

STATE OF CONNECTICUT

APPELLATE PREARGUMENT CONFERENCE HANDBOOK

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INTRODUCTION

This slide presentation has been put together by the Appellate Advocacy Section of the Connecticut Bar Association and the Connecticut Judicial Branch to help self-represented parties deal with a part of the appellate process known as the Preargument Conference (also referred to as PAC). The PAC is a mandatory settlement conference conducted by a judge. The PAC occurs before the parties have submitted briefs. It is arranged by the Court.

This presentation explains what to expect and how best to prepare for your attendance at a preargument conference.

DISCLAIMER

The information contained in this handbook and the accompanying slide presentation is an overview of the preargument conference process and is **not legal advice**. The information contained in the handbook does not replace or supersede any statutory or appellate rules that apply to the process. The purpose of the handbook is to provide general information to assist self-represented parties in preparing to attend a preargument conference.

PURPOSE OF A PAC

After an appeal is filed in Connecticut, the appealing party – called the “appellant” – must file a number of additional papers, including a “Statement for Preargument Conference” form.

A PAC is a very important part of the appellate process. Its main goals are to identify which issues in the appeal have the potential to win, weed out any issues that are unlikely to win, discuss the appellate process, and, most importantly, talk about resolving the case through settlement.

WHO ATTENDS A PAC

Every party must attend the PAC in accordance with Practice Book section 63-10; no one is excused unless the judge conducting the PAC excuses him or her for special circumstances.

A judge will conduct the PAC. Many of the PAC judges are former Appellate Court or Supreme Court judges. All PAC judges have experience and knowledge of the appellate process, and they can often anticipate how an appeal will turn out. A PAC judge is an important source of information, and is there to help the parties. The PAC judge will have read limited information about your case, and will understand what the issues are and what happened at trial.

HOW A PAC IS CONDUCTED

Every judge conducts a PAC differently. Most judges will not wear a robe during a PAC. Some judges prefer that the parties talk to each other directly, while other judges like to direct the conversation between the parties. Often, judges will start by talking to everyone in a group. After the group discussion, the judge may ask to speak to each side individually. Do not be surprised if the judge wants to speak to you alone.

PREPARING FOR A PAC: Appeals Are Different From Trial

The most important thing to keep in mind when preparing for your PAC is that the appeal process is very different from a trial.

Unlike the trial judge or a jury, appellate judges do not weigh evidence or find facts. During an appeal, there will be no witnesses or testimony, and you cannot offer any new evidence not presented to the trial court. As a result, it is important to understand that an appeal is not an opportunity for either party to retry the case. Instead, the appellate judges decide only issues of law. They have limited ability to review many decisions made in the trial court, including fact determinations. This means that in most cases the appellate judges' primary role will be to review the trial judge's or jury's decision, based on the facts already found, and determine legal not factual issues. Understanding this difference between trial and appellate courts is very important for you as you prepare for your PAC - you should keep them in mind when you think about whether you should settle your appeal, and if you don't settle, what issues you plan to present as the appeal moves forward.

PREPARING FOR A PAC: What You Need To Know

To help you prepare for your PAC, we will focus on four main areas of preparation:

1. Standard of review, or how the appellate judges will look at the issues in your case
2. Remedies, or outcomes
3. Assessing your position
4. Settlement considerations

Thinking about these four topics will help you get ready to actively take part in the PAC, and help you take advantage of all that a PAC has to offer.

STANDARD OF REVIEW

Before your PAC, you should try to understand how strong or weak the appeal is, and what result you can expect if the appeal is successful. You first need to consider whether each issue appealed was raised in the trial court – if it was not brought to the trial court’s attention, the Appellate Court’s authority to look at it on appeal is extremely limited. Even if an issue was correctly brought up in the trial court, you also need to understand the standard of review that the appellate judges will apply to the issues raised on appeal. The “standard of review” refers to the lens through which the appellate judges will evaluate the issues before them.

