

Your BPR Case Before the Tennessee Supreme Court:

Your Brief May Be Your Only Shot,
Make it Persuasive

Presented by:
Chief Justice Holly Kirby
Justice Roger Page
Staff Attorney Lisa Rippy-McGuffey

Board of Professional Responsibility's 2023 Ethics Workshop

Tenn. Sup. Ct. R. 9, section 33.1(d)

Either party dissatisfied with the decree of the circuit or chancery court may prosecute an appeal directly to the [Supreme] Court. The appeal shall be determined upon **the transcript of the record** from the circuit or chancery court, which shall include the transcript of evidence before the hearing panel, **and upon the parties' briefs'** but **without oral argument, unless the Court orders otherwise**. . . . Except as otherwise provided in this Rule, Tenn. R. App. P. 24, 25, 26, 27, 28, 29, and 30 shall apply to such appeals to this Court.

When might the Court exercise its discretion to order oral argument?

- Oral argument will aid or expedite resolution
- Involves an issue of first impression
- Involves an issue about which the Court has rendered inconsistent decisions
- Involves provisions of Tenn. Sup. Ct. R. 8 or 9 that have been amended since the Court last addressed the issue
- Another case has been decided since briefs were filed that impacts the appeal
- A party moves for oral argument and explains why it would be helpful to the Court in resolving the appeal

Brief Writing Tips



Comply with the rules.

- Tenn. R. App. P. 24, 25, 26, 27, 28, 29, and 30
- These rules address everything from the **manner and timing of filing the record and briefs**, to the **requirements of citing authority and citing to the record**, to the **type of paper and covers to use**.

Choose the issues carefully.

- It is counterproductive to raise issues that have no likelihood of success, even if you feel righteous indignation about that issue.
- Concentrate on issues on which you have a legitimate likelihood of success and don't waste time, paper, and your credibility on losing issues.
- In choosing the best issues, remember, the standard of review in BPR appeals is deferential.
- To gain relief on appeal, it is necessary to show that "the hearing panel's findings, inferences, conclusions or decisions are:
 - (1) in violation of constitutional or statutory provisions;
 - (2) in excess of the hearing panel's jurisdiction;
 - (3) made upon unlawful procedure;
 - (4) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or
 - (5) unsupported by evidence which is both substantial and material in the light of the entire record. In determining the substantiality of evidence, the court shall take into account whatever in the record fairly detracts from its weight, but the court shall not substitute its judgment for that of the hearing panel as to the weight of the evidence on questions of fact."
- The appealing party has the burden of showing the hearing panel erred. Chose issues with this in mind.

Comply with preservation requirements.

- Preserve issues by raising them below
- Cite authority
- Cite to the record
- “Unpreserved issues raised by parties that are unsupported by authority or citation to the record are waived.” *Waggoner v. Bd. of Prof'l Responsibility*, 673 S.W.3d 227, 234 n.12 (Tenn. 2023) (citing Tenn. R. App. P. 13(b); *State v. Bristol*, 654 S.W.3d 917, 925 (Tenn. 2022))).

Write for the audience.

- Appellate judges, not jurors, are your audience.
- They are not going to be persuaded by emotional arguments or fact-filled pleas.
- Also, they want to be able pick up your brief and quickly understand the material facts, the issues, and the relevant legal authority.
- Remember your audience, and tailor your brief to that audience.

Be selective with facts.

- Eliminate insignificant dates and facts that are not relevant to the issues you are raising.
- Cluttering your brief with irrelevant information may confuse the reader or distract the reader from the important facts.
- Research and outline your arguments first.
- Do not include information in your brief unless it is in the record.

Adhere to professionalism and maintain credibility.

- Do not include personal attacks or snarky remarks about disciplinary counsel, the trial court, the hearing panel, complainants, or any other participant in the process.
- Avoid labeling your opponent's arguments as "frivolous" or "ridiculous." Pejorative labels are unpersuasive and can also backfire by suggesting that your opponent's argument is so strong that name-calling is your only option as a response.
- Rely on analysis, authority, and persuasive logic to make your point and convince the court to rule in your favor.

Research the issues thoroughly and show your work.

- Weave pertinent authority in with the facts of the case.
- Include a descriptive parenthetical and explain how a case supports your position.
- Avoid string cites and block quotes.
- Disclose and distinguish negative authority or make an argument why it should be modified or overruled.
- Do not cite a case that has been overruled.

Edit and proofread the brief.

- It is easy to overlook typos and errors because our brains know what is coming, so they jump over minor errors.
- Online programs
- Have someone else look over it
- Or, use a ruler to read line-by-line for mistakes and typos (the only method that has ever worked for me (LRM)).
- Submitting a brief that is procedurally or grammatically sloppy may undermine the substantive persuasiveness of your arguments.

Avoid filing on the due day.

- Plan to file your brief a few days before it is due.
- Make time to edit, cite-check, proofread, and comply with all other applicable procedural rules.
- If you realize the brief will not be ready to file even by the due date, you will have time to **file a motion for an extension of time.** (Tenn. R. App. P. 22).

File a reply brief if the appellee raises new issues or arguments.

- Don't leave the Court wondering about your response to these new issues or arguments or surmising that you have none.
- File a reply brief and address those issues. This reply brief truly is your **final opportunity** to communicate with the Court.