Appellate Advocacy:

Brief Notes and Materials

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Sponsored by Justice and Legal System Research Institute

Addis Ababa, Ethiopia

July 2009

JUSTICE AND LEGAL SYSTEM RESEARCH INSTITUTE

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This volume is Part I of the teaching material for the course titled *Appellate Advocacy and Appellate Moot Court*. Chapter 1 lays down the conceptual foundation for the subsequent second and third chapters that deal with appellate briefs and oral argument.

Contents

Unit 3- The Role of Appellate Counsel

Chapter II- Appellate Brief

Chapter III- Oral Argument

Part II- Appellate Moot Court

The second part of the course, i.e. *Appellate Moot Court* will be covered from the 8th to the 15th week of the semester. The tentative syllabus reads: "[a]fter submission of appellate briefs, students will team up in a team of two …, and argue as counsels for appellant or respondent. After the coverage of the first part of the course during the first seven weeks, a teaching material titled Part II "*Appellate Moot Court*" will be used for the second part of the course.

Preface

This teaching material embodies notes and readings for the first part of the course, *Appellate Advocacy and Appellate Moot court*. Students benefit from earlier courses including Legal Research Methods, Law of Civil Procedure, Criminal Procedure, Evidence, Legal Writing, Legal Profession & Ethics and Pre-trial Skills & Trial Advocacy.

The course material for Part I, i.e. *Appellate Advocacy*, covers three chapters as indicated in the Table of Contents and the General Introduction. This teaching material briefly introduces a conceptual framework on procedural, technical and ethical issues (in Chapter 1) and aims at the enhancement of skills in identifying issues of appeal and preparation of appellate brief (in Chapters 2) and elements of effective appellate oral argument (in Chapter 3).

Students are expected to do thorough reading within the brief period allocated for the first part of the course (i.e. *Appellate Advocacy*) and do the tasks and review exercises in each unit so that they can be equipped with the basic skills they are expected to put in practice while writing appellate briefs and conducting oral arguments in appellate moot court rounds. Part I, i.e. *Appellate Advocacy* is covered within the first seven weeks after which the second part of the semester, i.e., weeks 8 to 15 will be devoted to *Appellate Moot Court*.

Instructors are expected to be innovative in using the notes and readings so that students can relate them to actual appellate settings.

Acknowledgement

I thank Ato Filipos Aynalem for the very useful feedback and comments he gave me as assessor of this teaching material. And, I am particularly grateful to Trial and Appellate Advocacy students at SMUC Faculty of Law (2000 & 2001 Eth. Cal) and to Lawyering Process III students at AAU Faculty of Law of the academic years 1998 and 1999 Ethiopian Calendar (i.e 2005/2006 and 2006/2007) because their active participation during class sessions and moot court rounds have greatly assisted the development of some of the readings that are included in this teaching material

General Introduction [1]

The course, *Appellate Advocacy and Appellate Moot court* focuses on appellate brief writing and appellate advocacy skills that are valid, coherent, brief and persuasive. Students are expected to individually write appellate briefs from cases which they can choose or a case given by the instructor. Research conducted by students on the legal issues involved in the appeal and (partial or complete) preliminary drafts of the brief shall be submitted for the comments of the instructor before the final draft. After the submission of the appellate brief, students shall be allowed to conduct oral exercises in group study sessions and tutorial sessions (outside class hours) so that they can get peer feedback and similar comments from their tutor or instructor.

The second part of the course (Weeks 8 to 15) involves appellate moot court in which students individually (or in pair where more than one major issue is involved) represent the sides of the appellant and the respondent. The mooting simulates the Federal Supreme Court or State Supreme Court and cases that have been decided at all levels (including supreme courts and courts of cassation) can be used with a simulation that they have been rendered by a court from whose decision appeal can be lodged to the Supreme Court. In case the class size exceeds a maximum of *twenty-four* students, the class can be split into sections.

The following *samples for* course description, objectives and methodology are mainly taken from the course syllabus for handy reference to the nature of the course to which this course material is prepared as teaching material for Part I.

[1] The General Introduction and Specific Learning Outcomes are mainly taken from the course description of the sample syllabus for the course "Appellate Advocacy and Appellate Moot Court" with adjustments.

Course description

The core objective of this course is professional and effective appellate advocacy in civil and criminal cases. Appeals involve submission of pleadings and oral arguments. The course primarily focuses on the skills involved in appellate advocacy and appellate moot court competition (i.e. simulated civil and criminal case oral litigation) that involve written appellate brief and oral debate.

After a brief introduction on basic procedural, technical and ethical concepts that are relevant to appellate review, students will practice writing appellate briefs which will serve as the basis of their oral argument in simulated appellate moot court rounds. In the process, students are expected to practice and enhance the basic skills of identifying issues of appeal, researching the appellant's points of facts and law, analysis and reasoning, and written and oral communication skills.

General Course Objectives

The general objective of this course is to enhance:

a) appellate issue identification skills,
b) appellate research and analysis,
c) appellate brief writing, and
d) appellate oral argument skills of students.

To this end, the course:

a) requires students to identify issues of appeal, prepare appellate briefs which will finally culminate in oral arguments at a moot appellate court,
b) gives students an opportunity to watch courtroom appellate litigations of real cases, and
c) nurtures the spirit of team work.

Specific learning outcomes

At the end of Appellate Advocacy and Moot Court students are expected to be able to:

a) explain appellate review on facts and law;
b) discuss the appellate and cassation structure under Ethiopian law;
c) identify appellant's points of fact;
d) identify appellant's points of law;
e) explain art of appellate advocacy;
f) discuss the role of appellate counsels;
g) discuss the elements of effective appellate briefs;
h) write appellate briefs;
i) write appellee's (respondent's) briefs;
j) explain the elements of effective appellate oral arguments;
k) submit appellate presentations; and
l) respond to questions during appellate litigations.

Tasks and Skills

The course focuses, *inter alia*, on tasks and readings that enhance the skills to:

a) conduct intensive research on the law relevant to the appeal;
b) examine the case and decision of a lower court from the perspectives of an appellant or an appellee and analyze the potential for review by the appellate court;
c) write, rewrite and edit the appellate brief in such a manner that it is brief, coherent, simple without meanwhile losing the core issues of appeal;
d) pay attention to appellate procedures and carefully undertake all procedural and technical requirements in the appeal process;
e) present oral argument as counsel for appellant or appellee;

f) respond to impromptu questions from the court throughout the appeal process.

Method

Introductory lectures shall be used to acquaint students with the conceptual framework relevant to the units covered in the course. Methods of teaching that ensure active participation of students are employed.

The principal methods to be used after introductory lectures are a mixture of simulation and discussion which include feedback from students and the instructor. Cases (both real and hypothetical) are used as inputs for classroom discussions. Course delivery is learner centered and requires prior reading, active participation and discussions.

Preliminary oral presentations are made by students if the class size is above twenty four, after which twenty-four students are selected for *First Round* moot court tryouts that will be held in class. Sixteen students will then be selected for the *Second Round* debate to be followed by the *Semi-final debate* that involves eight students. And finally, the *Final Round* shall be conducted among four finalists.

Supplementary activities

- Court watching during appellate oral debates and submission of *Observation Report*, with comments.

Student performance assessment

- Written assignments
- Appellate brief Oral presentations/ Appellate simulations
- Court watching reports on appellate oral debate

Part I
Appellate Advocacy

Overview

This teaching material deals with the first part of the course, i.e., *Appellate Advocacy*, and includes three chapters. As stated in the preface and general introduction, the first chapter lays down a *conceptual framework* on procedural, technical and ethical issues relevant to the appeal process. The second and third chapters respectively deal with *appellate briefs* and *oral arguments*.

The first seven weeks will be allotted for the first part of the course (*Appellate Advocacy*) during which the three chapters in this teaching material can be covered as a foundation for *Appellate Moot Court* that will be conducted from the eighth to the fifteenth weeks of the semester. *Chapter I* will be covered in three weeks, after which four weeks will be allocated to *Chapters II* and *III*. The course requires two class-hour contact sessions per week in addition to which students are expected to devote four hours (every week) for individual reading and group or pair discussion.

The Chapters and Units covered under Appellate Advocacy are the following:

Chapter I- Conceptual Framework

- Unit 1- Appellate Review: Basic Rules and Principles
- Unit 2- The Art of Appellate Advocacy
- Unit 3- The Role of Appellate Counsel

Chapter II- Appellate Brief

Chapter III- Oral Argument

Chapter I
Conceptual Framework

Introduction

The First chapter addresses the conceptual framework that is essential for the remaining sections of the course. The themes of this chapter are classified into three units. Unit 1 highlights the definition of appellate review and the structure of the appellate and cassation review system. Units 2 and 3, respectively deal with the *art of advocacy* and the *role of appellate counsel*.

Although the various concepts addressed in Unit 1 have already been covered in various courses such as laws of Civil Procedure, Criminal Procedure, Legal Writing, Legal Research Methods, Professional Ethics and others, certain core concepts are highlighted without going to details. Students are thus expected to revise their readings in the courses they have already taken such as laws of civil or criminal procedure. A case in point is the structure of the Ethiopian appellate court system which requires careful revision.

Issues that are relevant to appellate advocacy and that have been covered by laws of civil procedure, criminal procedure, evidence and other courses need to be revised by the students themselves so that this course can give more emphasis to appellate advocacy skills rather than issues of procedure. This course does not repeat procedural issues that are involved in the process of appellate advocacy.

Expected number of learning hours (Weeks 1, 2 and 3):

- Class hours: *Two hours* per week
- Student independent workload: *Four hours* per week
- Pace of chapter coverage: A unit per week

Unit 1: Appellate Review: Basic Rules and Principles

1. Specific Learning Outcomes

At the end of this chapter, students are expected to be able to:

a) define appellate review;
b) explain Ethiopian appellate and cassation structure;
c) discuss who can appeal and the time within which appeal can be filed;
d) explain how many times a person can lodge an appeal;
e) contrast appeal from final judgment and interlocutory appeal;
f) discuss the scope of appellate review regarding erroneous factual findings, erroneous findings on issues of law and on mixed questions of law and fact;
g) contrast appellate review on questions of law and fact versus cassation review on basic errors in law; and
h) relate the harmless error doctrine with Ethiopian law.

Expected number of learning hours for Chapter 1 Unit 1 (Week 1)

- Class hours: *Two hours*
- Student independent workload: *Four hours*

2. Unit Introduction

Appellate review is the process by which a party aggrieved by the decision of a court or a tribunal lodges an application requesting that the judgment be reversed or set aside by the higher court which is referred to as an appellate court. "When an appeal has been taken, the appellate court reviews the decision of the subordinate court to determine whether that court committed such errors in its hearing and disposition of the case as to require the appellate court to *reverse* the decision."[1] The outcome of the appeal might be *confirmation* of the judgment appealed from, or *reversal*. In some cases, the error may be "such that it can be corrected by *variation* of the judgment, and the appellate court has the power to do so." As Sedler wrote, "the appellate court will usually make a final disposition of the case, although in certain circumstances it may remand the case to the subordinate court for re-trial."[2] It is to be noted that an appellate review does not involve the retrial of a case by the appellate court and that the appellate court does not, in principle, hear additional evidence other than the few circumstances in which additional evidence is allowed.

The pertinent questions that arise at this juncture are who has the right to appeal, when may he/she appeal and how many times may he/she appeal?[3] There is also a fundamental question that needs to be addressed regarding the higher court that can hear a given appeal.

Article 320(1) of the Civil Code and Articles 185 and 186 of the Criminal Procedure Code allow any party to lodge an appeal against final judgment. Moreover, the right to appeal is enshrined in Article 20(6) of the Constitution of the Federal Democratic Republic of Ethiopia. However, there are limits to the number of appeals allowed and time-limit for filing an appeal. Moreover, there are

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[1] Robert Allen Sedler (1968) *Ethiopian Civil Procedure* (HSIU, Faculty of Law & Oxford University Press), p. 218

[2] *Ibid*

[3] Stanley Z. Fisher (1969) *Ethiopian Criminal Procedure* (HSIU, Faculty of Law & Oxford University Press), p. 426

restrictions regarding interlocutory appeal, an issue which is briefly addressed in the readings of this unit. The details of procedural issues are beyond the scope of this reading and students are expected to revisit their lessons on procedural laws.

One of the core issues that arise in appellate advocacy is the issue of identifying the court that is empowered to receive an appeal. Jurisdiction of courts is enshrined in Article 80 of the Constitution of the Federal Democratic Republic of Ethiopia which stipulates that "The Federal Supreme Court shall have the highest and final judicial power over federal matters."[4] Likewise, State Supreme Courts shall have similar final judicial powers over state matters.[5] Article 80 of the Constitution further empowers the Federal Supreme Court with "a power of cassation over any final court decision that contains a basic error of law."[6] State Supreme Courts are entrusted with similar powers of cassation over final judicial decision on state matters.[7]

In addition to state jurisdiction, State High Courts shall "exercise the jurisdiction of the Federal First Instance Court,"[8] while State Supreme Courts shall concurrently exercise the jurisdiction of Federal High Court,[9] and in effect receive appeal from decisions "rendered by the State High Court exercising jurisdiction of the Federal First Instance Court."[10] It is to be noted that decisions of a State Supreme Court on federal matters "are appealable to the Federal Supreme Court."[11]

Jurisdiction of courts may be first instance and appellate. A decision of first hearing is subject to appeal. If, however, the highest court is allowed to have first instance jurisdiction, this would violate Article 20(6) of the FDRE Constitution

[4] FDRE Const., Art. 80(1)
[5] FDRE Const., Art. 80(2)
[6] FDRE Const., Art. 80(3)(a)
[7] FDRE Const., Art. 80(3)(b)
[8] FDRE Const., Art. 80(4)
[9] FDRE Const. Art. 80(2)
[10] FDRE Const. Art. 80(5)
[11] FDRE Const. Art. 80(6)

which guarantees the right of an accused person to appeal from an order or judgment of the court which first heard the case. Article 8 (1) of the Federal Courts Proclamation No. 25/1996 confers first instance jurisdiction on the Federal Supreme Court over "offences for which officials of the Federal Government are held liable in connection with their official responsibility." Moreover, two other instances of the Federal Supreme Court's first instance jurisdiction are stated in Sub-Articles 2 and 3 of Article 8 of the Proclamation. In effect, for example, a minister in the Federal Government will not have access to appeal (other than cassation petition) because it is the highest court (i.e. the Federal Supreme Court) that would have first instance jurisdiction, beyond which appeal becomes impossible. This apparently calls for amendment of Article 8 of Proclamation No. 25/1996.

The details of appellate jurisdiction are stipulated in various laws. Article 9 of Proclamation No. 25/1996 (Federal Courts Proclamation) provides that: "[t]he Federal Supreme Court shall have appellate jurisdiction over:

1) decisions of the Federal High Court rendered in its first instance jurisdiction;
2) decisions of the Federal High Court rendered in its appellate jurisdiction in variation of the decision of the First Instance Court."

The appellate jurisdiction of the Federal High Court is embodied in Article 13 of Proclamation 25/1996 which stipulates that "[t]he Federal High Court shall have appellate jurisdiction over decisions of the First Instance Court." Articles 9 and 13 clearly state that the Federal High Court has appellate jurisdiction over the decision of the Federal First Instance Court, while there can be appeal from the decision of the Federal High court only if the latter had assumed first instance civil or criminal jurisdiction over the case or if the Federal High Court has rendered decision that varies from the decision of the Federal First Instance Court. In other words, a party who had appealed from a decision rendered by the Federal First Instance Court cannot lodge a second appeal to the Federal Supreme Court in case

the decision of the First Instance Court has been confirmed by the Federal High Court.

Courts decide on questions of fact and questions of law. Articles 9 and 13 envisage appeals from decisions that have been rendered on issues that involve facts, laws or both. Where the appeal does not involve additional evidence, the appellate court may hear the oral arguments of the appellant and dismiss the case without the need to call the respondent.[12] If the court dismisses the case upon the first hearing, memorandum of appeal is served to the respondent and there will be a hearing for both parties.[13] Article 339 of the Civil Procedure Code regulates the procedures of the oral argument and Article 340 deals with cross-objections where the respondent (in whose favor a decree was given by the lower court) may submit issues which he/she "could have taken by way of appeal notwithstanding that he did not appeal form any part of the decree or order." A case in point may be a decree allowing a respondent to receive claims lesser than the items or amount stated in her/his pleadings.

As covered under earlier courses, cassation revision is different from appellate review. Cassation revision requires that final decision rendered bear "fundamental error of law." Article 10 of Proclamation No. 25/1995 provides that:

> "In cases where they contain fundamental error of law, the Federal Supreme Court, shall have the power of cassation over:
>
> 1) final decisions of the Federal High Court rendered in its appellate jurisdiction;
> 2) final decision of the regular division of the Federal Supreme Court
> 3) final decisions of the Regional Supreme Court rendered as a regular division or in its appellate jurisdiction."

An appeal confirmed by the Federal High Court or Federal Supreme Court is final. However there lies the process of cassation from such final decisions where there is "fundamental error in law." In other words, there should be '*an error of law*' and secondly, the error should be '*fundamental*' enough to alter the outcome of the case.

[12] Civil Proc. Code, Art. 337
[13] Civil Proc. Code, Art. 338

For a decision to be heard in cassation by the Federal Supreme Court, Article 22 of Proclamation 25/1996 requires "prior ruling as to the existence of fundamental error of law qualifying for cassation, by a division wherein three judges of the Federal Supreme Court sit." It is to be noted that where the cassation litigation is allowed, Article 22/2 of the Proclamation uses "*applicant for a hearing in cassation*" thereby showing that cassation shall not be considered as continuation of the appeal process despite its potential for judicial review.

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3. Tasks (Week 1)

a) Structure of the appellate court system

Students will conduct individual reading and group/pair discussion on the Federal appellate system and Regional appellate systems, and make brief presentations in class during which they will respond to questions raised by other students and the course instructor.

b) Appellate review and the scope of appellate review

Students are expected to thoroughly go through *Readings 1* and *2* (Fisher & Sedler) and make class presentations on:

i. the 'right' to appeal
ii. Interlocutory appeals
iii. Time and procedures of filing an appeal
iv. Stay of execution
v. Grounds of appeal
vi. Hearing of the parties
vii. Framing of issues
viii. Additional evidence
ix. Review of findings of fact
x. Reversal and remand.

c) Cassation revision on basic errors in law

Careful reading of pertinent provisions in Proclamation 25/1996 (Federal Courts Proclamation) and Proclamation No. 454/2005 (Federal Courts Proclamation Re-amendment Proclamation) is required based on which cassation review is compared and contrasted with appellate review.