The standard of review is different for different kinds of issues. The most difficult issues to win on appeal are those where the appellate judges apply the abuse of discretion standard. The abuse of discretion standard applies to many trial court decisions such as rulings to admit or exclude evidence, whether it involves documents or testimony. A trial judge has a lot of leeway in making rulings during trial. So, the appellate judges will not disturb the decision unless they are convinced that the trial judge had no valid basis for making it. In the case where a party claims that evidence should or should not have been admitted, there is another hurdle: The appellant must also show that the trial judge’s decision was not harmless error. In other words, after convincing the appellate judges that the trial judge abused his or her discretion, the appellant must then prove that the mistake likely affected the outcome of the decision.

Findings of fact made by a judge or jury are also very difficult to overturn on appeal. This is because appellate judges generally follow what the trial judge or jury decides, especially on issues involving witness credibility, that is, whether a witness lied or told the truth. The appellate judges will overturn a finding of fact only if they determine it was clearly erroneous. This means the appellate judges will not overturn the finding of fact unless the finding could not reasonably have been made based on the evidence admitted at trial.

REMEDIES

In addition to the standard of review, to assess the strength of your position as compared to that of your opponent's, you need to understand what the outcome – called the remedy – will be if the appeal is successful. Will there be a new trial or other, additional proceedings in the trial court, or will the appellant win outright? If there would be a new trial, would the trial address only some issues, such as the damages to be awarded to the plaintiff? You may not be able to obtain the relief you want – it might not be legally possible – and it is important to know your limitations in advance.

ASSESSING YOUR POSITION

Be aware that the majority of civil appeals are unsuccessful, so it is important to weigh your position realistically. That is why understanding the standard of review and potential remedies is so important for preparing for your PAC. Understanding these issues will help you to figure out the strengths and weaknesses of the appeal, to think through what risks each party faces, and to understand how long litigation may go on even after the appeal is over.

The PAC offers all parties the opportunity to consider settlement. By understanding each party's strengths, weaknesses, and risks, you will be able to think about what a reasonable settlement might look like. An appellant with a strong appeal is in a better position to negotiate a favorable settlement. On the other hand, the weaker an appeal is, the worse position an appellant is in to negotiate a favorable settlement. It is critical to understand where your appeal falls before you participate in a PAC, so you can point out the strengths of your position to the PAC judge, while staying realistic about your chances for success.

After considering the strengths and weaknesses of your case, you should also think about the time the appeal will take, and how much the appeal will cost you. Appeals are time consuming and can be expensive.

SETTLEMENT CONSIDERATIONS

When you think about settlement possibilities, you should keep in mind that a settlement is always a compromise. No one gets everything he or she is looking for when a case settles. Each side has to give in on some things to reach an agreement. Think about what that means for you personally. In your case, do you need to lower your demand for money, or make some payment to another party, in order to settle? If your case is not about money, can you take some other kind of action, or keep from doing something so that the case can settle? Are you willing to make the first offer of settlement, or should you reconsider an offer that has been made by the other party?

As hard as it is to do, you need to give serious thought ahead of time to the compromises you are willing to make. In doing so, you can be creative in proposing a resolution that may be acceptable to all parties involved in the appeal. This kind of preparation will likely make your PAC a more worthwhile experience.

You should be realistic about your expectations. Considering your standard of review, the remedies possible, and the strength of the issues on appeal will help you arrive at a realistic goal.

WHAT IS DISCUSSED AT A PAC

The focus of the PAC will be on the appeal – whether it is a strong appeal and whether it can be settled. Settlement can mean many different things. Depending on what your case is about, this might involve paying an amount of money, or agreeing to do certain things. You might even be interested in going through a formal mediation process. If there is a chance of settlement, the judge may ask the parties to write out a settlement agreement. Or, if more time is needed, the judge may allow the parties to pick another date to come back and finish the settlement discussions.

The PAC can be very useful for understanding the strengths or weaknesses of an appeal. It is the judge's job to encourage parties to settle weak appeals, or to narrow and focus the appeal on strong issues. Not every issue will win, and some issues are better than others. It is far better to have two stronger issues than seven weaker ones. Additionally, the judge can answer questions about the appellate process and schedule the first deadlines for filing briefs in the appellate courts.

WHAT IS NOT DISCUSSED AT A PAC

A PAC, like an appeal, is not a second trial. You may only talk about evidence or testimony that was considered at trial. You cannot show the PAC judge any “new” evidence, or try to explain background facts that were not discussed at trial. You cannot bring any witness with you or try to give testimony. An appeal is primarily about legal issues, and the PAC judge will ask you to focus on the legal issues in your case.

