is confusing and may be viewed as either the product of disordered thinking, conflicting evidence or misleading presentation. If there is any complexity at all, spell out the math in a way that even a judge like me can understand. Clear, simple charts can help.

Response by Attorney Shapiro: I agree with Judge Shapiro's suggestions in this section, and will provide further insight.

Your goal should be a well organized and succinct brief. Edit your brief repeatedly to improve the logical flow of your arguments and make them more concise. Within the argument portion of your brief, clear and coherent sections and section headings are critical. When read alone, your section headings should form an outline of your argument. It is important to maintain your credibility throughout the brief, and never refer to facts not in the record. Appearing objective and being respectful of the Court as well as your adversary and his client preserves credibility. If you have a private sector client, do not permit your client to influence what to include in your brief or how to present it; you are the lawyer, and know best.

An appropriate introduction to your brief is important, and may form the judge's first impression of how to decide the matter. Protocol dictates that your introduction describes the nature of the action. Its primary function however is to preview your argument. Since organization and presentation of your argument will be fine-tuned many times during the drafting process, it is best to write the introduction after finalizing the argument section. As with the Statement of Facts,

strive to appear objective. Although it is more difficult to appear objective when overviewing your argument, you may be able to lessen the impact of your most controversial language by deferring to your argument section with words such as "it is demonstrated below that …". In the introduction, you can employ advocacy by emphasizing the most important aspects of your strongest arguments. If you elect to have your brief oppose anticipated counterarguments, I suggest not previewing them in your introduction.

Regardless of the Court you appear before, it is essential to become familiar with all applicable briefing rules, and obey them. Exceeding page limits or violating other briefing rules will irritate the judge or result in rejection of your brief. Also, judges frown upon lawyers squeezing their briefs within page limits by using excessive footnotes (in number or length) or manipulating spacing, margins or font size. Judges dislike straining their eyes to read small print, so keep the font size of your footnotes to one or two steps smaller than that of the text in the body of your brief. If you cite to authority which is not officially reported or readily available, it is helpful (and customary) to append that authority to your brief, but check the rules for the extent to which doing so is permitted; if the rules are not clear, check with the Court Clerk first.

Conclusions. Board trial lawyers should take advantage of the opportunity to speak directly and effectively to the judge through post-hearing briefs. Utilizing effective brief writing techniques, as suggested in this article, serves everyone's interest, including that of the judge.