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4. Review Exercises

(Cite relevant provisions)

N.B- Students are expected to go through the readings in this unit before they address the review questions:

a) Define appellate review and contrast it with cassation review.
b) What are the parties called during cassation, and why?
c) Discuss the number of appeals that may be allowed in the Federal court system and the court structure of one of the Regional States.
d) Define 'final judgment.' Should it mean judgment which cannot be appealed from? Or a judgment that ends litigation?
e) "Appeal is a legal procedure and not a right. It exists only when it is stipulated by laws, and not as inherently presumed right." State whether you agree with the statement and explain your reasons. If you agree with the statement, how do you reconcile your position with Articles 37(1) and 20(6) of the FDRE Constitution?
f) Define interlocutory appeal.
g) Fisher (Reading 1) classifies interlocutory appeal into three categories one of which includes the ones that are not allowed. State the interlocutory appeals that are not allowed in criminal and civil cases.
h) Article 320(4) of the Civil Procedure Code embodies the exception in which interlocutory appeals may be allowed. State another exception which is not stated under this provision.
i) The court's rejection of any preliminary objection can be ground of appeal where it leads to dismissal of the case. Explain.
j) Although appeal is not allowed in certain interlocutory orders, they are reviewable through appeal after final decision. Explain.
k) "Appeal means review of a case and not retrial." Do you agree? State your reasons. If so, how does remand of a case for retrial to a lower court fit to your conclusion?

l) A client seeks your legal opinion regarding review of judgment rendered by the Federal First Instance Court because new evidence has been discovered that would alter the decision of the case. Advise her which court she can seek the review.

m) Contrast submission of notice for appeal and filing memorandum of appeal.

n) State the time for appeal in criminal and civil cases.

o) Discuss stay of execution in criminal and civil cases. State the schemes of security for the due execution of the decree or order of the appellate court.

p) The defendant has been released on parole (አመክሮ) after having served two third of his sentence, 3 years. The Public Prosecutor has lodged an appeal and the respondent has appeared to court:

   i. Does the principle of *stay of execution* allow the respondent to stay on bail? Or, would the respondent be sent to prison until the Appellate Court renders judgment on Public Prosecutor's appeal?

   ii. What if the defendant is not released on parole, and is processing his release from prison because he has served his sentence?

q) Articles 328 of the Civil Procedure Code and Article 189 of the Criminal Procedure Code provide that grounds of appeal must be stated concisely and without any arguments. Write examples of argumentative statements that are not allowed.

r) State the situations under which the appellate court may authorize submission of new evidence in civil cases.

s) Compare and contrast the scope of Article 345 of the Civil Procedure Code and Article 194 of the Criminal Procedure Code with regard to allowing new (additional) evidence.

t) In a litigation between plaintiff and defendant that involved a claim of Birr 200,000 plus damages, the court decided in favour of the plaintiff for payment of Birr 200,000 but did not accept the claim for damages. Who may appeal in this case?

u) Assume that a charge of corruption has been filed against a minister in the Federal Government. Discuss first instance jurisdiction and prospects of appeal based on the relevant laws.

v) Murray and DeSanctis (Reading 3.1) suggest that "*quality is better than quantity*" when an appellate attorney (in an appeal) points out the lower court's errors. Explain.

w) In '*de novo*' review the Appellate Court decides the issue "as if the lower court had never taken it up." Does this mean retrial?

x) Compare the "*harmless error doctrine*" discussed in Reading 3.2 with Article 208 of the Civil Procedure Code and state their common features.

y) As Anna-Rose Mathieson observed:

> "In the American system, *trial* is a single grand event that is supposed to resolve all factual disputes; in continental systems the search for factual accuracy is an ongoing *process* from trial through appeal. The investigating magistrate begins the process of gathering facts; at trial these facts are re-examined and new conclusions drawn; on appeal new evidence may be heard, witnesses may be recalled, and the factual conclusions of the trial court may be reconsidered and revised." (*Emphasis added*)

Where do you classify the Ethiopian trial and appellate system?

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5. **Readings** (Week 1)

Reading 1- Stanley Z. Fisher, *Notes and Questions*

Reading 2- R. Sedler, *Review by Appeal to a Higher Court*

Reading 3- Comparative Literature

3.1- Murray & DeSanctis: *Appellate Advocacy: Appeals, Writ, Standards of Review*

3.2- Bentele & Cary: *Appellate Advocacy* … (Chapters 3, 4 and 5)

3.3- A. Mathieson, *Review of Error*

Reading 1: *S. Z. Fisher*

S. Fisher on Judicial Appeal in Criminals Law Cases

Stanley Z. Fisher (1969) *Ethiopian Criminal Procedure* (HSIU Faculty of Law & Oxford University Press)

Introduction

(Fisher: Page. 419}

For a party dissatisfied in whole or part with the decisions reached by the trial court, appellate procedures are foremost among the possible post-judgment remedies. …

Notes and Questions

(Fisher: Pages 426-427)

Every legal system must regulate the extent to which administrative and judicial decisions will be subject to review and revision. At some point, clearly, decisions must be deemed "final" if they are ever going to be enforced. But there is an obvious risk in giving unreviewable decision-making power, particularly in criminal law matters, to one individual or group at any stage of the process. The rules must attempt a balance of these conflicting values. Whether there should be any right to judicial review of a particular decision should depend upon such factors as the qualifications of the decision-maker, the nature and grounds of the decision, and perhaps also the availability of other issues of review aside from judicial appeal. Once it is decided that a particular decision is reviewable on appeal, we must settle three further preliminary questions: *who* has the right to appeal, *when* may he appeal, and how many times may he appeal?

While all of these questions are important, the "when" question may cause particular problems in Ethiopia. The Ethiopian Criminal Procedure Code is especially ambiguous on the question of interlocutory appeal; defined by Professor Sedler as "appeal from an interlocutory matter, a matter on which the court has rendered a decision, but which decision does not finally dispose of the case."[14] To the extent that "justice delayed is justice denied," a liberal interpretation of the right to take interlocutory appeals in criminal matters may have a disastrous effect on criminal law administration in [Ethiopia]. On the other hand, the formulation of satisfactory criteria for regulating the right will not be simple.

It may be useful to divide "interlocutory appeals" into three categories: those which the Code expressly forbids, those which it expressly permits, and those which

[14] R. Sedler, Ethiopian Civil Procedure (Addis Ababa, Faculty of Law, 1968) p.221

are neither expressly forbidden nor permitted. This third category, it will be seen, is the largest of the three, and it is important to decide at the outset: Are such appeals all impliedly forbidden (as the Civil Procedure Code /expressly/ forbids all interlocutory appeals which are not expressly permitted), or are they all impliedly permitted, or have the courts the discretion either to permit them or not? Insofar as the decision whether to permit an interlocutory appeal is discretionary with the court, then the following factors might be relevant in deciding which matters should be subject to interlocutory appeal: How likely is it that the decision appealed from is erroneous? Will the appellant suffer any irreparable harm if his appeal is barred until the litigation ends? Will it be more convenient for the court system to consider the matter later rather than earlier? What harm to the system or the appellee will result from the delay entailed in permitting the appeal? Are any remedies other than appeal (*e.g.*, administrative remedies) available to the would-be appellant?

Review Exercises

Read the hypothetical problem cases and questions in Stanley Fisher (1969) *Ethiopian Criminal Procedure* (pp. 426- 429) and discuss whether the defendant (or the Public Prosecutor) has the right to appeal including interlocutory appeal. The hypothetical problems include the following:

a) D is remanded in investigative custody for ten days … under Article 59.[15] …
b) D appeals … denial of bail to the (Federal) High Court and loses. May he appeal the (Federal) High Court's decision to the Supreme Court?
c) M wishes to appeal the [court] order under Article 79 that the [bail] bond he signed to guarantee D's presence at trial be forfeited. D disappeared the day after he pleaded not guilty to the charge under Article [675 of the 2004 Criminal Code] [16] but M claims he was coerced by the police into signing the bond.
d) Under Article 45(2) the High Court ordered the public prosecutor to prosecute D under [Article 665 of the 2004 Criminal Code].[17] The public prosecutor and D both appealed to the Supreme Court. …

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[15] The provisions are from the Criminal Procedure Code unless stated otherwise.
[16] The original reads "Article 641 [of the 1957 Penal Code]."
[17] The Original reads "Article 630 [of the 1957 Penal Code]."

Reading 2: *R. Sedler*

R. Sedler on Review of Judgments by Appeal

Review of Judgments by Appeal

The extract hereunder covers pertinent issues that are relevant to appellate review (in civil cases) under Ethiopian Law. Various issues that have already been covered under the course: Law of Civil Procedure have been omitted. Conceptual and illustrative details have also been omitted because the purpose of the reading is to enable students revise the laws and concepts relevant to the various tasks involved in appellate lawyering. The reading is taken from Chapter IX of Sedler's book stated below, and it doesn't include review of judgments in the court of rendition due to procedural irregularities (Articles 207 to 210 of the Civil Procedure Code). Moreover, the reading does not cover review of judgments owing to new evidence (Civ. Pro. C., Art. 6) or due to valid opposition by a person who was not a party in the litigation while he/she should and could have been made a party and whose interests are affected by a judgment as stipulated under Article 348 of the Civil Procedure Code. Footnotes that describe foreign laws and cases have been omitted

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Review (of Judgments) by Appeal to a Higher Court

Source: Robert Allen Sedler (1968) *Ethiopian Civil Procedure* (HSIU Faculty of Law & Oxford University Press)

(Pages 218 – 254, with omissions)

The most common method of obtaining review of judgment is by way of an appeal. An appeal may be defined as an application by a party to a higher, or as it is called, an appellate court, asking that court to set aside or reverse a decision of a subordinate court. [18] When an appeal has been taken, the appellate court reviews the decision of the subordinate court to determine whether that court committed such errors in its hearing and disposition of the case as to require the appellate court to *reverse* the

[18] Footnote omitted

decision. If such errors were not committed, the decision of the subordinate court will be *confirmed*. In some cases, the error is such that it can be corrected by varying the judgment, and the appellate court has the power to do so. In Ethiopia, … the appellate court will usually make a final disposition of the case, although in certain circumstances it may remand the case to the subordinate court for re-trial.

An appeal, then, means a review of the case *and not a retrial of the case by the appellate court*. Frequently, the ground for appeal will involve errors of law allegedly committed by the subordinate court. As a rule, the appellate court does not hear additional evidence on the appeal, and where the introduction of additional evidence is permitted, it is limited to a particular question. …

1. Right of Appeal

Either party may, in accordance with the provisions of the Code, appeal against any final judgment rendered in the subordinate court. [19] The party taking the appeal is called the appellant, and the party in whose favor the judgment was rendered is called the respondent. On appeal, they are referred to by these designations, although it is not uncommon to refer to the plaintiff-appellant or plaintiff-respondent and the defendant-respondent or defendant-appellant. It is also possible that both parties may be dissatisfied with the decision and if so, both may appeal. For example, the court may have found for the plaintiff, but may have awarded him a lesser amount of damages than claimed. In such a case, the defendant may appeal from the decision on the issue of liability,[20] and the plaintiff may appeal from the decision on damages. Since the judgment on the issue of liability was for the plaintiff, his appeal is called cross-appeal: as to that issue, the plaintiff would be the cross-appellant and the defendant the cross-respondent. However, if only the plaintiff appealed, he would be the appellant and the defendant would be the respondent.

The party seeking the appeal must have been adversely affected by the judgment which he is challenging. Just as a party cannot bring a suit to have some abstract question determined, he may not seek review of a decision unless he has been injured by that decision. Thus, where the plaintiff proceeded on alternative theories of liability, and the court found in his favor on one theory, but not on the other, and have him all the relief sought, he cannot appeal on the ground that one issue was decided against him. [21] … A party may only appeal where he has been adversely affected by the judgment which he is challenging. In multi-party litigation, any or all parties may appeal if they are adversely affected by the decision. …

The judgment appealed from is presumed to be correct, and the burden is on the appellant to show that it should be reversed or varied.[22] Thus where there was an appeal and a cross-appeal, the appellant would have the burden of showing that the

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[19] Civ. Pro. C., Art. 320 (1)

[20] The defendant may also appeal on the issue of damages. It is conceivable that the defendant would appeal, contending that the court awarded the plaintiff too much by way of damages, and the plaintiff would appeal, contending that the court awarded him too little.

[21] Footnote omitted

[22] Footnote omitted

portion of the judgment he was attacking was erroneous, and the cross-appellant would have the same burden with respect to that portion of the judgment which he was attacking.

Where an appeal lies, but a remedy is available in the court which gave the judgment or order, no appeal may be lodged until such remedy has been exhausted. [23] This would include a situation … where procedural irregularities have occurred in the subordinate court. The party must make his application to set aside the proceedings in that court, and if his application is denied, he may then appeal. …

Where the unsuccessful party has discovered new matter that would entitle him to review in the court that rendered the judgment, as provided in Article 6, he is not precluded from appealing, assuming that he has other grounds of appeal. Review, under Article 6 is authorized only where an appeal has not been taken, so where a party has taken an appeal, he could ask the appellate court to consider the new matter as additional evidence. … However, he could not appeal solely on the ground that he has discovered such new matter. The existence of that evidence does *not* render the judgment of the subordinate court subject to attack in the appellate court, and he would have to seek a review of the judgment in the subordinate court. [24] …

2. Interlocutory Appeals

… An interlocutory appeal is simply an appeal from an interlocutory matter, a matter on which the court has rendered a decision, but *which decision does not finally dispose of the case.* Examples of interlocutory matters would be an order or motion for adjournment, a decision on preliminary objections, a ruling on the admissibility of evidence and a decision on an application to sue as a pauper. [25] … (U)nder the Civil Procedure Code, interlocutory appeals are *not* permitted. No appeal lies from any decision or order of any court on interlocutory matters, but any such decision or matter may be raised as a ground of appeal when an appeal is made against the final judgment.[26] Thus, there can be but one appeal, that from the final judgment, and at such time all objections, both as to interlocutory matters and the final disposition, may be raised. However, a person my appeal from any order directing his arrest or detention, or transferring property from one party to another or refusing to grant an application for habeas corpus.[27] Although such orders may be considered interlocutory in nature, they do involve restraint of a person or deprivation of property, and it was decided that a person should be entitled to an immediate ruling on the validity of the detention or transfer. These are the only exceptions permitted, and in all other cases the court must reject any appeal taken on an interlocutory matter.

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[23] Civ. Pro. C., Art. 320 (2)

[24] Note that the decision of the court on the application for review is not appealable. C. Proc. C. Art. 6(4)

[25] See Civ. Pro. C., Art. 320(3)

[26] Civ. Pro. C., Art. 320(3)

[27] Civ. Pro. C., Art. 320(4)

It is necessary, therefore, to distinguish between a ruling on an interlocutory matter, which is not appealable, and the final judgment, from which, or course, an appeal lies. This is not as easy as might first appear, because, depending on the circumstances, a ruling on a matter essentially interlocutory in nature, may, in effect, be a final disposition of the case. …

(Read pages 222 to 224 for examples and detailed analysis of the issue.)

3. Taking the appeal

3.1- Memorandum of the appeal

A party takes an appeal by filing in the registry of the appellate court memorandum of appeal signed by him or his pleader. [28] Where there are several appellants, they may file one memorandum signed by all or by their pleader on behalf of all.[29] Every court must keep a Register of Appeals in which the particulars of all appeals are entered and numbered in order of reception. [30] The memorandum of appeal must contain, in addition to formal matters, (1) the name of the court which gave the judgment appealed from, the date of the judgment and the number of the suit in which it was given, (2) the grounds of appeal, that is, the reasons for which the judgment should be reversed or varied, and (3) the nature of relief sought, e.g. that the appellant wants the judgment to be reversed or that he wants it to be varied in certain respects.[31] A copy of the full record of the case and the judgment are to be attached to the memorandum of appeal.[32] …

3.1- Time for appeal

The memorandum should be filed within 60 days from the time of the delivery of judgment.[33] Note that this does not mean from the time that the trial court pronounced judgment in accordance with Art. 180. (In other words, the days will be counted from the date the judgment is delivered in written form). Where an appeal is filed after the 60 day period, the Registrar must refuse to accept the memorandum of appeal, and he will inform the appellant that he may within 10 days file an application for leave to appeal out of time.[34] …

The clearest example of good cause is where the appellant was prevented from appealing by physical illness; in such a case leave should be granted providing the appellant filed the application for leave as soon as he was reasonably able to do so.[35]

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[28] Civ. Pro. C., Art. 323(1)
[29] Civ. Pro. C., Art. 323(3)
[30] Civ. Pro. C., Art. 323(4)
[31] Civ. Pro. C., Art. 327(1)
[32] Civ. Pro. C., Art. 320(2). A party would make application under Civ. Pro. C. Art. 184(1) and in light of Art. 327(1); this would include application for the record. As to the keeping of the record, see Civ. Pro. C. Art. 269 and the discussion in (Sedler, Ethiopian Civil Procedure, chapter VII, ... notes 97-101 and accompanying text).
[33] Civ. Pro. C., Art. 323(2)
[34] Civ. Pro. C., Art. 324(1)
[35] Footnote omitted

Good cause might also be found to exist where the appellant was called away on an emergency before he had the time to file an appeal, e.g. because of the illness of a near relative or military service. A question arises as to whether the illness of the pleader which prevented his filing of the appeal would constitute good cause. It has been so held elsewhere.[36] However, the Code specifically provides that there is not good cause where the failure to appeal in time is due to the default of the appellant's pleader. It may be asked whether 'illness' constitutes 'default' within the meaning of the rule, but I do not think the problem should be approached in this way. The primary responsibility of filing the appeal rests upon the party, and he should not be able to avoid this responsibility on the ground that he instructed his pleader to file the appeal and the pleader was unable to do so. If the appeal could have been taken within the prescribed time despite the pleader's illness, the failure to appeal in time was due to the pleader's default. Therefore, I would suggest that in such cases, there should only be good cause if the illness occurred in circumstances that prevented the pleader from communicating the fact to the party in time for him to engage another advocate or properly file the appeal himself. …

It is not possible to formulate rigid rules as to what constitutes good cause in every case. The good faith of the appellant and the circumstances surrounding the failure to take the appeal in time must be considered. But, for the most part we can say that good cause should be found to exist only where physical factors or an emergency prevented the appellant from appealing in time or where the failure to appeal was due to the erroneous advice of counsel rendered while the appellant was seeking to exercise the right to appeal.