The PAC judge will not give you legal advice, and you should not ask the judge to do so. However, the PAC judge may give you his or her opinion on how the appeal might turn out, but he or she will never tell you what to do. You should not think of anything discussed during the PAC as legal advice.

During the PAC, you should not complain about the personality or competence of the trial judge. You can talk about any mistakes the trial judge may have made, and why those mistakes will create a good appeal. This is also not an opportunity to insult any attorney, witness, or the other party. Doing so will only damage your credibility.

Most importantly, do not forget that the main goal of the PAC is to figure out whether settlement is the best option for you, or, if not, which issues in the appeal are the most important.

WHAT SHOULD I DO DURING A PAC

It is important to behave appropriately during a PAC. Although the PAC is not a court proceeding, like a trial or hearing, it is a professional setting that requires appropriate and professional behavior.

First, you should come to the PAC with the right attitude. Keep an open mind, as you might learn something about your case and the appeals process. Be involved in the discussion by listening to everyone and participating when it is appropriate. You must also be ready to discuss the substance of your case, including the issues, the standard of review that applies to those issues, and what remedies you want. It is good to talk openly with the judge, and to keep realistic expectations.

Second, you should act in a professional manner. Do not interrupt anyone who is talking – you will be given chances to talk, and you won't want anyone else to interrupt you. You should always stay calm, use neutral language, and never swear, raise your voice, or be sarcastic. Do not sigh, roll your eyes, or use inappropriate hand gestures. You should also dress neatly and modestly. That means no baseball hats or other caps (unless they are for religious purposes), and no dirty or ripped clothing, shirts with offensive words or pictures, or tank tops. Never eat, drink, chew gum, or walk around the room. Food required for a medical condition may be allowed during the PAC, provided you ask the judge first and are not disruptive while you eat or drink. You should also plan to arrive 15 minutes early for your PAC.

FREQUENTLY ASKED QUESTIONS

Do I have to attend the PAC – What happens if I don't go?

Yes. Attorneys and self-represented parties must attend the PAC. Attendance is by order of the court and the failure to attend can result in sanctions, which might include a fine. If you are unable to attend the conference on the date and time scheduled, you must contact the judge holding the PAC to request that it be rescheduled. If you need to reschedule the PAC, you should also tell any opposing counsel and/or self-represented party. Finally, if, prior to the date of a scheduled PAC, the appeal is settled or withdrawn, the parties must notify the PAC judge prior to the scheduled date that the matter has been resolved.

Are my discussions during the PAC confidential?

Yes. Statements and comments made during the PAC are confidential. They may not be later discussed by the judge, attorneys or self-represented parties if the appeal moves forward. Conversations taking place during the preargument conference about the case are kept confidential to allow for honest discussions that may help reach a settlement or narrow the issues on appeal.

What orders can the Judge enter regarding my appeal?

The PAC judge does not enter any orders regarding the merits of the appeal. The judge does not enter any orders regarding any appeal or trial motions. The judge cannot decide the appeal. The preargument judge can set the timetable for filing briefs in the Appellate Court and can recommend that a case pending in the Appellate Court be transferred to the Supreme Court.

Will the PAC delay my appeal?

The PAC is an essential part of the appeal process. It provides an opportunity for the parties to think about their interests, assess the risks of appeal and determine whether a mutually satisfactory solution can be reached. The appeal does not move forward until after the PAC has been held. The appellate clerk's office often extends the time for filing the appellant's brief until after the PAC. If this has not occurred, the PAC judge has the power and will often extend the times for filing briefs.

Can I communicate directly with the Judge either before or after the PAC?

Parties should not independently communicate (either by phone, writing or e-mail) with the PAC judge concerning the substance or merits of their appeal. Communication with the judge either before or after the PAC without the other party present should only concern scheduling or a matter specifically requested by the judge during the conference.

What happens next?

If the appeal does not settle after the PAC, then the appeal will proceed. The next step usually will be to file a brief. A briefing schedule will be set and the appeal will move forward according to the appellate rules. In some cases, follow up settlement discussions may be scheduled with the PAC judge. Whether the appeal will move forward during the follow up time period will depend upon the specific situation and the briefing schedule ordered by the judge.