STATE BAR of NEW MEXICO
BRIDGE THE GAP MENTORING PROGRAM

Bridge the Gap Mentoring Program
Introduction to Appellate Courts
Resource 40

Worksheet 40 is intended to facilitate a discussion about appellate arguments and techniques and tips for effective oral argument.

- Observe together appellate arguments in the Supreme Court of New Mexico, New Mexico appellate court, or United States Circuit Court. Observe the different styles of argument and discuss what was the effective and ineffective. http://nmsupremecourts.gov/
- Provide suggestions for preparing for oral argument. Share with the new lawyer exercises that you or members of your firm engage in to prepare for oral argument.
- Discuss techniques for being effective during your argument, including:
    - Choosing the most important issues to raise during argument
    - Avoiding misstating or over-stating the facts or law in a case
    - Being honest and responsive when asked questions
    - Re-focusing on an issue you were addressing before being interrupted with questions.
    - Limiting or excluding emotion from argument
    - Having a conversation with the court (as opposed to reading from a script)
    - Managing your time
- Review the suggestions and tips provided in the attached articles. Boggs, Daniel. *Appellate Advocacy from a Judge's Perspective*. ABA Young Lawyer Division e-Library; John M. McCoy III, *Litigation 101*: *Handling Your First Appeal*, http://meetings.abanet.org/webupload/commupload/YL406000/realtedresources/HandlingYourFirstAppeal.pdf.
- Discuss the importance of professionalism in appellate practice. Review the attached article by Elligett, Tom, Scheb, John, and Farrior, Amy. *Answering to a Higher Authority: Appellate Professionalism*. The Bencher. Sept. /Oct. 2008.*
- Discuss unwritten guidelines for oral arguments such as proper attire, how to address the court, when and where to check in before arguments, who may sit at counsel's table, etc.

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Appellate Advocacy from a Judge's Perspective

Hon. Danny J. Boggs[1]

I. Getting inside the mind of the judge.

Davis said that if "fishes had the gift of speech, who would listen to a fisherman's weary discourse" about flies and lures, "[f]or after all, it is the fish that the angler is after and all his recondite learning is but the hopeful means to that end." While I doubt that I will replace all the weary discourse of the teaching world, I will try to discuss the view of one judge and my view of the views of other judges as well.

A. You are there to convince judges, not to win style points.

B. You are doing selling of a very special kind. Judges are not juries.

C. Sympathy and emotion have a part to play but quite a small one. In general, judges are smart enough to know their sympathies. You don't have to arouse them.

II. Your stock in trade is knowledge and candor. Don't oversell. You almost always hurt only yourself.

III. Remember your limits.

A. In the brief, the limit is the judge's attentiveness. The judge's time is flexible, but you have to earn her interested attention.

B. At oral argument, you have the attention, but time is the enemy. Don't waste it.

1. Minor points are time-wasting.

2. Overstating, and wrangling with the court about it, are deadly timewasters.

IV. Recognize that there is another side.

A. If your case has no difficulties, you don't need any advice.

B. If there are difficulties, recognize that you must deal with them.

[1] The Honorable Danny J. Boggs is Chief Judge of the United States Court of Appeals for the Sixth Circuit.

C. Deal with the difficulties yourself, in the questions presented, in the facts, and in the argument.

D. Put yourself in the judge's shoes. What questions would you want answered if you were judging?

E. What would you want to know and want to say to a curious but not unfriendly fellow bar patron?

V. Practice, practice, practice.

A. Spend a lot of time on role playing and "what if" questions.

B. Not just on verbal agility. Think through every avenue the oral argument could take.

C. You may come up with a brilliant answer on the spur of the moment, but don't bet on it.

D. Remember there are always three arguments:

1. The competent, thorough argument you prepare in advance.

2. The disjointed, hectic combat that is the actual argument.

3. The absolutely brilliant and convincing rejoinder you think of the next day.

VI. In your brief, don't leave rough edges and don't leave unanswered questions.

The judge's attention and "train of belief" is like a car with poor suspension. It can be jostled and sent out of control by small potholes. It will also unerringly find gaps in the road. Whatever your actual answer to those gaps will be, it is unlikely to be worse than the judge's unfettered speculation.

VII. Accuracy, accuracy, accuracy.

A. Nothing derails the judge's "suspension of disbelief" like inaccuracy, either in brief or oral argument.

B. Sometimes it is only annoying, like a page reference that is a little off, either in a case or in your own table of authorities.