3.3- Cross-objections & **3.4- Additional Parties** (Omitted, Sedler, pp. 228- 232)

3.5- Stay of Execution

The fact that an appeal has been taken does not operate to stay the proceedings or to prevent execution of the decree. Execution can be stayed only upon a showing that substantial loss will result if the stay is not granted and the appellant's furnishing security for the performance of the decree.[37] A stay in execution may be ordered by the appellate court [38] or the court which rendered the decree if an application is made to that court before the expiration of the time allowed for appeal.[39]… (Read Sedler pp. 332 to 334 for examples and detailed analysis)

… (T)here are two approaches to the granting of a stay: granting stay as of course and granting a stay only in exceptional cases. The Civil Procedure Code adopts the latter approach. The fact that an appeal has been taken do not prevent execution of a decree, and it is only where the appellant demonstrates that substantial loss will result if execution is not stayed that the appellant court will interfere with the execution of the decree.

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[36] Footnote omitted
[37] Civ. Pro. C., Art. 335(1)
[38] Civ. Pro. C., Art. 332
[39] Civ. Pro. C., Art. 333

4. Grounds of Appeal

In the memorandum of appeal, the applicant must set forth his grounds of appeal, the grounds on which he objects to the judgment from which the appeal is taken. They must be stated concisely and without argument; where there is more than one ground, each ground shall be set forth separately and numbered consecutively.[40] It is very important that the appellant state all his objection to the decree in the memorandum of appeal, since he may not, except with leave of court, urge or be heard in support of any ground of objection not set forth in the memorandum of appeal.[41] While the court may allow an amendment to the memorandum of appeal,[42] or may permit the appellant to argue an objection not raised, it is not likely to do so unless it is convinced that there was good cause for omitting that ground in the memorandum; the appellant cannot obtain such permission as of right. [43] This rule is based on the consideration that if appeals are to proceed in an orderly manner, the appellant must be made to set forth all his objections in the memorandum of appeal. If he does not do so, he may be precluded from raising the objection subsequently. For these purposes, it does not matter that the objection was made in the court below; to be raised on appeal, it must be made in the memorandum of appeal, which may be said to establish the issues to be determined on the appeal. …

However, the appellate court, in deciding the appeal, is not confined to the grounds of objection set forth in the memorandum of appeal of argued by leave of court. It may decide the case on any ground. [44] … (S)uppose that in a suit on a written contract, the court , over the objection in the defendant, permitted the plaintiff to introduce oral evidence inconsistent with the terms of the written agreement. This would be in violation of Art. 2005 of the Civil Code. Even if the defendant does not file this ground as objection in his memorandum of appeal, the appellate court may reverse the judgment because the lower court permitted the terms of a written contract to be contradicted by oral evidence. But the respondent must have been given the opportunity to contest the ground of objection on which the court is basing its decision.[45] … On the other hand, the subordinate court may have incorrectly applied the law, and no objection may have been made. The appellate court may decide the case on any rule of law it considers applicable, but it must give the respondent the opportunity to present his arguments as to the new rule of law which may result in a reversal, and should give the appellant the same opportunity.[46] The point is that while the court may decide the case on any ground it thinks proper, the appellant may not ordinarily present arguments on the ground that he did not raise in his memorandum of appeal.

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[40] Civ. Pro. C., Art. 328(1)
[41] Civ. Pro. C., Art. 328(2)
[42] Civ. Pro. C., Art. 329(2)
[43] Footnote omitted
[44] Civ. Pro. C., Art. 328(3)
[45] *Ibid*
[46] Footnote omitted.

By the same token, except where the court permits the introduction of new evidence, the appellant may not raise any fact which was not in evidence in the subordinate court.[47] "Fact in evidence" must be construed to include any objection or issue that was not raised in the court below. An objection or issue cannot be raised for the first time on appeal, and an appeal should be limited to a review of the questions decided by the lower court. If a party can raise new objections and issues on appeal, the appellate court is, to that extent, turned into a court of first instance, and the reason for permitting an appeal – that the decision of the subordinate court may be reviewed – is lost.

There are, then, two aspects to the rule. The first is that the appellant may not raise new issues for the first time on appeal. The trial is limited to those issues framed at the first hearing or subsequently by amendment, and the only evidence introduced at trial relates to those issues. Once the issues are resolved, the decision of the trial court may be reviewed by the appellate court, but it is too late to raise new issues with new evidence before the appellate court. So, where in a suit to recover an agent's commission, the principal defended on the ground that there was not a valid contract of agency, he could not on appeal contend that the judgment on behalf of the agent should be reversed because the contract of sale executed by the agent was not authorized by the agency contract. [48] There was no issue as to non-conformity in the trial court and the issue could not be raised for the first time on appeal. Also, where a party abandons an issue at trial and does not introduce evidence to support his side of the issue, he cannot revive the issue on appeal.[49] Where a party at trial seeks to introduce evidence on a matter not in issue and objection is made on ground of variance, he should seek to amend his pleading to include the allegations that are the basis of the issue, and …, such an amendment should be permitted; if the motion to amend was erroneously denied, the appellate court can permit the amendment and hear the evidence on that issue. But, otherwise, an issue is not raised in the court below, it cannot be raised for the fist time on appeal.

The same is true with respect to objections. … (C)ertain objections are waived if not raised prior to trial. *i.e.*, at the first hearing,[50] and, of course, they cannot be raised on appeal. Moreover, where no objection was taken to procedural errors committed at the trial, such errors cannot be assigned as a ground of appeal.[51] So too, as regards objections to the introduction of evidence. If the opponent does not object to the introduction of evidence at the time it is sought to be introduced, he cannot contend that the subordinate court committed error in considering the evidence. [52] … The point is that the review on appeal is to be restricted to the questions that have been decided in the subordinate court; it is the decision of the subordinate court on those questions that is being reviewed on appeal. Where issues have been resolved against a party or his objections have been overruled, he is entitled to have those issues and

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[47] Civ. Pro. C., Art. 329(1)
[48] Footnote omitted
[49] Footnote omitted
[50] See Civ. Pro. C., Art. 244(3)
[51] Civ. Pro. C., Art. 211(1)
[52] Footnote omitted

objections reconsidered on appeal. But he cannot obtain a review of the entire case, trying to find new reasons why the judgment should not have been for his opponent. He may only obtain review of the issues that were resolved against him and of his objections that were overruled by the subordinate court.

There are certain exceptions to the general rule. The clearest is the objection that the court lacked material jurisdiction. … [I]t is specifically provided that the objection may be raised on appeal, even though it was not raised in the court below.[53] The same reasoning is applicable to the failure to join an indispensable party; since the absence of such a party affects the power of the court to hear the case, the objection may be taken at any time.[54] It is also said that the defendant can always contend that the plaintiff has failed to establish an essential element of his cause of action. In other words, even though the defendant did not, at the end of the plaintiff's case, contend that the plaintiff had failed to establish a cause of action, or in his statement of defence, did not allege that the contract was unenforceable as illegal or as against public policy, he can raise the argument or issue for the first time on appeal. So too, it is said that the plaintiff can contend that the defendant has failed to establish the existence of an affirmative defence that he has set up.

It is submitted that these exceptions should be recognized in Ethiopia. The appellate court should not permit a judgment to be entered for a party where it is clear from the record that he has not made out his case or defence although no specific objection was taken on the ground. This does not involve a new issue but merely the question whether a party has sustained his burden of production on the issues that were tried. Where the evidence on the record is not sufficient to sustain the finding of the existence of a cause of action of defence, the appellate court cannot permit the judgment to stand, and the opponent should be permitted to raise the argument on appeal. As to the unenforceability of a contract on the grounds of illegality of public policy, this is the kind of defence that the court should not permit to be waived. Here the public interest is involved, perhaps more so than the interest of the defendant. The defence should be allowed to be raised on appeal, and an issue on that point will be framed.[55]

It has also been held that a party may make a new legal argument on appeal, even though this argument was not made in the court below. This refers to a legal argument on the issue that was decided there. For example, where the case involved a document, a party was permitted to argue that certain legal consequences followed from the construction put upon the document, although he did not make that argument in the court below.[56] It does not seem objectionable to permit the raising of new legal arguments on appeal, since, as we have said, the appellate court can decide

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[53] Civ. Pro. C., Art. 211(1). See also Civ. Pro. C., Art. 9(2) providing that whenever a court is aware that it lacks material jurisdiction, it must strike out the suit, notwithstanding that an objection on this ground was not taken. …

[54] Footnote omitted.

[55] As to the power of the appellate court to frame additional issues, see Civ. Pro. C., Arts. 342,343.

[56] Footnote omitted

the case on the basis of any rule of law it considers applicable.[57] It cannot be said that the case is being retried, because different legal arguments to sustain a party's position on an issue are raised on appeal. What cannot be raised ordinarily are new issues and new objections to the action of the subordinate court. Apart from the exceptions noted, the grounds for appeal are to be limited to those issues resolved by the subordinate court and the objections raised at the trial.

5. Procedure on Appeal

5.1- Hearing of parties

… (T)he memorandum of appeal is filed in the appellate court, and it serves as the pleading that originates the appellate proceedings.[58] Assuming that the appellant bases his appeal entirely on the memorandum of appeal and does not apply for permission to call additional evidence, the appellate court may decide the case solely on the basis of the grounds set forth in the memorandum of appeal and does not apply for permission to call additional evidence, the appellate court may decide the case solely on the basis of the grounds set forth in the memorandum of appeal. It fixes a day for hearing the appellant or his pleader, and following the hearing, it may dismiss the appeal *without calling the respondent to appear* if it agrees with the judgment of the subordinate court.[59] This procedure is analogous to dismissing a statement of claim for failure to state a cause of action. Where the appellate court believes that the appeal is groundless there is no reason to proceed further, and the court is authorized to dismiss the appeal.[60]

If the appellant sets forth more than one ground of appeal, and the court finds that some grounds are meritorious and other grounds are not, there is the question whether the appellate court can dismiss the appeal in part, that is, as to the grounds it finds are without merit. …

Where the appeal is not entirely dismissed, the appellate court is to cause the memorandum of appeal to be served on the respondent, fix a day for the appeal and summon the respondent to appear, [61] advising him that if he does not appear the appeal will nonetheless be heard.[62] The respondent must be allowed sufficient time to prepare his reply and to appear and be heard.[63] …

On the day of the appeal, the appellant is to be heard first,[64] since he has the burden of proof on the appeal. If he has not made out a case justifying further argument, the court may dismiss the appeal at that time.[65] If the court does not

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[57] Footnote omitted
[58] Civ. Pro. C., Art. 80(1)
[59] Civ. Pro. C., Art. 337
[60] Footnote omitted
[61] The notice is to be in the same as that given to the defendant following the filing of the statement of claim. See Civ. Pro. C., Art. 79(2)
[62] Civ. Pro. C., Art. 338(1)
[63] Civ. Pro. C., Art. 338(2)
[64] Civ. Pro. C., Art. 339(1)
[65] Civ. Pro. C., Art. 339(2)

dismiss the appeal, the respondent is then heard in rebuttal, and the appellant is entitled to reply.[66] The court may, however, require the respondent to submit a written reply to the memorandum of appeal and the appellant to submit a written counter-reply. [67] There are no specific provisions governing the order of proceeding where a cross-appeal or cross-objection has been filed. … After the appellant's appeal has been heard, the court will hear the cross-appellant (or respondent, where only cross-objections have been filed), the cross-respondent will be heard against the cross-appeal, and the cross-appellant will reply.

5.2- Framing of issues

If, when it is hearing the appeal, the appellate court concludes that the subordinate court has omitted to frame or try an issue or to determine any question of fact which is necessary for the decision of the suit on the merits, the appellate court may frame those issues and refer them to the subordinate court, which is to take the evidence on those issues. It then submits the evidence and its findings to the appellate court, and the evidence and findings form part of the record.[68] Either party may file an objection to the findings, and after they have been submitted, the appellate court proceeds to determine the appeal.[69] By employing this procedure, the appellate court avoids the necessity of taking such evidence itself. Note that the subordinate court does not review its decision in the case; it merely takes the evidence, makes findings, and submits the evidence and finding to the appellate court.[70] The appellate court may accept or reject those findings, and must review them notwithstanding that neither party files objections.[71]

This procedure enables the appellate court to avoid requiring a retrial of the case because of the failure of the subordinate court to frame or decide a particular issue. Perhaps, that court was careless in framing the issue, *e.g.*, the pleadings may have raised the issue, but the court did not see it and the parties did not see it either. Or, although some evidence was introduced on the issue, the court did not make a finding. Rather than send the case back for retrial or try it itself, the appellate court may order the subordinate court to take the evidence on that issue, and then proceed to hear the appeal, considering the evidence that was taken. In this connection, it does not matter that the failure to frame or decide the issue was not taken as a ground of appeal. [72] As we have seen, the appellate court is not limited to the objections set forth in the memorandum of appeal; if it believes that the correct decision of the case may depend on another issue that existed, but was not framed or resolved, it may consider that issue after requiring the trial court to take the evidence on it. Note, however, that the issue must have been involved in the case before the subordinate court. This power cannot be used to enable a party to raise new issues on appeal. It is only where

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[66] *Ibid*
[67] Civ. Pro. C., Art. 339(3)
[68] Civ. Pro. C., Art. 343
[69] Civ. Pro. C., Art. 344
[70] Footnote omitted
[71] Footnote omitted
[72] Footnote omitted

the issue was, in effect, before the subordinate court, but was not framed or decided there, that the court can be ordered to take evidence on it. Also, if the issue was before the court, but was abandoned by a party, it must be deemed to have been withdrawn, and the appellate court cannot order a trial of that issue.[73] The power to require the subordinate court to take the evidence is discretionary, and the appellate court may decide to try the issue itself if this can be done conveniently. Assuming that substantial evidence must be taken, the sounder procedure would be to have the evidence taken by the subordinate court.

5.3- Additional Evidence

The most difficult question relating to the procedure to be followed on appeal is whether the appellate court should allow additional evidence to be produced. The general rule is that the parties are *not* permitted to produce such evidence.[74] All issues must be raised at the trial so that the court can render a final judgment on the merits. By the same token, it must have all the evidence on those issues before it so that it can resolve them properly. In order to force the parties to present all their evidence at that time, they must understand that they may not present additional evidence subsequently. If the subordinate court has not heard all the evidence, its decision may not conveniently be reviewed. In effect, the appellate court would have to try the issue again in light of the new evidence. In view of these considerations, additional evidence ordinarily may not be introduced on appeal.

However, there are three situations where the introduction of new evidence on appeal is authorized: (1) where the subordinate court refused to admit evidence that ought to have been admitted; (2) where the appellate court requires any document to be produced or any witness to be examined to enable it to pronounce judgment; (3) where there is "substantial cause" justifying the production of the evidence.[75] …

…

Whenever additional evidence is allowed to be produced, the appellate court must record the reason for its admission.[76] If a second appeal is taken, the reason could be considered, and the judgment set aside if the improper admission of additional evidence caused the first appellate court to reverse the decree of trial court. When such evidence is to be taken, the appellate court may take it itself or may direct the trial court or any other subordinate court to take such evidence and send it to the appellate court.[77] It must also specify the points as to which the evidence is to be confined and record in its proceedings the points so specified.[78]

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[73] Footnote omitted
[74] Civ. Pro. C., Art. 345(1)
[75] Civ. Pro. C., Art. 345(1) (a) (b)
[76] Civ. Pro. C., Art. 345(2)
[77] Civ. Pro. C., Art. 346(a)
[78] Civ. Pro. C., Art. 346(b)

5.4- Review of findings of fact

A related question concerns the extent to which the appellate court is bound in its decision by the findings of fact made by the court. Assuming that the issue is one on which additional evidence is not taken, the question is whether the appellate court should accept the findings of fact made by the subordinate court on that issue. …

… Where the evidence is primarily oral, and the decision depend on the court's resolution of conflicting oral testimony, the findings of fact made by the subordinate court should not ordinarily be disturbed. But where the findings rest on written evidence or undisputed oral evidence and the question is what inferences shall be drawn from the evidence, the appellate court is in as good a position to draw those inferences and should not be bound by the findings of the subordinate court. The more difficult case is where the finding depends on both written and oral evidence. The following guides may be suggested.[79] Where the evidence supporting the finding (in the opinion of the judges should indicate the evidence on which the findings were based), is primarily oral and involves the resolution of conflicting oral testimony, the finding of the subordinate court should ordinarily be accepted. Where the issue was decided entirely on the basis of written evidence, the decision may be reviewed fully by the appellate court. Where, although there was conflicting oral testimony, it appears that the written evidence or undisputed oral evidence was such as clearly to outweigh the disputed oral evidence, the appellate court can disregard the findings in light of the written or undisputed oral evidence. The point is that the appellate court cannot retry the case. Where, as happens so often, there is conflicting oral testimony, the finding will depend on an assessment of the credibility of the witnesses. In such a case the finding of the subordinate court should be accepted by the appellate court, since that court is in the best position to determine matters of credibility.

6. Judgment on Appeal

6.1- Reversal of substantial error

After the appellant court has heard the parties or their pleaders and has referred to such part of the proceedings, *e.g.*, the record, as is considered necessary, it pronounces judgment. The judgment may confirm, vary or reverse the decree or order from which the appeal is taken.[80] In considering whether a decree should be reversed or varied as a result of an error committed by the trial court, it is important to determine whether the error amounts to what is called a procedural irregularity. If the error is such as to amount to a mere 'irregularity', the Code directs the appellate court to correct it, but also provides that the decree may not be reversed on that ground.[81] It follows that the decree should only be reversed or varied if the subordinate court committed "substantial error," which affected its decision. …

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[79] Footnote omitted

[80] Civ. Pro. C., Art. 348(1). Where the parties agree as to the form which the decree in appeal shall take, or as to the order to be made on appeal, the appellate court may pass a decree of make an order accordingly.. Civ. Pro. C., Art. 348(2)

[81] Civ. Pro. C., Art. 211(2)

It is only where the error substantially prejudiced the unsuccessful party that the judgment will be reversed or varied. The clearest example is where the subordinate court incorrectly applied the law. The appellate court will apply the law as it believes it to be and reverse the decision based on what it considers to be incorrect application of the law. Or, suppose the appellate court believes that the subordinate court has made an incorrect finding of fact in that it has drawn improper inference from the facts, as we have discussed above. It will then reverse, substituting its finding for that of the lower court. Where procedural errors have been committed, the decree is not to be reversed unless the errors were such "as to prevent a valid judgment from being given."[82] In such a case the appellate court is directed to quash the proceedings and order a retrial.[83] An erroneous ruling on a question such as material jurisdiction or the absence of an indispensable party would fall under this provision. It would also include errors that prevented the appellant from receiving a fair trial in the subordinate court. For example, if the court erroneously decided that there was local jurisdiction, the decree may not be invalidated unless "the decision has caused a failure of justice."[84] If the defendant was compelled by the error to try his case in a very inconvenient forum, as a result of which he was unable to bring his witnesses or attend the trial in person, the decision might require a reversal. So too, if the court erroneously denied a request for an adjournment, following which a party was not able to present his case, or if it did not let a party introduce all his material evidence in an issue. The point to stress is that a decree should be reversed because of procedural errors only where those errors affected the power of the court to hear the case or denied a party a fair trial. Such errors "prevent a valid judgment from being given," and the judgment must be quashed. But other procedural errors should not be construed to have this effect, and even though committed, should not result in a reversal.

6.2- Remand

It may be that the subordinate court disposed of the case on a preliminary point, and its decision on that point is reversed by the appellate court. Since the decision was on a preliminary point, the substantive issues in the case have not been determined. For example, suppose the subordinate court dismissed the suit on the ground that it was barred by limitation. The appellate court concludes that the decision on the question of limitation was erroneous and reverses. The merits of the case remain to be tried. The appellate court may, if it thinks fit, remand the case and may direct which issues shall be tried on remand.[85] Or it may try issues itself, in which case the parties will present their evidence to the appellate court. …

Before remanding, the appellate court must have concluded that the decision on the preliminary point should be reversed. It is not authorized to remand the case for

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[82] Civ. Pro. C., Art. 211(2)

[83] *Ibid*

[84] Civ. Pro. C., Art. 10(2)

[85] Civ. Pro. C., Art. 341(1). Where the case is so remanded, the appellate court sends a copy of its judgment and order to the subordinate court with directions to readmit the suit under its original number and proceed to hear the case. Civ. Pro. C., Art. 341(2).

the subordinate court to take additional evidence on that issue. [86] It must also conclude that the disposition of the case as a result of the decision on the preliminary point was erroneous. …

6.3- Powers of appellate court

The appellate court is given broad powers with respect to its disposition of the case. Where the evidence on the record is sufficient to enable the appellate court to pronounce judgment, it may, after resettling the issues, if necessary, finally determine the case *notwithstanding that its decision proceeds on a different basis than the decision of the subordinate court*.[87] For example, in a case where there are issues as to the existence of a contract and as to force majeure, the subordinate court finds that there was a contract, but that performance was prevented by force majeure. The plaintiff appeals from the decree, assigning as error the decision on the question of force majeure. The appellate court upholds his contention. However, in reviewing the record, it concludes that the evidence does not establish the existence of a contract. It will then confirm the judgment for the defendant on the ground that there was no a valid contract. Note that the defendant, who did not take a cross-appeal, could not have challenged the decision on the existence of the contract. But if the appellate court concludes that there was no contract, it can confirm on that basis notwithstanding that the basis of the decision of the subordinate court was that performance was prevented by force majeure.

This procedure can be employed where the appellate court reverses on a preliminary point, but the evidence in the record is sufficient to enable the appellate court to dispose of the case without a remand.[88] Suppose that the subordinate court took evidence on both the issues of the existence of a contract and on force majeure. It found that there was no contract, and rendered judgment for the defendant without resolving the question of force majeure. Now the appellate court reverses the decision as to the existence of the contract. Assuming that the evidence on the issue of force majeure is sufficient to enable the appellate court to decide that issue, it can do so and render a final judgment. If some additional evidence is necessary, the court can call for such evidence and then render the decision. Or, suppose that although the pleadings raised an issue of force majeure, that issue was not framed as such. However, evidence on the issue was introduced by both sides. The appellate court may now frame an issue as to force majeure and resolve it.[89] Whenever possible, the appellate court should try to render the final decision and avoid remanding the case.

So too, the appellate court may pass any decree or order which ought to have been made by the subordinate court and may make any order or decree that the case may require. [90] It does not matter that such order was not requested by either party.[91]

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[86] Footnote omitted
[87] Civ. Pro. C., Art. 342
[88] Footnote omitted
[89] Footnote omitted
[90] Civ. Pro. C., Art. 182(2)
[91] Footnote omitted

In this connection, reference should be made to the court's power under Art. 40(5) to join as a respondent any person who was a party to the original proceedings, but who was not a party to the appeal. The court may join him as respondent and issue a decree or order affecting him.

We may consider some examples of the exercise of this power. A sues B and C, claiming that one or the other is liable to him. He obtains a decree against B, but not against C. B appeals, joining A and C as respondents. The appellate court finds that B is not liable to A, but C is. It will reverse the decree as to B and can issue a decree in favor of A against C.[92] Or, A sues B and C, claiming contribution against them. A obtains a decree against B, but not against C. B appeals from the decree rendered in favor of A, but not against C. B appeals from the decree rendered in favor of A, but A does not appeal from the decree in favor of C. It has been held that if the court thinks that C is liable for contribution, it can add him as a person interested in the result of the appeal and vary the decree to make C liable to A. [93] Although C may not be "interested in the result of the appeal," as we have defined that term, since the appellate court has concluded that the subordinate court should have entered a decree against him and since it has the power to enter any decree that the subordinate court should have entered, it may join C for the purpose of entering a decree against him. A similar situation arose in a suit by the purchaser of land against the occupier to require his removal and alternatively, to obtain compensation against the vendor if the occupier had a right to possession. The court found that the occupier was entitled to possession, and entered a decree awarding the plaintiff compensation against the vendor. The vendor appealed. The appellate court concluded that the vendor was able to pass ownership free of occupants and reversed the decree against him. It then made the occupier a respondent for the purpose of entering a decree in favor of the plaintiff for possession and mesne profits against him.[94]

This power should be used to prevent the issuance of inconsistent decrees. A sues B and C, claiming that each is liable for part of the damage he suffered.[95] Judgment is entered against both defendants, but only B appeals. The appellate court finds that B is liable for all the damage. It can issue an order to the effect that B is liable for all the damage and reverse that part of the decree of the lower court holding C liable.[96] In light of its decision as to B's liability, the decree holding C liable for part of the damage is inconsistent and cannot stand.

The only limitation on the power of the appellate court to issue a decree is that it cannot take away from a party relief which he was granted by the sub-ordinate court and which is not challenged on appeal nor inconsistent with the final decree to be rendered. Suppose that A sues B to recover (Birr 30,000)[97], and the court renders a

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[92] Footnote omitted
[93] Footnote omitted
[94] Footnote omitted
[95] Footnote omitted
[96] Footnote omitted
[97] Eth. $ 300 in the original

decree in his favor for (Birr 10,000),[98] from which he appeals. B does not cross–appeal. … Therefore, since no objection was made to the court's finding on that point, the case held that the appellate court should not be able to set that portion of the decree aside. This seems to be a sound approach, since when a party fails to appeal from a portion of the decree, he may be deemed to have admitted the correctness of the decision. It is only where multi–parties are involved or where a decision on an issue not raised on appeal is necessary for the final disposition of the case that the court should reverse a finding that was not challenged.

Finally, the court may reverse or vary the decree in favor of a person who is not a party to the appeal. Where there is more than one plaintiff or defendant and the decree appealed from proceeds on a ground common to all plaintiffs or defendants, any one of the plaintiffs or defendants may appeal from the whole decree, and if the appellate court finds that the decree should be reversed or varied, it may do so in favor of all plaintiffs or defendants, even though some were not parties to the appeal.[99] The test is whether the decree appealed from proceeded on a ground common to all. Suppose that A sues B, C and D to recover (property), claiming that he is the owner and that he was dispossessed by all three. B, C and D claim to hold separate parcels of the (property), granted to them by different persons. The court finds that A is the owner of all the (property) and that he has been wrong-fully dispossessed by B, C and D. Only B appeals, and the appellate court finds that A is not the owner. Since the lower court's decree proceeded on the ground that A was the owner, it proceeded on a ground common to all defendants, and that decree will be reversed as to C and D notwithstanding that they did not appeal and that each set up a separate claim of ownership.[100]

On the other hand, it is not proper to reverse the decree in favor of the non–appealing parties if the subordinate court did not proceed on a ground common to all, even though one of the grounds of reversal is common to all. [101] Suppose that in our example it was B, C and D who brought suit to recover the (property)[102] against A. The court found that neither B, C or D was granted his portion … by the person under whom he claimed. Only B appealed. The appellate court found that B was granted the portion that he claimed, and that A did not have a better claim to the (property). The decree in favor of A against D will not be reversed. A ground of reversal is common to B, C and D in the not entitled to the (property). But the decision of the subordinate court proceeded on a ground separate to each plaintiff, that neither was granted his portion by the person under whom he claimed. The appellate court did not have to do so in order to determine B's claim. Therefore, there is no reason to reverse the decree as to C and D. B will have the portion that he claimed, and A will have the portion claimed by C and D.

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[98] Eth. $ 100 in the original
[99] Civ. Pro. C., Art. 331
[100] Footnote omitted
[101] Footnote omitted
[102] 'land' in the original

However, it is only necessary that the decree have proceeded on one common ground. Suppose that A sues B to recover damages for breach of contract, and C to recover damages for causing B's breach. The court finds against both defendants. Only B appeals, and the appellate court finds that B did not breach the contract. The judgment should be reversed against C as well, since the decree of the subordinate court proceeded upon a common ground to both, that B breached the contract. But had C appealed on the ground that the court erred in finding that he caused the breach, and had the court reversed the decree as to C, it would not have reversed the decree as to B. This is because the decision of the appellate court as to C has nothing to do with whether B breached the contract, and the ground taken in C's appeal was not the ground on which the subordinate court proceeded in rendering the decree against B.

This power can be exercised in favor of a defendant against whom an ex parte decree was passed.[103] There is a split of authority in India as to whether it can be exercised where a party who has taken an appeal dies and the legal representative does not become a party, resulting in the abatement of the appeal.[104] It could be contended that the rule only authorizes reversal in favor of a non–appealing party and does authorize reversal where an appeal has in fact been taken, but has abated. However, the primary purpose of the rule would seem to be to enable the appellate court to prevent inconsistent decrees. Where the appeal has abated, the decree of the subordinate court stands and inconsistent decrees may result. Therefore, it is submitted that where the decree entered against the deceased party whose appeal has abated would be inconsistent with the decree entered in favor of the successful appellant, the court should reverse the former decree as well.

The broad powers of the appellate court should always be kept in mind. The decision of the appellate court should dispose of the case in all its aspects, and the final decree should conclude the litigation once and for all. This is true even where multiple parties are involved, and the Code gives the appellate court the power to settle the rights and liabilities of all parties to the controversy.

6.4- Pronouncing of judgment

The provisions regarding the pronouncing of judgment … are equally applicable to the judgment of the appellate court; in addition, there are special requirements for the giving of a judgment of appeal. … The judgment of the appellate court must be pronounced in court either at once, or what is more likely, at a future day to be fixed by the court.[105] The judgment must be in writing, signed by all members and pronounced by the presiding judge. [106] Since an appellate court will always be composed of a collegiate bench, it is important to note again that the decision is by majority vote, and that a judge dissenting must state in writing the decision which he

[103] Footnote omitted
[104] Footnote omitted
[105] Civ. Pro. C., Art. 180
[106] Civ. Pro. C., Art. 181(1)

thinks should be made together with the reasons therefor.[107] The dissenting opinions are important, particularly where the dissent involves a disagreement over the law to be applied or the interpretation of a provision of law. The reasons given by the dissenting judge may be very significant if there is a second appeal, and these reasons help to focus sharply the precise legal question involved. Experience in other countries has indicated that, not infrequently, the view expressed by the dissenting judges becomes the majority view in the future. The dissenting judge should prepare his opinion as carefully as the judge writing the majority opinion. [108]

The judgment must contain the points for determination, *i.e.* the grounds of appeal as set forth in the memorandum of appeal and the further questions, if any, developed by the appellate court, the decision, and the reasons for the decision. The appellate court should give its own reasons for deciding as it has even where it is confirming the judgment of the subordinate court. It is poor practice to confirm "on the basis of the reasons set forth in the judgment from which the appeal is taken,"[109] unless they are discussed in the opinion of the appellate court. Where the decree is varied or reversed, the judgment of the appellate court must specify the relief to which the appellant is entitled.[110] Where there are several issues, the court must state its decision on each issue unless the decision on any one or more issues is sufficient for the decision of the case.[111] It may be that one of the grounds of appeal justifies a reversal and judgment for the appellant, and if this is so, it will not be necessary to consider the other grounds. As with the judgment of the subordinate court, the operative part of the judgment must be reduced to a decree.[112] The decree may specify by whom and how the costs incurred in the suit are to be paid, and this would include both the costs in the original suit and on appeal. [113] With regard to execution, the appellate court may either give the necessary directions for execution itself or may delegate the execution to the subordinate court.[114] Certified copies of the judgment or decree or both are to be furnished to the parties on application. A certified copy of the judgment and decree also are to be sent to the court which passed the decree appealed from. There they must be filed with the original proceedings in the suit, and an entry of the judgment of the appellate court will be made in the registrar of civil suits.[115]

N.B-

(*Sections 7, 8 and 9 that respectively deal with second appeal, restitution and repealed provisions on the Zufan Chilot have been omitted*).

[107] Civ. Pro. C., Art. 181(2)
[108] Civ. Pro. C., Art. 182(1)
[109] Footnote omitted
[110] Civ. Pro. C., Art. 182(1)
[111] Civ. Pro. C., Art. 182(3)
[112] Civ. Pro. C., Art. 183(1)
[113] Civ. Pro. C., Art. 183(1) (e)
[114] Civ. Pro. C., Art. 183(1) (f)
[115] Civ. Pro. C., Art. 184

Reading 3: Comparative Literature

Reading 3.1: *Murray & DeSanctis*

Appellate Advocacy: Appeals, … Standards of Review

Michael D. Murray & Christy H. DeSanctis, (2006) *Appellate Advocacy and Moot Court* University Casebook Series (Foundation Press), pages 1-6 (with omissions)

....

An appeal is the action taken by the non-prevailing or aggrieved litigant in a litigation or other adversarial matter. The appeal is made to a higher level court ... . The non-prevailing party takes an appeal when it believes that errors were committed during the course of the litigation by the judge. ... The errors assigned might involve the interpretation of the governing law, the application of the law to the facts, the finding of facts, or a procedural ruling before or during the trial. The non-prevailing party will look for any way possible to reverse the outcome.

It is hard to win an appeal

It is important to note that no matter what court you are in, it is very difficult to win on appeal. Most appeals fail, and in some jurisdictions the vast majority of appeals fail. It is difficult to convince a higher court to overturn the determinations and actions of a lower court. Therefore, the first job of an advocate in a situation presenting a potential appeal is to counsel your client that most appeals fail. Then, you can review the potential errors that might be asserted in the appeal and see if there are grounds to reverse the lower court that make the risk worth taking.

Quality is much better than quantity

When evaluating the possible errors committed by the lower court, quality is more important than quantity. In other words, you will do much better if there is one horrible, unforgivable error you can point to, rather than a dozen somewhat troublesome errors that might be raised. Appellate courts are sensitive to the tactic of certain litigators to throw up as many assertions of error as they can think of, hoping that one will stick and cause the case to be overturned. This is a tactic of desperation, not of effective advocacy. A quantity of "also ran" errors or legal arguments on the errors also can drown out the effectiveness of any of the better allegations and arguments you may have. So the second piece of advice we will give you is to limit yourself to the most important and egregious errors and arguments in support of reversal and assert as few of these as possible.

…

Interlocutory Appeals

The next type of appeal in order of frequency (going down in scale to remedies that are less frequently available) is the interlocutory appeal ... . "Interlocutory " means that the appeal happens prior to a final judgment in the case. A final judgment is one

that disposes *all* claims of *all* the parties in the case, damages and all. That can take a while, especially in a multi-party, multi-claim case, and litigants do not necessarily want to go that far and spend that much money just to have someone take an appeal from the final judgment and show that certain interlocutory decisions were wrong, and then the case has to be done over. So, if a legal issue is resolved by the trial court in the middle of the case, not as part of the final disposition of all of the claims and defuses, and that determination of the issue will or may have a tremendous effect on one party's or both parties' prosecution of the case from that point forward, one or more parties might ask the trial court, "May we please find our what the appellate court thinks about this issue before we go further in this case?"

Both sides may have an interest in taking the interlocutory appeal. While the side that lost the point might feel totally handcuffed or crippled by the decision, the other side might think they got a good ruling but are not sure it will hold up in the appeal from a final judgment in the case, thus creating the potential for any judgment on the case will be overturned later on. A reversed judgment and a new trial would not be a good use of the client's litigation budget. So, although it is unusual for a party that prevailed on the point to join in the request for an interlocutory appeal, it is not unheard of, or the prevailing party might simply fail to oppose the request very strenuously.

…

Standards of Review

Even before your appeal is pending before a court of appeals, an important concept to consider is the standard of review that the court must exercise when evaluating your various allegations of error and grounds of reversal. The standard review in how much deference to give the determinations of the court or adjudicatory entity below, as oppose to an issue governed by a clearly erroneous standard, which is a great deal of deference, is the difference between an appeal that may have a decent chance and one that may have a snowball's chance in hell. Thus, the issue of the appropriate standard of review must be examined before you take the appeal, and you should counsel your client about the chances for success based on your evaluation of the proper standard of review.

The standard of review is determined by the type of the issue that is being asserted on appeal. In that there may be several issues raised in any given appeal, there may be several applicable standards of review that must be anticipated in evaluating and briefing the arguments of appeal. …

A. Determinations of law – "de novo" standard of review

If you are appealing from the lower court's determination of a pure issue of law – what the law is or what the law means, the elements or legal standards that apply, the actual law that applies under a conflict of laws analysis, and other questions of law – then the standard of review *is de novo.* This is the best standard of review for an appellant, because it means that the court of appeals gets to revisit the issue from start to finish and make its own determination of what the answer should be. In essence, no deference to the lower court's determination is required. *De novo* review means

that the court of appeals decides the issue as if the lower court had never even taken it up.