C. Sometimes it is fatal, or even sanctionable, as with misstatements of the record or exaggerations of holdings.

VIII. Work to give genuine help to the judge that is inclined to be for you.

A. Make it harder for the judge that is inclined to be against you.

B. Give pause and food for thought for the judge that is genuinely undecided.

IX. Top Ten *Rejected* Techniques for Writing Your Appellate Brief

10. The new associate needs hours? She *can abstract the record* in my Sixth Circuit Appeal. Somebody's gotta read the thing.

9. Issues presented for review—buckshot from a shotgun.

8. The law's on our side, don't waste a lot of pages on the facts.

7. Add a couple of transitional phrases to the Table of Contents and— presto— summary of argument.

6. Universal first heading for every appellant's brief: The Trial Court Committed Reversible Error.

5. Words you must use in the argument when describing opponent's positions: ludicrous, shameless, misleading, outrageous.

4. Losing? Use Latin.

3. No Room? Argue it in a footnote.

2. Conclusion must be a single sentence with as many dependent clauses as possible and necessary to repeat entire argument.

1. Heaviest wins.

X. Top Ten Ways to Lose Your Case on Oral Argument

10. Thinking, as you walk to the podium, "Wow, never seen this much walnut paneling and marble and that presiding judge—white hair, bushy eyebrows—central casting."

9. "Your honor, although my time today is very limited, my ambition is not—I plan to touch briefly upon and summarize all of the arguments in our brief."

8. "Your honor, we would like to divide our argument time in the following manner: I will take the first 5¼ minutes to discuss our first issue; my partner, Ms. Smith, will take the next 3¾ minutes to discuss our second issue; my partner, Mr. Davis, will take the next 4 minutes to discuss our third issue, and my senior associate, Mr. Kelly, will take the next 1¾ minutes to discuss our fourth issue, and we would like to reserve the remaining ¼ minutes for rebuttal."

7. "Your honor, I didn't happen to read the case, but my partner did and she said it's not applicable."

6. "That's a very good question, your honor, but…"

5. "I'll come back to that a little later."

4. Head down. Reading (even with a few hand gestures thrown in).

3. "I know there's not much authority to support my argument, but gee, at one time everybody thought Copernicus was wrong, too."

2. Collapsing under the weight of the record as you answer, thumbing frantically, "I know the answer to your question is in here someplace, your honor."

1. Concluding with your best Dirty Harry impression, "Go ahead, your honor, make my day and rule from the bench!"

LITIGATION 101: HANDLING YOUR FIRST APPEAL

by

John M. McCoy III[1]

- **Understand the Rules.** Review the trial court's rules about appeals from its rulings as well as the rules of the appellate court, including local court rules.

- **Ensure the necessary steps have been taken in trial court to preserve issues for appeal.** Some issues may be waived by failure to file written objections or otherwise lay the appropriate foundation in the trial court.

- **Calculate and calendar the deadline for filing a Notice of Appeal.** In many jurisdictions, this deadline is jurisdictional and strictly enforced – make certain you know the date from which the deadline will be calculated.

- **Ensure all possible appellate issues are encompassed by the Notice of Appeal.** A failure to identify certain issues in the Notice of Appeal may be construed as a waiver. For example, be sure to appeal adverse evidentiary issues as well as substantive rulings, and any discovery rulings that may have affected your ability to develop and present evidence.

- **Review the necessary steps, and determine and calendar relevant deadlines, for perfecting record on appeal.** In some jurisdictions, the trial court clerk may be responsible for providing the appellate court with the official record in transcript – but don't simply assume it will be done. It's your obligation to ensure the record is complete.

- **Determine and calendar deadlines, and review service and filing requirements for opening and responsive briefs.** Many courts require the filing of multiple copies of the briefs. You may need to allow additional time for mailing if the appellate court is out of town.

- **If your case raises issues of broad interest to a particular industry or interest group, consider whether the filing of an amicus brief would be helpful.** Industry groups, public interest organizations, and trade associations are often willing to file amicus briefs that address the broader issues implicated by the resolution of a particular case, if the groups are made aware of the appeal.

- **Coordinate carefully with counsel for parties with aligned interests.** In cases involving more than two parties, there may be a number of briefs filed. Depending on the degree of overlap between the interests of your clients and other parties, consider filing a joint brief.

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[1] Mr. McCoy is a shareholder in Bird, Marella, Boxer, Wolpert, Nessim, Lincenberg & Drooks APC in Los Angeles, California. His practice focuses primarily on commercial litigation and white collar criminal defense. He is also a member of the Litigation Section of the ABA and the Business Torts and Technology For The Litigator Subcommittees.

Alternatively, pursuant to a joint defense or similar agreement, exchange and discuss drafts of your briefs well in advance of the filing deadline to avoid contradicting or undermining each others' arguments.