…

An appellant can make the same legal arguments in favor of its interpretation of the law that were made to and rejected by the lower court. Naturally, if the arguments failed once, you should go back to the research table and satisfy yourself that you are presenting the strongest possible argument on the law. Point out the specific areas where the lower court's reasoning and analysis went astray. It will do not good to remind the appeals court that they get to take a fresh look at the issue if you present the same failed arguments and do nothing to rebut the lower court's reasoning in the matter.

B. Determination of fact by …[116] the standard of review

On the opposite end of the scale from *de novo* review is the standard of review that applies to review of the findings of fact … .

Reading 3.2: *Bentele & Cary*

Ursula Bentele and Eve Cary (1995) *Appellate Advocacy: Principles and Practice, Cases and Materials*, 2nd Ed, (Cincinnati: Anderson Publishing Co.) Chapters 3, 4 and 5, pages 54 - 211 (with omissions)

Scope of Review and the Preservation Requirement

Scope of Review

"Scope of Review" refers to the questions that a court has the power to decide. Not every issue that arises in a lower court can be reviewed by an appellate court. On the contrary, in addition to such considerations as the "case or controversy" requirement, mootness, ripeness and the standing of the parties to raise an issue, the scope of review of appellate courts is further restricted by decisional law, court rules and statutes to specific kinds of questions. ... [N]ot all courts are subject to the same limitations. The appellate lawyer's first task when choosing which issues to raise on appeal is therefore to ascertain the scope of review of the court that will be hearing the appeal.

At all levels of appellate review, it is a fundamental rule that the appellate court is bound strictly by the record of the evidence adduced in the trial court. An appellate court has no power to consider new evidence on appeal. In those relatively rare cases in which important new evidence has been discovered post-trial, the case must be remanded to the lower court for a determination of its significance; the appellate court cannot perform that function in the first instance. Indeed, any attempt by counsel to

[116] "the jury" is omitted

introduce a new fact in an appellate argument may be viewed as a serious infraction and will at least result in the new material's being stricken from the brief of the court.

The Preservation Requirement

In addition to the requirement that all appellate arguments must be based on facts reflected in the record of the trial court, the next most important limitation on an appellate court's scope of review is the general rule that any legal issue raised on appeal must have been "preserved." That is, the issue must first have been presented to the trial court. This rule stems directly from the old writ of error procedure, since, as a matter of common sense, a judge could not have erred with respect to an issue that had never been presented at trial.

Despite the disappearance today of the original rational underlying the preservation requirement, there remain some substantial modern reasons for its continuing application. First, if a party who objects a ruling of the trial court voices its disagreement at the time the ruling is made, the court has the opportunity to consider the objection, hear the views of the opposing party and, if necessary, to correct the error or arrive at mutually agreeable alternative. In this way, the need for any appeal at all can be avoided, with the consequent saving of valuable judicial resources. Second, the rule avoids the danger of Sandbagging by trial counsel, who, knowing full well that reversible error is being committed, fails to call the error to the attention of the trial court so as to ensure an appealable issue in the event of an adverse verdict. Third, by making it likely that under all but the most exceptional circumstances it is the trial that will determine the final outcome of the case; the preservation rule also encourages trial lawyers to prepare carefully and to perform competently, rather than to assume any omission or mistakes can always be remedied on appeal. Finally, the rule recognizes the unfairness of snatching a judgment from the prevailing party on the basis of arguments that it never had the opportunity to meet at trial.

For all these reasons, the failure of trial counsel to object to an erroneous ruling will result in the inability of some appellate courts and the unwillingness of others to consider the issue. ...

…

The Plain Error Rule

The major exception to the preservation requirement is the provision for reviewing for the first time on appeal "plain error" that affects substantial rights. … Different courts have different views of what sort of errors "seriously affect the fairness" of a trial. ...

Standard of Review

Appellate Review of Mixed Questions of Law and Fact

One of the most difficult areas involving standards of appellate review concerns mixed questions of law and fact. Findings of historic facts, such as "the landlord changed the locks," are most firmly in the "fact" category. When the finding includes a legal component, however, such as "the landlord evicted the tenant," the issue is outside the "pure fact category and may suggest a different standard of review.

Mixed questions generally involve both a legal standard to be interpreted, such as "what constitutes ineffective assistance of counsel?" and a factual component to be determined such as "what did counsel do, fail to do, during the course of trial?" The ultimate conclusion – counsel was, or was not, ineffective – incorporates both a legal ruling and factual findings. Courts have sent decidedly mixed signals about what is the appropriate standard of review for such hybrid questions, with some courts announcing that a de novo standard should apply, others deciding that mixed findings are essentially factual, and therefore entitled to great deference, and several courts swinging back and forth between these two positions. …

Different types of discretionary rulings may call for different standards of review. Some decisions said to be within the discretion of the trial court are actually circumscribed by fairly specific boundaries, so that reversal for abuse of discretion is relatively common. On the other hand, some type of decisions are so squarely within the control of the trial court that an appellate court will virtually never review them. …

The Harmless Error Doctrine

…

When is an Error Harmless?

The initial question that the appellate attorney must answer when arguing that a particular error is or is not harmless is what standard the appellate court should apply when deciding the issue. That is, how certain must the court be that the error did not affect the "substantial rights" of a party? The degree of certainty that an appellate court requires for a determination that a trial error was harmless is influenced by several considerations. …

Constitutional Harmless Error

When an error implicates an appellant's constitutional rights, the burden on the prosecution to demonstrate that it was harmless is considerably higher than when the error involves a simple statutory or common law right that falls short of a constitutional violation. Indeed, for several decades after the enactment of the federal harmless error statute, courts continued to reverse automatically in cases involving constitutional error, presuming that any constitutional violation would invariably affect the "substantial rights" of the parties. In 1967, however, the Supreme Court ruled that at least some constitutional errors could be harmless.

…

Appellate Strategy: The Harmless Error Argument

The harmless error doctrine significantly changed the practice of litigation in general and appellate advocacy in particular. Because almost no errors presumptively call for reversal, the appellate lawyer can no longer rest after making a convincing argument, that an error indeed occurred at trial. Counsel has the additional job of demonstrating that the error prejudiced the client. Counsel for respondent, on the other hand, must now take advantage of the fall-back argument that any error that did occur at trial, had, in any event, no prejudicial effect. Such harmless error analysis is a crucial

section of almost every point in every appellate brief. The lawyer who omits it has done only half the job.

The first task facing the appellant's lawyer, when writing a harmless error argument, is to determine the appropriate harmless error test to be applied by the court in deciding whether a particular error is harmless or prejudicial. This, of course, involves identifying the nature of the case, whether civil or criminal, and the nature of the error, whether constitutional or non-constitutional. Because it is more difficult to do so, the lawyer for appellant will want to characterize an error as one that has denied the client a constitutional right. Respondent's lawyer will naturally want to argue that no such significant right was affected at all.

Upon determining that the error was constitutional, appellant's lawyer in a criminal case will argue that … a reasonable possibility exists that the error might have contributed to the defendant's conviction and that it therefore cannot be said to be harmless beyond a reasonable doubt. If the error is non-constitutional, the lawyer must, in federal, civil, and criminal cases determine the degree of assurance required in the particular jurisdiction that the judgment was not substantially swayed by the error test and argue accordingly. Likewise, the lawyer in state court must research and argue the correct state of harmless error test.

The next step is to convince the court that under the applicable standard, the error was prejudicial (or was harmless, in the case of respondent). This requires the lawyer to make a showing that the evidence was not (or was) overwhelming, and that the error complained of may well have (or was likely to have) affected the verdict.

A good harmless error argument must in most cases make a connection between a weakness in the evidence and the particular error. For example, if the error complained of involves the court's change of intent, it will certainly be found harmless if the defendant's only defense at trial was misidentification. Often pointing to another event at trial can indicate that the jury was, in fact, influenced by the error. For example, if the error complained of is the admission of unfairly prejudicial evidence, it would be important to point to the fact that the opposing attorney dwelled on that evidence on summation …. All such connected facts should be laid down clearly in the statement of facts so that the harm of the error is immediately apparent.

Reading 3.3: *Anna-Rose Mathieson*

Anna-Rose Mathieson, "Review of Error" *Probability and Risk (December, 2003)*
LP&R 2003 2 (259) © Oxford University Press 2003

Review for error

…

I.

Trial is the centrepiece of our system. Few cases may actually go to trial, far more time may be spent in pretrial preparation, post-trial appeals may take years or even decades, but trial is the main event.[1] Our definition of 'error' is consequently trial-centric; though error is usually *identified* on review, in ordinary appellate litigation it *exists* and can be found only within the limited bounds of the trial record.[2]

The ideal of review for error is easily stated: the reviewing court should systematically scrutinise the entire trial record to identify procedural mistakes. Substantive mistakes should not be considered. …

… [A] reviewing court may not reverse a judgement because it disagrees with the verdict, may not assess decisions within the scope of the trial judge's discretion, may only consider factual information that was presented to the trial court, and ordinarily may only consider claims of error that were made at trial. There are, of course, extraordinary procedures for reconsidering cases in which important evidence is discovered after trial, or in which a fundamental injustice occurred that is not apparent on the trial record.[4] But these procedures are not part of the regular process of review, and are only grudgingly and infrequently permitted.[5] …

II.

The civil-law systems on the European continent embody a fundamentally different vision of the process of litigation. We describe a few elements of these systems in order to highlight, by contrast, some aspects of our own system. We do not pretend to provide an accurate description of any specific continental system; instead, we draw on elements from different countries to create a composite sketch.[7]

As Mirjan Damaška has pointed out, the title of Franz Kafka's famous book about a man trapped in an endless legal controversy is usually translated into English as *The Trial*. In the original German it is *Der Process*.[8] This shift in focus—from trial to process—reveals a fundamental difference between the two systems. In the American system trial is a single grand event that is supposed to resolve all factual disputes; in continental systems the search for factual accuracy is an ongoing process from trial through appeal. The investigating magistrate begins the process of gathering facts; at trial these facts are re-examined and new conclusions drawn; on appeal new evidence may be heard, witnesses may be recalled, and the factual conclusions of the trial court may be reconsidered and revised.

In continental systems, a higher court may reject the conclusions of a lower court without implying that the lower court committed an error: the reviewing court may

simply have more information at its disposal. With less emphasis on the legal battle between competing adversaries, a reversal on appeal is not seen as depriving the winner of a victory won at trial. To illustrate, consider the double jeopardy prohibition. Both the American and continental systems prohibit multiple prosecutions of a defendant for the same crime, but a continental prosecutor may appeal the factual accuracy of a criminal acquittal. In America this would be considered a gross violation of the rule against double jeopardy; once a defendant has been acquitted at trial, she must be released. The difference turns on the way the process of fact-finding is conceived. In continental systems the factual determination, and hence the first round of jeopardy, is not thought to be complete until it has been approved by the highest court that will review it. The continental prosecutor may appeal an adverse factual ruling for the same reason that an American prosecutor may appeal an adverse legal ruling—no final decision has been made at trial, so reconsideration of the factual determination is not seen as a second proceeding. This continual process of honing and revising the factual findings is aided by comparatively transparent decision-making. At every stage of the proceedings, the continental fact-finder must produce a written opinion justifying its factual findings. On review, the logic of these factual assessments can be examined and tested. The authority to reconsider factual findings gives appellate courts the power to forthrightly correct lower-court decisions that they believe are substantively incorrect.

III & IV (*Omitted*)

V.

What does this open disjunction between theory and practice on appeal tell us about American legal culture? We have several lightly connected observations.

1 & 2(Omitted)

3. Variability

Appellate review in America is notoriously inconsistent. It varies from court to court[27] and from case to case. The quality of the legal work on appeal may make a big difference. A skilful defence lawyer can sometimes make the judges worry about the substantive justice of the result while simultaneously casting the argument in terms of procedural error.[28] A prisoner filing a petition for review *in pro per* has little chance of being noticed. The substance of appellate review also varies from one type of case to another. Several state trial-court judges with whom we spoke thought that their appellate courts are likely to be genuinely concerned about procedural error in family-law cases—an area of law where most judges have few preconceived assumptions about the correct outcomes and no particular systemic agenda. On the other hand, in ordinary criminal cases appellate courts might tacitly assume that most defendants are guilty, focus their attention primarily on the rare cases in which they think a defendant might be innocent, and paper over procedural errors in the rest.

4. Responsiveness

Lack of principle makes our courts more flexible and responsive; it enables judges to keep closer to the mainstream than official norms sometimes permit. The public at

large seems to believe that courts should focus on punishing the factually guilty and protecting the factually innocent, rather than producing procedurally flawless trials. Even educated adults who realise that the best laws may produce harsh or distressing consequences have a hard time accepting the notion that our legal system is often unconcerned with the accuracy of its verdicts. In the rare cases in which appellate judges reverse judgements because they think the decision may be inaccurate—and in the many cases in which they affirm procedurally flawed judgements that they believe are factually correct—they are reflecting, if not responding to, the common view of a court's true function.

Our culture celebrates judicial independence, but we also want politically responsive courts. One of the most unusual aspects of our legal system is the extraordinary American institution of a largely elected state-court judiciary.[29] In civil law countries a judge is a career civil servant whose assignments and promotions are determined within a judicial bureaucracy. American judges are chosen by politicians or voters, answer (if at all) to the electorate, and run their courts with a great deal of independence. This independence brings with it a measure of personal accountability for their decisions. One reason for the reluctance to reverse in criminal cases—even in the face of serious procedural error—is that criminal appeals are often the subjects of political campaigns, and always in the same way: American judges are never criticised for affirming convictions, only for reversing them.[30] This sort of political pressure is less common in non-criminal cases and can run in either direction. Occasionally, it may lead appellate judges to overstate trial-court error in order to reverse an unpopular ruling. The Michigan trial-court judges we talked to told us about a case in which an appellate court went out of its way not only to reverse but to publicly rebuke a trial-court judge in a family-court case that happened to generate an extraordinary amount of unfavourable publicity.

5. Obscurity

American law consists of a patchwork of statutes, rules, and judicial opinions. The answers to most questions can only be found by carefully researching scattered appellate opinions. Even if a statute seems directly on point, a wise lawyer will not rely on its language until she has examined the relevant cases interpreting that language. This emphasis on precedent makes American law less accessible to ordinary citizens than the law in code-dominated civil-law systems. Concealed substantive review makes our law more inaccessible yet. Even if an interested citizen could find the relevant appellate opinions, the true reasons for decisions—not to mention the process by which the decisions are reached—are hidden. Imagine a lawyer trying to explain appellate practice to a client:

First, we must base our claims on procedure, not fact; we can't simply say the lower court is wrong, we have to point out technical errors in the process used to make the decision. However, *second*, procedural claims don't really matter; if that's all we have, we'll probably lose despite all the procedural errors at trial. Therefore, *third*, substance is critically important after all, but, *fourth*, it can only be used indirectly. Our best hope is to get the judges worried about an underlying claim of factual injustice, in

which case the court may reverse on other grounds, without anybody ever openly addressing the substantive issue.

6. Adversarialism

Finally, covert substantive review may represent one of the many triumphs of adversarialism in American justice. The role of a judge presupposes neutrality, but American judges are at heart adversarial advocates; they are '[l]awyers who were once advocates, whose job now is to decide among advocates, and who, in the process of deciding, will advocate their position to their colleagues'.[31] The contrast in judicial style with the continental system is telling: Continental legal opinions are supposed to be written in an authoritative tone that suppresses individuality and describes the law in an impersonal didactic manner that resembles legislative enactments; dissents or other separate opinions are discouraged.[32] In America, judicial opinions are argumentative. They are supposed to persuade us that the court's decision—or the writer's position—is just and correct. We know that our judges are advocates; we expect them to be advocates; we celebrate brave or prescient acts of judicial advocacy, especially by judges who wrote in dissent or took unpopular positions: Harlan's dissent in *Plessy*,[33] for example, or Holmes's dissents on the First Amendment.[34] From the Chief Justice of the United States on down, everybody in our legal system, judge and lawyer, is always *arguing*, always trying to *persuade* someone to agree with them, and frequently doing so—as advocates are trained to do—for reasons beyond those that are explicitly given. It should be no surprise that in a system that exalts the virtues of advocacy, in which the *only* well developed professional role is that of the advocate, decisions on review are often made for reasons that are not stated in the opinions.

[Footnotes are omitted except *Footnote 4*]

[4] This is particularly true in criminal cases. If a defendant who was duly convicted at an error-free trial is proven innocent by DNA analysis 15 years later, he may be released, but the procedure by which he obtains his freedom will normally be a new legal proceeding rather than a review of the original conviction. He may be granted an executive pardon, or the case may be reopened and dismissed, but not, technically, reversed. And some reasonably common sorts of error may occur at trial but not appear in the trial record—again, especially in criminal cases. This is frequently true, for example, for claims of ineffective assistance of counsel. In that situation, review for error is normally accomplished by means of a petition for a writ of habeas corpus or some other 'original proceeding' which permits the petitioner to supplement the trial record, and the court to make new findings of fact. *See, e.g*. *Massaro v. United States*, 123 S. Ct. 1690 (2003). …

Unit 2- The Art of Appellate Advocacy

1. Specific Learning Outcomes

At the end of this unit students are expected to be able to:

a) explain the difference between appellate and trial advocacy;

b) discuss the elements of appellate advocacy;

c) explain the non-admission of new evidence during appeal and the exceptions thereof;

d) state the art of the sequencing of issues during the preparation of appeal;

e) state the key skills and approaches that are crucial in appellate advocacy;

f) discuss the significance of evaluating the chances of success of an appeal before taking up a case.

Expected number of learning hours for Chapter 1 Unit 2 (Week 2)

- Class hours: *Two hours*
- Student independent workload: *Four hours*

2. Unit Introduction

Various lawyering skills are needed during the different phases of the lawyer's services. The skills required in pretrial lawyering include interviewing, pre-trial negotiation, etc., while trial lawyering mainly involves submission of evidence and legal arguments. In appellate advocacy, there is more focus on legal arguments because, unlike trial advocacy, the appellate court will not devote most of its time in taking evidence in the form of documents, witnesses and other forms.