- **Review requirements for format of briefs and other submissions.** Don't assume you'll be able to just "dress up" your trial court brief and slap on a new cover. Appellate courts often have specific requirements – requirements that differ markedly from those in the trial court – for everything from the color of your brief's cover to way you cite the evidentiary record.

- **Carefully research the appropriate standard of review.** Simply demonstrating that the trial court made an incorrect ruling may not be enough to obtain relief from an appellate court. Make sure you understand and articulate the applicable standard of review and the degree of prejudice, if any, that an appellant must establish.

- **Familiarize yourself with the rules and conventions for oral argument in your jurisdiction.** These can vary widely from jurisdiction to jurisdiction. Do you need to request oral argument, or is it granted automatically? How much time is allotted, and how is that time allocated if there are more than two parties to the appeal?

- **Obtain the address, and driving and parking directions, for the appellate court.** Arguing your first appeal is stressful enough without worrying about whether you're going to get lost or be late.

- **Observe an oral argument in the court that will hear your appeal.** Learn the layout of the courtroom. Observe how more experienced lawyers address the court. If the panel is the same one that will hear your appeal, try to get a sense of how active the judges are in questioning.

- **Educate yourself about the judges assigned to hear your case.** Depending on the jurisdiction, you may not learn until a few days before argument which appellate judges will participate in your case. Research relevant prior opinions by those judges, but also survey more senior lawyers for information about the judges' demeanor and proclivity for asking questions during argument.

- **Prepare a single-page outline of points you want to address during oral argument.** Try to focus on broad themes and critical cases rather than a detailed "script". Don't become so wedded to detailed notes or a scripted presentation that you can't respond to questions or issues posed by the court.

- **Ask a colleague to "moot" you before oral argument.** You don't necessarily need to arrange a full-scale mock court, but do have someone else read the briefs and question you about them. A fresh eye and mind may identify questions or potential pitfalls you have overlooked while preparing the briefs.

- **Know what your "exit line" will be for oral argument.** Identify and make note of the final thought or argument with which you would like to close your argument. That way, you'll

have a comfortable way to "wrap up" your argument even if you've gotten off-track and are running out of time.

- **Simplify your pre-argument preparation.** Pick out the suit you intend to wear ahead of time and set it aside in the closet. Make sure you get enough sleep the night before your argument, and eat a healthy breakfast or lunch the day of your appearance. Arrive at the courthouse early enough to get a drink of water, relax, and organize your thoughts.

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Answering to a Higher Authority:

Appellate Professionalism

By Tom Elligett, Judge John Scheb
and Amy Farrior

Much of the emphasis on the need to improve professionalism focuses on trial practice. When a case moves to the appellate tribunal, it triggers a new set of procedural rules, new ethical considerations, and new opportunities for professional–or unprofessional–conduct.

Many ethical rules apply in appellate practice as well as trial practice. For example, candor with the tribunal (such as citing controlling adverse authority), diligence, and competence (a trial lawyer is not always best equipped with the different skills required in appellate practice). Beyond the ethical minimums, professional appellate lawyers should aspire to a higher level of practice.

Counsel should cooperate with each other on non-substantive issues, like submitting a full record for the appeal and reasonable extensions of time. On occasion, counsel may discover that a pleading, evidence, or something else they consider relevant has been omitted by the clerk preparing the appellate record. When opposing counsel recognizes the item was part of the record below, counsel should stipulate to supplementing the record on appeal. Not only is this the professional approach, but fighting may make it appear that counsel seeks to conceal something from the appellate court.

Some cases present time sensitive issues - an incarcerated prisoner's appeal or an appeal on which finalizing an adoption may depend. But in most cases, the professional approach is to agree to an extension. To the extent a client in a non-exigent case may be impatient, counsel can explain that (in most courts) such a request will be granted anyway, so there is no need to appear uncooperative before the court. One Florida appellate court has admonished counsel for opposing, without good cause, reasonable requests for an extension of time to file a brief. *See Florida Appellate Practice Guide*, Third DCA p. 6 (2005 edition).

Perhaps the area presenting the greatest potential pitfalls or chances to shine is the language appellate counsel chooses for written briefs and motions, and for oral argument. Some situations cross the ethical line. *See In re Paulsrude*, 311 Minn. 303, 248 N.W. 2d 747 (1976) (disbarring attorneys for referring to court as "kangaroo court" and judge as a "horse's ass."); *Thomas v. Patton*, 939 So. 2d 139 (Fla. 1st DCA 2006)(awarding attorney's fees against an appellant for raising frivolous arguments, and for using inappropriate phrases in the briefs); *Johnson v. Johnson*, 948 S.W.2d 835 (Tex. App. 1997)(appellate court referring counsel to the State Bar of Texas for maligning the trial judge in the appellate briefs).