The first medium of appeal is the appellate brief. And the second medium is the oral argument where the appellate court is, to a certain degree, persuaded by the appellate brief. Appellate advocacy involves the art of identifying valid issues of appeal, preparing the appellate brief and conducting persuasive oral arguments. As J. S. Caroll noted (in Reading 1), "communication through the written word is an art, and appellate brief writing is no exception." Caroll also underlines the need for the art of effective oral arguments because they are conducted under a setting of time restraints and other factors that require various skills and techniques.

Trial lawyers initiate the course of the trial process in framing and forwarding questions and in challenging the other party's witnesses, while on the contrary, the appellate lawyer is usually required to streamline her/his arguments in response to questions from the appellate court. This requires not only thorough preparation to present effective oral arguments but also needs prompt response to questions. Apparently, the answers ought to be valid, relevant, persuasive and they must be blended with the overall argument.

Effective appellate advocacy presupposes a sound foundation during the trial. The Ethiopian Civil Procedure Code does not allow the appellate lawyer to raise new facts "which were not in evidence in the court which gave the judgment

appealed from." [117] The two exceptions to this rule are first, if the lower court had "refused to admit evidence which ought to have been admitted,"[118] and secondly, where "the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause."[119]

Appellate advocacy thus benefits from the prudent *preservation* of issues at the trial stage by raising them in the course of the trial irrespective of the lower court's position. In Reading 2, Del Sole raises the importance of raising and preserving issues at a trial stage so that they can be allowed during the appellate litigation. Del Sole further noted the importance of "deciding what issues to ignore and which to advance" and stated the "reluctance to abandon any issue, no matter how remote its chance for success." The reading underlines the need to begin with the strongest issue that has the potential for success and warns against repeating every detail of the appellate brief during the oral argument.

In Reading 3, Cordy suggests that a good appellate counsel is like a good teacher who is prepared deep and wide. He also states the crucial importance of written communication skills and effective oral argument in appellate advocacy. The reading further states the appellant counsel's tasks of identifying the relevant constitutional provisions and other laws, appropriate statutory interpretation and the need to pay due attention to legislative intent.

The need to know the jurisprudential bent of the judges and knowledge of their prior decisions and patterns of interpretation is among the points raised in Reading 4. Moreover, the reading gives emphasis to preparation, persuasiveness, effectiveness, time management, listening to questions and manners.

The fifth reading entitled "Rules of Appellate Advocacy: An Australian Perspective" suggests ten 'rules' of effective appellate advocacy. They are: know

[117] Civil Proc. Code, Art. 329(1)
[118] Civil Proc. Code, Art. 345(1)(a)
[119] Civil Proc. Code, Art. 345(1)(b)

the court, know the law, use the opening, conceptualize the case, watch the bench, focus on substance than elegance, cite authority with care, honesty, courage during intensive questions, and attention to legal principles and policies. According to Justice Kirby, these 'rules' "would have much less application in jurisdictions" where appellate litigation "is strictly limited to a fixed time for extended oral persuasion." Although the appellate court setting in Australia does not have tight time restraints, the "rules" are obviously vital under all circumstances despite the magnitude of their impact in persuading the appellate bench.

Before an appellate attorney takes up a case, s/he is expected to "evaluate with the client the chances of success on appeal."[120] After having decided to take up the appeal, appellate lawyers do their utmost towards reversal or affirmance of the lower court's decision. Since each appellate practice enhances the art of appellate advocacy, lawyers are expected to be open-minded for life-long learning through time and practice. As Dianna Terry noted "[w]ell-presented briefs and oral arguments are the best way to represent clients in an appeal. Regardless of the outcome of a given appeal, the court will appreciate your efforts to present your case clearly and succinctly, and in accordance with the appellate rules."[121]

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3. Review Exercises

(Cite relevant provisions)

N.B- Students are expected to go through the readings in this unit before they address most of the review questions:

a) Contrast appellate advocacy and trial advocacy.

b) "*Facts* are predominant during the trial while points of law are usually focused upon during appellate advocacy." Do you agree? State your reasons.

c) Appellate advocacy is an art that needs skills and techniques. Explain.

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[120] Diana L. Terry "Putting Your Best Foot Forward: Improving the Effectiveness of Appellate Advocacy", *Colorado Lawyer* (July 2008) p. 111

[121] Ibid, p. 113

d) Article 329(1) of the Civil Procedure Code does not allow the appellant to "raise any fact which was not in evidence" in the lower court subject to the exception stated under Article 345. Similarly, objections to procedural errors that were not raised during the trial cannot be taken as ground of appeal as stipulated under Art 211(1) of the Civil Procedure Code unless the appellate court opts to correct irregularities of its own motion in accordance with Article 211(2). Discuss these provisions in comparison with the principle of *Preservation* addressed in the various readings in Units 1 and 2.

e) Take notes for each reading and state:

   i. the tasks and techniques that are stated in most or all readings as elements of effective appellate advocacy

   ii. the skills that can be easily attained through attention and practice.

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4. Readings (Week 2)

Reading 1- Jennifer S. Carroll, *Appellate Specialization and the Art of Appellate Advocacy*

Reading 2- J. A. Del Sole, *What Makes a Successful Appellant Advocate*

Reading 3- Robert J. Cordy, *A Practical View from the Appellate Bench*

Reading 4- David M. Gersten, *Dynamic Trial and Appellate Advocacy*

Reading 5- M. Kirby, *Rules of Appellate Advocacy: An Australian Perspective*

Reading 1- *J. S. Carroll*

Jennifer S. Carroll, "Appellate Specialization and the Art of Appellate Advocacy, "*The Florida Bar Journal*, June 2000, Volume LXXIV, No. 6 (pp. 107- 109)

Appellate Specialization and the Art of Appellate Advocacy

Appellate practice has developed over the years into a specialized area of the law. …What is "appellate practice," and why is it considered a specialty? How does appellate practice differ from trial practice? Is there truly an "art" to appellate advocacy? ….

What Is Appellate Practice?

To best understand exactly what appellate practice is, one must first understand what it is not. Simply stated, appellate practice is *not* trial practice. At first glance, such a description appears obvious. However, appellate judges often express amazement at the number of practitioners who treat the appellate process as nothing more than a continuation of the trial. Many attorneys view an appeal as a "second chance" to argue their case … and to present what they deem to be the crucial facts and equities which will make all the difference. These attorneys often become mired in the types of factual disputes that weigh so heavily at the trial level (*e.g.*, witness credibility issues, emotional pleas), but tend to distract the appellate court from significant legal issues on appeal.

Appellate judges perceive a difference between the advocacy skills necessary to litigate a case in the appellate court, as opposed to the trial court. As explained by Justice Leander Shaw of the Florida Supreme Court: [T]here is a difference between the skills needed in litigating a case before trial and appellate courts. … In appellate advocacy … the emphasis switches and the attorney must stress the application of law to facts—…. Thus, the ability to present thoroughly researched legal arguments and to present them in a very orderly and logical manner becomes more important.

…

At trial, an attorney's major objective is to persuade the fact-finder—that credibility lies on the side of his or her client's witnesses, and the evidence, although controverted, favors his or her client. Trial lawyers ascertain the factual strengths and weaknesses of both sides of their cases, and then sift, select, and evaluate the evidence to be presented. To be successful, the trial lawyer must build a convincing argument from an amorphous mass of testimony and create an aura of righteousness around client and cause.

The appellate lawyer, by contrast, deals primarily with the law …; The focus of the appellate specialist is on *legal* argument, through written and oral advocacy. Broadly stated, appellate practice involves the practice of law before appellate courts. The function of appellate courts is, of course, to review the decisions of lower courts to determine if reversible error has been committed. Such review involves the interpretation and application of the law to a given set of facts.

At the appellate level, therefore, the aim of the appellate lawyer is to be persuasive and to effectively assist the appellate courts in accomplishing their review and decision-making objectives. In accomplishing this goal, the appellate practitioner must be proficient in several key areas, including, but not limited to: brief writing; oral argument; and rules of appellate procedure. …

The "Art" of Appellate Advocacy

- *"The pen is mightier than the sword."*

There can be little dispute that communication through the written word is an art, and appellate brief writing is no exception. In composing a brief, the appellate practitioner must know which questions to raise, which arguments to pursue, and which facts to stress. He or she must determine the most significant legal issues worth pursuing on appeal and present only the strongest arguments.

The technique of writing is equally significant. Arguments, no matter how strong from a substantive perspective, lose their force if not expressed cogently. To write a convincing brief, counsel should adopt a simple style consisting of short sentences, active verbs, and concise paragraphs. The words must be chosen carefully, and should be clear and direct. As all lawyers (both trial and appellate) know, simplicity can be difficult to achieve. The writing of a brief is an arduous task; and the writing of a simple, yet compelling, brief is even more arduous.

Recognizing the most common mistake made by attorneys when writing appellate briefs for his court, Judge Joseph Nesbitt … advises:

> … Use short declaratory statements that are completely understood on first reading. If you do not make your client's position "simple" you can't expect the judges to do it for you. Most of your time should be spent in reading, evaluating, and comprehending your own case. Outline, at least in your mind, the matter about which you must convince … the judge. If you do this, brevity will naturally flow.

…

Appellate Attorney and Trial Attorney: Essential Components of Process

Both the appellate attorney and the trial attorney are essential components of the litigation process. The difference between the two lies … in focus. The trial attorney's focus is on gathering facts and presenting these facts, consistent with the law, to support his or her client's position. The appellate attorney's focus is on placing the relevant facts in the context of the appropriate law and overcoming legal hurdles faced at trial. At the appellate level, counsel must analyze the entire record and make the appropriate legal arguments in support of affirmance or reversal.

Appellate practice has evolved into a specialized area of the law, and justifiably so. The fundamentals of appellate advocacy—writing a simple, persuasive brief, making an effective oral argument, and having a command of the appellate procedural rules—necessarily reflect effort, skill and, at the highest level, art.

Reading 2 – *J. A. Del Sole*

Joseph A. Del Sole, [122] "What Makes a Successful Appellant Advocate", *Lawyers Journal* (December 5, 2008) pp. 5, 6

10 No. 25 Lawyers J. 5

What Makes a Successful Appellate Advocate?

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Appellate advocacy begins in the trial court, raising and preserving issues for possible review. Having raised and preserved an issue is, however, merely the beginning of good advocacy. The more difficult but vitally important task is deciding what issues to ignore and which to advance. My experience, both on the bench and in consulting with counsel on appellate matters, convinces me that there is a reluctance to abandon any issue, no matter how remote its chance for success.

In seminars across the land, appellate judges repeatedly admonish counsel that focus and directness are more persuasive than volume. United States Circuit Judge Ruggiero Aldisert observed: "[W]hen I read an appellant's brief that contains ten or twelve points, a presumption arises that there is no merit to any of them. I do not say that this is an irrebutable presumption, but it is a presumption nevertheless that reduces the effectiveness of appellate advocacy." [FN1]

I recognize the difficulty one faces when deciding to "give up" an issue without having its merits reviewed, but counsel must honestly assess each preserved issue. It is true that there is a clutter effect as more issues are presented. Weaker issues tend to obscure the focus of the argument and diminish the entire presentation.

Recently, in consulting with an appellee's counsel, it was apparent that the adversary's strongest argument was buried at the end of the appellant's brief and given only a cursory analysis. While it is debatable whether the issue would have carried the day, it was clear that counsel for the appellant failed to recognize this issue presented a better chance for reversal than the others advanced in the brief which were afforded the most attention.

In making the decision to include or exclude an issue, the court's scope and standard of review must be assessed. For example, an issue claiming an error of law has greater chance to persuade an appellate court than an abuse of discretion issue. Counsel must understand these differences and realistically evaluate the chances for success.

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[122] Judge Joseph A. Del Sole (Ret.) is former President Judge of the Superior Court of Pennsylvania.
…

After deciding which issues to advance, preparing the brief is critical. It goes without saying that the brief is the first opportunity to persuade an appellate court. Too much has been written on the subject of effective briefing; there is nothing I can add.

I hold the view that oral argument can change the minds of appellate judges and carry the day. Remember that the judges have read the briefs, and based on their analysis, have tentative opinions on the issues raised. Oral argument presents counsel with the ability to either reinforce the judges' initial leanings or create sufficient doubt about the correctness of their initial view and cause a change in outcome. It also presents the judges with the chance to inquire into and test their initial impressions of the claims.

Unfortunately, all too often this opportunity is wasted. In order to present a successful oral argument, counsel must first know exactly what outcome is desired and convey this to the court. Having determined what you want the court to do, you must then explain to the court why it can, and should, reach the desired conclusion. This is best done with a critical examination of your case from the look of an outsider. You probably have spent years with the case, which is now before the appellate court. You know its history, and the various rulings which have brought it this far. I believe it is important to examine the case fresh, to condense it to its simplest, most straightforward form, and to identify its chief weaknesses and strengths.

If you are counsel for the appellant, because the judges have reviewed the briefs, very little background should be necessary. Identify the type of matter involved and highlight the facts to aid the court in its recollection and to set the background for the issues you wish to address. Your strongest issue, the one with the greatest potential for success, should be presented first. This approach may require counsel to orally argue only one or two issues, and not address all the issues contained in the brief. You are free to advise the court that you are limiting your oral presentation to certain issues, but by this action you do not intend to abandon the others contained in your brief.

Reading from your brief is not good appellate argument. However, a short quote of a controlling principle of law or factual admission, if properly delivered, can be extremely effective. Remember two words--"short" and "controlling."

I will not repeat in detail what has been written and discussed many times about oral presentations. Stay focused, answer questions directly, know the record, and be knowledgeable about relevant precedent. These are but a few essential principles to which successful oral advocates adhere.

During my tenure on the bench, there were two statements often made by counsel that caused me to pause. The first was, "I was not trial counsel." Generally, that told me that counsel was either not familiar with the record, or that the glaring mistakes in the record were caused by others: the "don't blame me approach."

The second came in response to a question by the court, "Judge, that is a very good question." I didn't know if counsel was surprised that judges could think of

good questions, or whether counsel had not anticipated the inquiry and was stalling to frame an answer. In either event, it was not flattery.

Effective oral argument starts with a clear understanding of what you want the court to do and developing a presentation to support that goal. While no one can predict the result of an appeal, I believe a successful argument has been made when counsel can say no questions were asked that were not anticipated.

[*Footnotes omitted*]

Reading 3- *R. J. Cordy*

Robert J. Cordy, [123]"A Practical View from the Appellate Bench", *Boston Bar Journal* (January/February, 2002) pp. 8, 9

46-FEB B. B.J. 8

A Practical View from the Appellate Bench

During my brief tenure on the Supreme Judicial Court, I have learned a great deal about appellate advocacy from the other side of the bench (or, at the very least, confirmed various suspicions and hopes I have harbored). While the process by which each of the justices makes up his or her mind is undoubtedly different, there can be no doubt that good appellate arguments and good appellate lawyers are essential to good appellate opinions. While the court can always resolve cases and controversies that come before it - at least in some manner - a good decision requires the proper framing of the issues, and the thoughtful compilation of a record. Those important responsibilities rest with the lawyers in the case. In this regard, the quality and vitality of our work in a very real sense reflects the quality and scholarship of yours.

The best appellate advocates recognize that good advocacy is always an exercise in education as well as opposition. While I have had the good fortune in prior professional experiences to have been exposed to many substantive areas of the law, nothing could have prepared me for the enormous breadth of issues raised before and decided by the court each term. The depth of understanding necessary for the proper balancing of legal and policy interests in so many complex and rapidly changing fields is beyond the capability of at least this justice, without significant help from those who advocate before us. While I have always prided myself in being able to operate in an environment that required quick decisions across a broad range of subjects (the "inch deep and a mile wide" phenomenon), what the work of the court requires every day is a justice who can be both a mile wide and a mile deep in his or her thinking. The decisions we make must stand the test of time. Hence, the first requirement of good appellate advocacy is the understanding that you must be a good teacher.

The second requirement is good written communicative skills. Each of the justices reads the briefs carefully before oral argument - and, of course, we go back to them thereafter. But it seems to be an almost immutable law of nature that there is only so much trauma a human brain can sustain at one sitting. If your briefs fail to explain in understandable terms and in a logically organized manner, what you seek and why you are entitled to it - you start off a step behind. Clarity, connectivity, intelligent organization, and the sequencing of "new" and "old" information enable the justices

[123] Robert J. Cordy was appointed Associate Justice of the Massachusetts Supreme Judicial Court on February 1, 2001. Justice Cordy previously served as chief legal counsel to Massachusetts Governor William F. Weld from 1991-1993. He received his law degree from Harvard Law School in 1974 and graduated from Dartmouth College in 1971.

to read and understand your positions in the context of simultaneously preparing for 21 or 22 cases which are to be argued the first week of every month. That often translates into more than 50 briefs, reply briefs, and record appendices. Therefore, if an "objective" partner or associate comes back to you after reading your draft and either does not understand the relationship of ***9*** points, or complains of a headache (having to read forward and constantly go backward to understand the argument), you can be assured that we will have the same problem.

The third requirement of good appellate advocacy is, of course, good oral argument. I am told by experienced appellate lawyers that they understand their cases and the points on which they must be persuasive with the most clarity and intensity the night before they argue, not the day they filed their briefs. No matter how well a brief may be written, it is still two dimensional. Oral argument is your chance to make the case come to life - to transform it in ways not really possible in the briefing process, and to frame the thinking of the court at a very critical time in the decision-making process. While good oral argument will not win the unwinnable case at the appellate level (unlike, perhaps, before a jury), it will, most assuredly, influence the way in which the case is discussed and the way in which it is analyzed. It has on many occasions changed my view of which issues are most important to the case, and how we should approach the analysis. In this way, good oral argument can affect both how we decide a case and the path we follow to get there.

There are a few other points about appellate advocacy before the Supreme Judicial Court that bear mentioning as well, even to experienced practitioners.

· *First, know the language of the relevant statutes and the relevant principles of statutory construction.*

… We assume that statutes and regulations mean what they say and that they exist for a reason. Whether you are asking us to implement, interpret, or invalidate a statutory or regulatory scheme, you must be intimately familiar with what the law actually says, each and every word of it.

· *Second, know the legislative history.*

While researching legislative history … can be a tremendous challenge, where a question involving the Legislature's intent is a close one, the legislative history can often be a decisive factor in determining which side is to prevail. The legislative history and knowing how it supports your position can make the difference between a good argument and a really compelling one.

· *Third, know the … Constitution.*

… The court is committed to ensuring the continued vibrancy of our Constitution, and to building on the already substantial body of our State constitutional jurisprudence. So if you are raising a Federal constitutional issue, you will also want to consider whether the provisions of [a state] … Constitution might apply as well. ….

Reading 4- *D. M. Gersten*

David M. Gersten[124] "Dynamic Trial and Appellate Advocacy", *Family Advocate* (Fall 2008), pp. 41-43

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Dynamic Trial and Appellate Advocacy

…

Appellate Advocacy

In addition to knowing your audience and your goal and being prepared, persuasive, and effective, the appellate advocate must be cognizant of some special rules. In the appellate arena, an advocate must learn to manage effectively his or her argument time and listen carefully to the court's questions.

□ Your two audiences

… [A]ppellate advocates have a primary and secondary audience. Your primary audience is the three-judge appellate panel. The secondary audience is their law clerks. If the case is set for rehearing *en banc*, you will have an entire court and their law clerks as your audience.

As with trials, I believe the first rule for appellate advocates is also to "know your judges." For example, my court is a diverse bench. Some judges have trial experience as litigators, others as trial judges. Some judges have experience in different areas of practice, such as criminal or family law.

Knowing your panel's background helps you tailor your argument to their experience. For example, if you are faced with a family-law experienced panel, you will not need to explain basic family law concepts and issues. However, if the panel has little family law background, you will need to familiarize them with basic law.

Remember, in an appellate court, although you are trying to convince the whole panel, an appellate decision is determined by a majority vote. Thus, focus on those judges who seem to be accepting your argument while still trying to convince those who are not.

□ Be prepared

As is the case at the trial level, total preparation is essential to winning your case on appeal. Total preparation for purposes of an appellate advocate means "know the

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[124] David M. Gersten is Chief Judge of the Third District Court of Appeal in Miami, Florida. The oral advocacy suggestions and views expressed here are Judge Gersten's own and reflect his nine years of experience as a trial judge and his nineteen years as an appellate judge.

record inside and out." Do not shuffle through papers when a judge asks you a simple question, such as how many children do the parties have?

Besides knowing the record, "know the rules." The Rules of Appellate Procedure set out the oral argument protocol for your court. Each court handles oral argument differently, but I imagine most appellate courts have similar oral argument policies.

Your preparation should include an awareness of the court's standard of review. You cannot ask an appellate court to do that which it is not allowed to do under its standard of review. In arguing policy, respectfully direct the court's attention to the ramifications of its decision. An appellate court is not only concerned with how your case is decided, but also with how it will aid others who are faced with similar issues in the future.

Be prepared for oral argument, but be flexible. The most common mistake I see is when the over-prepared advocate arrives at the podium with a script. "May it please the Court? My name is X. I represent Y. I would first like to ..." Then, in midsentence, one of the judges interrupts the advocate, and he or she unfortunately cannot get back on track for the rest of the allotted time.

□ **Be persuasive and effective**

Remember, your goal is to win your case. To win, you must be persuasive and effective. Lead your judges down a path that allows them to understand your case completely and rule in your favor. Instead of a script, create a roadmap, starting with the most critical point. This roadmap should focus on the opening statement, the major argument(s), and the judge's questions.

Open in a straightforward and cogent way. Keep it simple. Remember, legalese and complex issues will not win the day. For example, the opening statement in a dissolution of marriage could be: "The main issue is a lack of substantial competent evidence to support an award of alimony to the husband."

After a brief opening statement, begin with your strongest substantive argument. Save the procedural arguments for last, unless the court does not have jurisdiction to even hear the case. Then, of course, that would be your strongest argument.

Focus on one to three points of error. Remember, you do not have to make every argument in your brief. You can assume that the judges and law clerks have already read your briefs and the record. Regurgitating what is already in your brief is a waste of time.

□ **Time management**

Because you do not want to waste your allotted time, learn to manage your time effectively. Use your ten to twenty minutes to argue your case effectively. Time goes by quickly when you are answering questions.

Armed with your roadmap, hit your high points first. Start with your strongest point. Unless a judge asks you to do so or your case is particularly fact sensitive, do not waste time reciting the facts of your case.

Try not to repeat yourself. Count on the judges hearing everything you said the first time. Unnecessary repetition wastes time and does not make you sound more persuasive. It may even aggravate your judges.

If you are the appellant, remember to save time for rebuttal. Parties usually save two to three minutes of their oral argument time for rebuttal. Rebuttal is not usually something you can plan for in advance. Listen carefully to the judge's questioning of your opponent and to his or her responses. Then, use your rebuttal time to focus on these points.

Again, avoid reading from a script, but bring your roadmap to the podium. You can even consider bringing an outline with key points, record citations, and cases with their citations. Judges often ask for the citation to the case you have discussed.

Never make excuses if you have something in your case that is unfavorable. Instead, if you have an unfavorable record or case law against you, distinguish it. A simple way to respectfully distinguish a case is: "Yes, your honor, Smith v. Smith, does go against my position. However, that case is from another district. This district has not directly addressed this point, and I believe that this district should adopt my position."

Finally, as you make your arguments, politely ask the judges if they have any questions. If they have questions, answer them directly. If they do not have questions, conclude your argument and sit down. Just because you have time left does not mean you must use it.

□ Listen to the questions

While you are making your arguments, the judges may bombard you with questions. It is important to listen carefully to each question and answer the judge directly. Do not beat around the bush. Avoid saying, "I'll get back to that later." Give the correct answer and not the answer you may think the judges want to hear. In some situations, a judge may ask you a question that goes against your case. You must still answer the question directly. Failing to do so may affect your credibility.

If a judge is asking a specific question, there is almost always a reason for it. Sometimes the judge just wants to inquire about something he or she is not sure about. At other times, the purpose of the question might be to influence one or both of the other judges on the panel. Do not worry about the effect of the answer on your appeal.

When I enter oral argument, I typically have a thorough understanding of the case, but I still ask the lawyers several questions. It gives me the opportunity to listen to how the lawyers respond to my questions. It also might spark questions or comments from my colleagues.

Although I believe that the judges' questions are the most important part of oral argument, do not panic if there are no questions. Instead, finish your argument, request the relief sought, and sit down. There is nothing worse in appellate law than stealing defeat from the jaws of victory.

□ **Mind your manners**

Finally, it is essential for you as an advocate, and as a human being, to mind your manners. Minding your manners begins with arriving at the courthouse on time. On time is actually ahead of time, so that you are in the courtroom before the judge(s) enter.

Before your first appearance at trial or oral argument, take a field trip to the courthouse to get acquainted. This will certainly ease your first-time jitters.

Next, always be respectful. Be courteous to everyone in the courthouse, including the other lawyers, administrative staff, and any others with whom you come in contact. When the judge(s) enters or leaves the room, stand.

In addressing the bench, never interrupt the judge(s). Speak loudly and clearly, yet slowly enough so the judge(s) can understand your argument. Avoid bringing anything to the podium that may be distracting, and watch your hand movements. Avoid long pauses, if possible, because they are always awkward.

Finally, control your temper. Even when you have a hot bench that asks lots of tough questions or an uncompromising trial judge, maintain your composure. Although you may respectfully disagree, do not argue with a judge, particularly after a ruling. Your credibility is always on the line, and you are always in battle with someone who really gets the last word.

□ **Conclusion**

Taking these pointers to heart will make you a better trial and appellate advocate. Remember, you can firmly advocate for your client while safeguarding your credibility and respecting the bench and all others.

Reading 5- *M. Kirby*

Michael Kirby AC CMG [125] "Rules of Appellate Advocacy: An Australian Perspective," *Journal of Appellate Practice and Process* (Summer, 1999) pp. 227- 242

1 J. App. Prac. & Process 227

Rules of Appellate Advocacy: An Australian Perspective

I. Advocacy and Australian Courts

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A Justice of the High Court of Australia gains a perspective of the quality of advocates from all over Australia. This experience is enhanced by the continuance of a tradition, which dates back to the days before the Court building in Canberra was opened, whereby the Court conducts a circuit to some of the outlying States for sittings one week each year. The basic requirements of appellate advocacy are common to every appellate court. There is no jury, yet persuasion is still important. There are no witnesses, and the judges must work from transcript and pre-read written argument. Yet the advocate must bring the case to life. If possible, he or she must show the merits (even if only the legal merits) of the case.

On the eve of my departure from the Court of Appeal, I wrote an essay identifying ten rules of appellate advocacy for ***232** Australian advocates. [FN15] Necessarily, it was written from my perspective after more than a decade in the central seat of an extremely busy state appellate court of general jurisdiction in Australia. It also called on my experience sitting in the Court of Appeal of Solomon Islands. Most of my ten rules remain true for the ultimate national court on which I now sit. To limit the rules for advocates to ten and, indeed, to call them "rules" is a presumption. No simple set of rules will ever suffice to encapsulate the basic requirements of good appellate advocacy. No amount of time or thinking about such rules will substitute for the experience of conducting oral argument, or even closely watching other good advocates. Nevertheless, the rules may help to organize some thoughts that an advocate, seeking to succeed before an appellate court, will do well to consider. Obviously my rules would need adaptation in jurisdictions of the common law where procedures are significantly different from those that we follow in Australia and other countries of the same tradition.

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[125] Justice of the High Court of Australia. Formerly President of the Courts of Appeal of New South Wales and of Solomon Islands and Judge of the Federal Court of Australia..

II. Ten Rules

1. Know the Court

In the New South Wales Court of Appeal, the Court will make available to the parties, on the afternoon before the case, the names of the judges rostered to participate. Informed advocates will know, or soon find out, the general predilections, philosophy and attitude of the judges assigned to the case. Pre-supposition about judicial opinions, based upon result-oriented analysis, may be dashed in a particular decision. But every experienced appellate advocate will be aware that different judges have different interests and distinct approaches to the three determinants of many an appeal: legal authority, legal principle, and legal policy. [FN16] In the High Court of Australia, there is no pre-announcement of the names of the Justices who will sit, either on special leave applications or on an appeal. ***233*** Obviously, if a constitutional question is involved, the advocates will know that all of the seven justices (save any who are disqualified) will participate. But in other appeals, original proceedings and special leave applications, the advocate must be prepared for any combination.

Having discovered, or worked out if they can, the composition of the Court, it will be no bad thing if advocates can find authority, particularly recent authority, from the sitting judges relevant to the issue at hand. It is important to check the recent cases. The judges will tend to know these because the probabilities are that one or more of them will have participated. Nowadays, electronic systems permit speedy analysis of legal issues, including by reference to the opinions of particular judges. Knowing the court is not simply a matter of pandering to particular judicial egos. It is also vital to know how the court operates. In the High Court of Australia, there is no system of pre-hearing assignment of the obligation to prepare the first draft of the Court's reasons. Obviously, some of the Justices may have a greater interest in certain areas of the law than in others. Although before the hearing all judges will usually have read the opinion under appeal and reviewed the written submissions of the parties, typically one judge will have a more detailed knowledge of the appeal papers and of the issues. The art of the advocate may be to attempt to carry that judge. But if it appears that he or she is antagonistic, it may be vital for the advocate to work particularly hard on the other judges-seeking to fill gaps in knowledge that the primary judge may not care to recognize.

2. Know the Law

It is vital that any advocate appearing before an appellate court know the basic procedural rules that govern the bringing of the proceedings to the court. Checking that the appeal is in the right place may also be important because some appeals and summonses are assigned to single judges with further appeal only by leave. It may also be a wise precaution to check, at least in important cases, that the required written submissions and other documentary material (e.g., chronologies, affidavits and narratives) have been received by the judges.

Commanding the detail of the facts of the case and thoroughly researching the applicable law go without saying as ***234*** prerequisites of the successful advocate. The

advocate who has not really mastered the papers is soon exposed in Australia by sharp judicial questioning. Once so revealed, it is very difficult for that advocate to recapture the confidence of the court, at least in the case at hand. The court is then forced to the realization that it will receive inadequate assistance and be obliged, unaided, to research the facts, or the law, fully for itself. Advocates who present in this way on a couple of occasions may have good excuses. They may be too busy. But the result will be that their reputations in the appellate court will be shattered. They may be able to deceive their clients and those instructing them, but they will rarely deceive the court.

Certain legal developments of a general character must be understood by any appellate advocate in Australia today. One of them affects the gateway to appellate review of facts. Authority of the High Court of Australia limits the power of appellate courts to disturb primary decision-making where it rests, directly or indirectly, upon judicial findings based on the credit of parties or witnesses. [FN17] Science casts doubt upon the capacity of a judge, or anyone else, to decide the truthfulness of a witness's testimony by appearance-and particularly in the artificial circumstances of a courtroom. Some observers consider that a far greater advantage of the primary judge over an appellate court is the opportunity to see the whole of the evidence unfold in sequence, to absorb its detail and to have the opportunity to reflect upon it, in its entirety. [FN18] Typically, the appellate judge does not have the time to read every page of the appeal papers. In Australia, the judge is often heavily reliant upon the advocates to highlight crucial passages of the evidence.

An appeal, even by way of rehearing, is not an occasion for a revisit to all of the supposed wrongs of a trial. Still less is it an opportunity to salve the wounded feelings of an advocate who thought the trial was won. It should never be forgotten that the process is an *appeal*. It is necessary to show that the primary decision is wrong. In finely balanced decisions, upon which ***235*** differing judicial minds could reach differing conclusions, appellate courts will ordinarily give great respect to the advantages and opinions of the primary judge. The process of appeal is thus concerned with demonstrating error.

Therefore, a good advocate will present the appeal in a quite different way than the primary hearing was conducted. This is also why advocates who are wonderful in the constructive work of a trial may be less impressive in the often critical and destructive business of appellate advocacy. In ultimate courts, the technique of permission will require that less attention be given to factual nuances and more to legal differences and issues of legal policy. Justice Ruth Bader Ginsberg acknowledged the common reputation of appellate judges amongst their trial brethren: "They are the ones who lurk in the hills while the battle rages; then, when the battle is over, they descend from the hills and shoot all the wounded." [FN19] There is more than a grain of truth in this accusation, but it derives from the abiding appellate search for error.

3. Use the Opening

The opening words of the advocate in an appeal can be an important opportunity to seize the attention of distracted and over-worked decisionmakers. The point of attention may be the merits or justice of the case. It may be an interesting issue of legal policy. It may be the clear requirement of legal authority. Sir Anthony Mason, a former Chief Justice of Australia, suggested that advocates should search for an exhilarating or humorous way to catch the attention of the court at the outset. [FN20] However, one leading Australian advocate has, rightly in my view, cautioned against forced humor. [FN21]

Many judicial officers, myself included, usually commence their opinions with a sentence or two explaining the central issues at stake in the appeal, a citation from authority designed to achieve the same object, or a reference to an arresting fact ***236*** that will intrigue the reader and capture his attention. The advocate should seek to do likewise. The opening is generally the one moment when the advocate has the undivided attention of all members of an appellate court. Do not squander the moment by plunging straight into the reading of a tedious extract from legislation or a lengthy citation of authority. The opening is the headline. It is the chance to communicate the advocate's basic point of view. It is a moment for selectivity. First impressions are often important. [FN22] The good advocate will therefore give a lot of thought to the opening oral argument and to the strategy of explaining the case to the court.

One very important point to understand is that the advocate will usually know much more about the case than any of the judges. No matter how clever and experienced the judges are, the pressure of work upon them today is such that few, if any, will have read the appeal papers from cover to cover. Few will have thought about them at any depth. It is important for the advocate to lay out the issues and at least the principal facts. This should be done, even in the face of some judicial resistance. Otherwise, it may not be possible ever to communicate the key issues to the minds of all of the decisionmakers.

4. Conceptualize the Case

An advocate's mind naturally hastens to the strongest (and weakest) points in a case. [FN23] Most decisionmakers are interested in the merits and in correcting injustices, if they lawfully can. [FN24] Thus the advocate will do well to exercise discipline and to think through the issues-identifying the strengths and weaknesses of the argument to be pleaded. Candid acknowledgment of a problem may even enlist the assistance of the court, if the merits suggest that course. In the end, the decisionmaker must conform to the law and the law may not permit the correction even of an apparent injustice, but the ***237** merits of the case are usually very important to any judge sworn to do justice.

5. Watch the Bench

Communication is more than a skill with words. It involves the eyes and indeed the whole body of the advocate. It is vital that advocates watch those to whom they are addressing their arguments. In this way, they will be more likely to follow the tendencies of thought that may be expressed as much by judicial body language and attitude as by oral expression. How many advocates I have seen clutching the podium as a support, lost in their books and in their reading, and ignoring the very people whose decision is vital to their client's cause. Courtesy and tact will suggest that, in a multi-member bench, the advocate will look not only at the presiding judge but at all participating judges in due turn. Otherwise, the ego of neglected participants may be bruised or their attention lost.

I do not underestimate the difficulty of capturing the attention of all members of a multi-member body, especially if they are as many as seven or nine. Different judges, for example, have different attitudes to particular tools of advocacy. Some like and even encourage the presentation of Ministerial Second Reading Speeches in aid of statutory construction. Some appellate judges in Australia make no secret of their view that such materials are generally worthless. [FN25] Differences in multi-member courts may even extend to the choice of a dictionary to be used in argument about the meaning of words. Some judges are attracted, in appropriate cases, to international human rights jurisprudence. Others regard it as completely heretical or irrelevant. [FN26] A good advocate, faced with such divergences of opinion, will play the field with gentleness but persistence: winning the one with good humor without losing the other.

Watching the judges' reactions to arguments can help the advocate know how far to push an issue and when enough has ***238*** been said. Invariably, the advocates who make the biggest impact on an appellate court are those who, at least for a time, stand away from their books and engage in a direct conversation with the bench. They will have thought through their case. They can encapsulate its strengths and acknowledge its weaknesses. They show the appellate judge the way, if possible, to reach a just and lawful conclusion.

6. Substance over Elegance

It is, of course, preferable that everything done in a courtroom be done with style. In an appellate courtroom, which misses much of the drama of the trial, the central skills are somewhat different. I have always thought that good appellate advocates will concentrate on substance. That is what their audience is usually interested in. If substance can be presented with style, so much the better. Many times, at the end of argument, I have watched and waited as counsel of high talent go through their notes to make sure that every point of importance has been covered by their submissions. Such waiting is often worthwhile. Nowadays appellate courts in Australia are more lenient in permitting post-hearing submission of supplementary written arguments, by leave. But it is preferable that points should be covered before the judges depart the bench lest they hasten to judgment before brilliant, but late, thoughts occur to the advocate.