Motions for rehearing dashed off in anger or disappointment are fraught with danger. One appellate court struck a petition for rehearing, stating the appellate court "has either ignored the law or is not interested in determining the law." *Vandenberghe v. Poole*, 163 So. 2d 51 (Fla. 2d DCA 1964). One member of the panel would have required the attorney to appear before the court to show cause why he should not be held in contempt. He observed that such a sentiment came within the colloquialism, "You can think it, but you'd better not say it." 163 So. 2d at 52.

As noted, the ethical rules require candor with the court. Professionalism and long term effectiveness also require honesty. This applies both to the facts, and to statutes and judicial decisions, including not lifting words out of context.

There are fewer appellate judges compared to trial judges, but all are likely to recall who has not been candid with them. Once a lawyer has a reputation for not being honest, that lawyer may share the predicament of comedian Lewis Grizzard's friend who ran for a local political office. His friend said "every time I told a lie I got caught, and every time I told the truth no one believed me."

Moving beyond the ethical minimums, the "tone" of the appellate lawyer's language reveals the lawyer's level of professionalism. Counsel should refrain from personal attacks on opposing counsel. Judges say they find it unprofessional for counsel to make disparaging remarks about opposing counsel or the trial court. Appellants should remember that on appeal they are seeking a reversal of a ruling, even when the argument may be based on the conduct of opposing counsel. It is still the ruling declining a mistrial, new trial, etc., that is under review.

Lawyers should choose their words cautiously. Attacking words like "frivolous," "absurd," "ridiculous," and "fatally flawed" are often examples of lazy as well as unprofessional writing. If the brief is well written - describing what happened and citing persuasive authority - the appellate judge should be able to draw the obvious conclusion. When criticizing one counsel for referring to the other side's arguments as "ridiculous," "blatantly illogical," and "silly," the court reminded counsel that "righteous indignation is no substitute for a well-reasoned argument." *Mitchell v. Universal Solutions of North Carolina, Inc.*, 853 N.E.2d 953 (Ind. App. 2006).

There may be instances when a particular word is a term of art, as in the rule of statutory construction that courts will not construe statutes to reach an absurd result; so using "absurd" may be appropriate. There are also instances where a harsh word choice may convey the wrong meaning. For example, an appellant might write that something is a "fundamental error" when he means the ruling was a big mistake that only an inferior intellect could make. But to appellate judges, "fundamental error" means the writer is conceding the point was not preserved for appellate review.

If a writer thinks the opposing counsel has not accurately portrayed the facts or the law, saying counsel "misrepresented" connotes a malicious intent. By using words like "misunderstands," "misreads," or "fails to appreciate," the writer takes the high road. If the judicial reader agrees enough times (or has seen this before from the lawyer), the judge can conclude the obvious.

As with other aspects of our practice, the professional choice is the better choice. Counsel may be tempted to write or speak in a harsher tone if the lawyer or client feels the other side is getting away with things despite corrections in an answer or reply brief. And counsel may be concerned that subtlety may be lost on busy courts. The appellate and trial courts might foster more confidence if they, perhaps subtly in oral argument, convey that they "got it." But in any event, professional lawyers should focus on presenting their points effectively and professionally, and not be lured off-course by an unprofessional opponent's antics.

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(Ethics Column continued from Page 4)

practice, respectively. Report 114 also takes the position that a purpose of the Model Rules is to promote uniformity in ethical principles and that that objective has not been achieved on this important subject, impairing the effectiveness of the Model Rules as a unifying model.

Some members of the House of Delegates opposed the screening proposal outright. Others supported one or both of two amendments to the proposal that were floated in the days before the vote. One of those amendments would have limited screening to situations in which the disqualified lawyer was not substantially involved in the prior representation. That would have significantly limited the effect of the proposal. The other amendment to the screening proposal would have added some procedural safeguards for the lateral attorney's applicable former clients.

The screening proposal currently is expected to be taken up again by the House at the ABA Midyear Meeting in Boston in February 2009. Unlike the vote in 2002, the 192-191 vote on August 12, 2008, was to table the screening proposal indefinitely, not to defeat it. While there were not "sub-votes," it appears that many of those who voted to postpone the proposal wanted more time to consider the subject and the proposed amendments to the proposal and were not necessarily opponents of the proposal, and, at the same time, that some who voted not to postpone may simply have wanted to proceed to a final vote and were not necessarily supporters of the proposal.

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This column should not be understood to represent the views of any of those entities or the firm's clients. John's e-mail address is jratnaswamy@foley.com.

Editor's Note: In the last Ethics Column by Francis Pileggi, we neglected to italicize his case citations. That was our error.