7. Cite Authority with Care

The tedious recitation of authority and the endless reading of old cases is the surest way of losing the attention of the decisionmaker. Where an earlier decision is read, the advocate should always state at the beginning or at the end, or both, the holding that is extracted or the principle for which the case stands. In the welter of case law today, it is necessary to show great discernment in the reading of cases to an appellate court. Analogous reasoning by reference to previous decisions involves a subtle process. The court will be helped if the advocate can quickly and accurately summarize the relevant facts of the case, state the decision, and proceed to the briefest possible recitation of the crucial passage.

***239** One big change that has occurred during my fifteen years service in appellate courts in Australia is that the citation of English authority has declined as that of the courts in the other Australian jurisdictions, New Zealand, Canada, the United States, and elsewhere has increased. This is a process that is encouraged by the High Court of Australia. [FN27]

8. Honesty at All Times

The corollary of the immunity from being sued, which advocates enjoy in Australia for what they do in court as advocates, is that they are obliged at all times to be honest to the court. [FN28] In the appellate court, this usually means that the advocate who discovers binding or even persuasive legal authority that stands in the way of the propositions advanced to the court is duty-bound to bring that authority to notice. Difficult passages in opinions of appellate courts should be brought to attention. Advocates who do this faithfully are much valued by the judges. Their honesty is remembered. It adds to the most priceless possession of an advocate-reputation. It is easy today for a judicial officer or other decisionmaker to overlook a change of the law or to be unaware of recent statutory developments that may affect the case at hand. The advocate who brings to notice apparent difficulties of which the judicial officer was unaware, and then seeks to explain a way around those difficulties, will often enliven appreciative assistance, so far as the law permits.

9. Courage under Fire

A silent appellate judge is a positive menace who may occasion an injustice by not exposing his or her preliminary views. [FN29] The actors in the appellate courts of Australia rarely complain of judicial silence. The bad old days of appellate rudeness and even bullying have generally been replaced with a mixture of courtesy, insistence, and efficiency. The advocate ***240** must be ready to move with the judicial questions. If it is thought that insufficient time has been allowed to express the factual or legal foundations of the argument, a request for further time, courteously addressed to the court, will rarely be denied. Courage and determination are wonderful qualities in advocates. They must not wilt under fire.

Without indulging in intellectual pride, the advocate before an appellate court should sometimes press on, even if the court appears antagonistic. Perhaps one judge

will be induced into dissent, which may attract a higher court, future development of the law or, at worst, endorsement by the High Court of the Law Reviews.

10. Explain Policy and Principle

Once a case comes on appeal, and in particular in an ultimate national court, it is essential that the advocate should have considered the issues of legal principle and of legal policy that lie behind the case at hand. At least at these levels of the judicial hierarchy, it is typical for the decisionmakers to be reflecting, as they consider the arguments, the differential consequences of upholding, or rejecting, the contentions advanced in the appeal. There are some appeals in which the facts are clear, the law is well known, and the outcome is virtually automatic. But in most, there is real room for the advocate to maneuver.

Principle and policy can be derived both from the context of the law under consideration and from a deep knowledge of the fundamentals of the common and statutory law and legal history. In the life of an advocate (or of an appellate judge) there is rarely time to pause and think for an extended period about legal principle and legal policy. Such thoughts must occur, if at all, in the spare available moments in and out of the courtroom. Ideas about legal policy sometimes arise, by serendipity, when the judge reads a decision in another case. The judge will suddenly see its significance for other tasks and note it for its utility there. The busy attorney preparing for the hearing may experience the same process.

The pressure on judges and advocates today has encouraged an increasing reliance in Australia on academic writings. No longer do the judges unreasonably require that ***241** academic authors have died before their thoughts may be read to a court. The old days when legal principle and policy were ostensibly ignored in appellate decisionmaking and advocacy are gone forever. With greater candor about judicial choice comes a larger realization of the need to assist that choice with more than old case law, mutually inconsistent rules of statutory construction, and the citation of dictionaries that pleases everyone and no one. [FN30]

III. The Future

The rules that I have stated would have much less application in jurisdictions of the common law where an appellant (like the applicant for special leave to appeal in the High Court of Australia) is strictly limited to a fixed time for extended oral persuasion. The foregoing rules are therefore most helpful to those jurisdictions that continue to follow, so far as they can, the tradition of oral persuasion. This was the tradition that we all originally inherited from England. In most countries of the Commonwealth of Nations and in Ireland, that tradition is maintained. Only in recent decades has there been, for efficiency's sake, a shift to the requirement of detailed written submissions in the hope of saving time in court. In jurisdictions of the United States of America and those that follow their lead, strict time limits are commonly imposed for advocacy. More detailed written briefs must be filed than are usual in my country. Different necessities will obviously produce different rules. However, the situation in Australia is sufficiently similar to that in many other common law

jurisdictions as to make the foregoing discussion applicable to countries far from my own.

If the pressure on appellate courts continues to increase in Australia and other common law jurisdictions that cling to oral persuasion, and if the appointment of more judges is either unacceptable or thought undesirable, new techniques will clearly be required. More appeals will require leave of the court. More decisions will be given without reasons or with only short reasons. More of the load will be shifted to the advocate. I would not rule out the possibility of requiring advocates in the *242 future, in effect, to prepare submissions in the form of a draft opinion for the Court which, in some cases, the Court could accept as its own, with or without modifications. Preparing a draft opinion would certainly require the advocate to cast his or her mind into the judicial mode and to see the case as the decisionmaker must. This, indeed, is the ultimate challenge of the advocate: to see the case as the judges will, and thereby more effectively persuade the judges to see the case from the client's perspective. There are few occupations with so many perils, as well as so many exhilarating rewards when the work is well done. The skills of the advocate must therefore be sharpened and improved to avoid the moments of peril and to multiply the moments of deserved exhilaration.

[Footnotes are omitted]

Unit 3- The Role of Appellate Counsel

1. Specific Learning Outcomes

At the end of this unit, students are expected to be able to:

a) explain effective representation and corresponding loyalty to the legal profession and the law;

b) enumerate tasks that fall under advocacy services;

c) illustrate competence and integrity in the context of legal services;

d) contrast *professional* endeavours and *business* undertakings;

e) discuss the obligations that an appellate counsel owes to judges, witnesses, colleagues, the profession and the law; and

f) explain the elements of effective representation;

Expected number of learning hours for Chapter 1, Unit 3 (Week 3)

- Class hours: *Two hours*
- Student independent workload: *Four hours*

2. Unit Introduction

The appellate counsel's role is to, *inter alia*, effectively represent his/her client in the context of loyalty to the profession and the law. This requires not only technical competence and proficiency but also integrity and ethical obligations towards the client and the law. "*Basic Principles on the Role of Lawyers*" adopted at the 8th UN Congress on the Prevention of Crime and the Treatment of Offenders[126] embodies the following regarding duties and responsibilities of lawyers:

> ***"Duties and responsibilities***
>
> 12. Lawyers shall at all times maintain the honour and dignity of their profession as essential agents of the administration of justice.
> 13. The duties of lawyers towards their clients shall include:
> a) Advising clients as to their legal rights and obligations, and as to the working of the legal system in so far as it is relevant to the legal rights and obligations of the clients;
> b) Assisting clients in every appropriate way, and taking legal action to protect their interests;
> c) Assisting clients before courts, tribunals or administrative authorities, where appropriate.
> 14. Lawyers, in protecting the rights of their clients and in promoting the cause of justice, shall seek to uphold human rights and fundamental freedoms recognized by national and international law and shall at all times act freely and diligently in accordance with the law and recognized standards and ethics of the legal profession.
> 15. Lawyers shall always loyally respect the interests of their clients."

The Preamble of the Federal Courts Advocates' Licensing and Registration Proclamation considers advocacy as "a profession wherein a person trained and experienced in law, fully aware of judicial proceedings and dictated by the spirit of loyalty, sincerity and [honesty] works in cooperation with the judicial organs

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[126] Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990

for the rule of law and prevalence of justice."[127] According to Article 2(2) of the Proclamation, Advocacy Services include "preparation of contracts, memorandum of association, documents of amendment of dissolution of same, or documents to be adduced in court, litigation before courts ... and ... consultancy services for consideration or without consideration, or for direct or indirect future consideration." To this end, advocates take an oath embodied in Article 13 of the Proclamation which reads: "... I will, with honesty and good faith defend the causes of my clients in accordance with the law, work with understanding with my opponents and colleagues, and give due respect to courts and be helpful to the rule of law."

The provisions cited in the preceding paragraph clearly show that appellate advocates need to have the competence (education and experience) for the services they offer and they ought to have the integrity (i.e. the spirit of loyalty, sincerity and honesty). In addition to these two domains of competencies, the preamble and the provisions cited above entrust appellate attorneys with responsibilities to:

a) the client (by defending the causes and interests of the client in accordance with the law) – Article 13;
b) the law (by being helpful to the rule of law – Art. 13, for the prevalence of rule of law and justice – preamble);
c) judicial organs (by working in cooperation with the judicial organs – preamble, and giving respect to courts – Art. 13); and
d) the other party in the litigation and to colleagues (Art 13).

These duties are expected from appellate attorneys because lawyering is a *professional* endeavour different from activities such as *business* undertakings. While the latter aim at profit, professions, including the legal profession, mainly target at public service although there are pecuniary benefits obtained from the services. Teferi Berhane makes a distinction between *business* and *profession* and

[127] Federal Courts Advocates' Licensing and Registration Proclamation No. 199/2000, Preamble, Paragraph 1

underlines the duties that every member of the legal profession owes to the client, the law, courts and other lawyers.[128] It is this feature of the legal profession that would render law firms "non-business organizations the liability of which is unlimited."[129]

Federal Court Advocates' Code of Conduct Regulations[130] addresses the responsibilities entrusted on advocates. Article 3 of the Regulations articulates the responsibility "to assist the organs of the administration of justice in the effort to promote respect for the law and attainment of justice" and the particular duty to "discharge the professional duty to [one's] client, other lawyers and opposing party, the court, [the legal] profession, and the society in general honestly, faithfully and truthfully." The fact that lawyering is a profession and not a business activity is evident from provisions such as Article 4 of the Regulations which requires advocates not to handle a case if they realize that the claim has no legal ground after having evaluated "the facts and evidence."

Most of the provisions from Articles 4 to 27 and many other provisions in the Regulations deal with various issues related with services and obligations to and relationships with clients. Article 8 states the advocate's duty to render competent services through "high level of professional competence and skill in the advocacy service he renders." The provision further requires the advocate to have professional obligation, within the limits of the law, "to employ his legal knowledge and work experience to protect the rights and interests of his client" and follow up his client's case "diligently and take all the necessary measures carefully and timely so as to obtain a quick and just decision."

In addition to the provisions that dwell upon the advocate's tasks owed to the client, the Regulations require advocates to refrain from harassing the opposing

[128] Teferi Berhane, "Professional Ethics of Advocates and Consultants at Law", (Amharic) *Journal of Ethiopian Law*, Vol. VIII, No.2, December 1972, pp. 272- 305
[129] Federal Courts Advocates' Licensing and Registration Proclamation No. 199/2000, Art. 18(1)
[130] Federal Court Advocates' Code of Conduct Council of Ministers Regulations No. 57/1999

party by contentions without cause of action [131] and to be fair to the opposing party by restraint from obstructing access to evidence, falsification of evidence and lodging unsubstantiated assertions.[132] Moreover, the Regulations embody various duties that ought to be respected by advocates during the proceedings and throughout his services. These include good faith and the obligations owed to judges, witnesses, colleagues, the profession and the law.[133]

Similar tiers of professional responsibility apply to the Public Prosecutor's Office, as well, when it acts as appellant or respondent (appellee) in criminal cases. As Tilahun Teshome noted "the Public Prosecutor is said to have failed to perform its functions if it fails to bring an offender to justice; and its fault becomes even worse if it prosecutes and brings about the punishment of an innocent person ."[134]

ABA's[135] Code of Professional Responsibility cited in Reading 1, *inter alia*, embodies the duties to "act with competence and proper care in representing clients," to "strive to become and remain proficient in his [her] practice" and the duty to accept employment only in matters which s/he can handle. Effective representation requires examination of merits of a case. The appellate counsel is expected to refrain from handling no-merit appeals. It is, however, to be noted that issues that are at least arguable can be regarded as having merits of appeal provided that the degree of the strength and the downsides of the issues are objectively clarified to the client. The role of the appellate lawyer involves responsibility to the law at large by restraint from knowingly advancing "a claim or defence that is unwarranted under existing law" unless such argument is made in good faith "for an extension, modification or reversal of existing law."[136]

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[131] Ibid, Art. 28
[132] Ibid, Art. 29
[133] Ibid, Arts. 55 to 58
[134] Tilahun Teshome, "The Profession and Ethics of Public Prosecutors" (Amharic), *Ethiopian Bar Review*, Vol. 3 No. 1, March 2009, p. 130
[135] American Bar Association
[136] ABA, Code of Professional Responsibility, DR-7-102

As stated in Reading 2, the lawyer's role needs "mastery of the facts, however voluminous" and "fluency in the law" accompanied by written and oral communication and persuasion skills. Promenance discusses the extent to which the lawyer's task requires "diligent, focused and concentrate effort" and quotes Justice Cardozo who said "what we give forth in effort comes back to us in character."

Reading 3 relates competent representation with "legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Competence and proficiency with regard to procedural and substantive laws governing the case are indeed indispensable. Arey discusses three categories of "tasks, abilities, or practices the appellate litigator typically encounters: (1) preliminary concerns; (2) brief writing; and (3) oral argument.

According to Arey, preliminary concerns include deciding whether to appeal, which court can address the issues raised and relief sought, thoroughly examining the record on appeal and carefully examine which of the issues ought to be raised on appeal, after which the attorney can decide whether s/he can "devote the time and resources necessary to bring this appeal, or [whether is] better to refer it to another lawyer." The reading then briefly discusses the tasks of preparing appellate briefs and conducting oral arguments which are skills that can continuously be enhanced through experience and continuing legal education.

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3. Review Exercises

a) Contrast a business undertaking exclusively established for profit and a profession.

b) A lawyer has tasks and responsibilities in his functions as a lawyer (while handling a particular case or activity), as member of the legal profession and as member of the community and society. Explain and give examples.

c) List down the core elements in the *Code of Conduct* embodied in the Federal Court Advocates' Code of Conduct Council of Ministers Regulations No. 57/1999.

d) State the core objectives of legal aid clinics in law schools, and relate them with professional services.

e) Write your comment on the following:

> "Lawyers … must avoid false and misleading statements of fact and law, and must not mislead through silence when they ought to speak. …"[137]

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4. Readings (Week 3)

Reading 1- Ursula Bentele & Eve Cary, *Appellate Advocacy: Principles and Practice, Cases and Materials,* Chapter 6

Reading 2- Renee M. Pomerance , *Appellate Advocacy: Presenting the Oral Argument*

Reading 3- C. Franklin Arey, Competent Appellate Advocacy and Continuing Legal Education

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[137] Douglas R. Richmond "Appellate Ethics: Truth, Criticism and Consequences," *Review of Litigation,* Vol. 23 (Spring 2004) p. 318

Reading 1 – *Bentele & Cary*

Ursula Bentele and Eve Cary (1995) *Appellate Advocacy: Principles and Practice, Cases and Materials*, 2nd Ed, (Cincinnati: Anderson Publishing Co.), Chapter 6

The Role of Appellate Counsel

Introduction

The attorney's task in representing clients on appeal, as at other stages of litigation, may be complicated by the different obligations to the client, the adversary, and the court. Counsel's duty to represent a client competently and zealously may come into conflict with counsel's ethical obligation to refrain from pressing frivolous claims and to be candid with opposing counsel and the court.

The A.B.A. Code of Professional Responsibility provides:[138]

EC 6-1 Because of his vital role in the legal process, a lawyer should act with competence and proper care in representing clients. He should strive to become and remain proficient in his practice and should accept employment only in matters which he is or intends to become competent to handle.

EC 7-1 The duty of a lawyer, both to his client and to the legal system, is to represent his client zealously within the bounds of the law, which includes Disciplinary Rules and enforceable professional regulations.

DR 7- 102 Representing a Client Within the Bounds of the Law

A. In his representation of a client, a lawyer shall not:

2. Knowingly advance a claim or defense that is unwarranted under the existing law, except that he may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law.

DR 7- 106 Trial Conduct

B. In presenting a matter to a tribunal, a lawyer shall disclose:

1. Legal authority in the controlling jurisdiction known to him to be directly adverse to the position of his client and which is not disclosed by opposing counsel.

Counsel's relationship with an adversary whom counsel must face frequently may interfere with the kind of forceful, uncompromising representation to which the client is entitled. For example, an attorney with several cases presenting similar claims may be placed in a position of comparing the relative strength of those claims, to the detriment of some clients. …

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[138] Similar provisions are contained in the A.B.A. Model Rules of Professional Conduct. See 1.1 and 3.1.

When the appellate court has assigned counsel to represent an indigent client, counsel's role as an officer of the court may come into conflict with undivided loyalty to the client's desires. When a client is entitled to an appeal as of right, but the case presents no meritorious claims, counsel will be unable to satisfy both the court and the client. Counsel's task is made even more complicated in light of the difficulty of classifying claims as frivolous, weak, or strong. The law is not a science, so that reasonably competent attorney may well differ regarding an assessment of a claim as frivolous, as opposed to merely weak. And it is not hard to imagine that counsel's judgment about whether an issue might be meritorious could be affected, consciously or not, by whether the client is in a position to pay the costs of framing and developing that issue.

Effective Assistance of Appellate Counsel

The appellate attorney's task consists primarily of trying to convince an appellate court that the client, whether appellant or respondent, should prevail on the claims presented to the court. In order to perform that role, the attorney should, of course, follow all applicable rules in the court in which the case is pending. Failure to follow required procedures can have disastrous consequences for the client...

…

Special Concerns of Assigned Appellate Counsel

A. The No-Merit Appeal

The question of what an appellate attorney must do to represent a client effectively on an appeal can become complicated when the attorney is assigned to provide representation to an indigent defendant on an appeal as of right. … (The assigned attorney may decide) that the case is not worth the court's attention in that no frivolous issues would be raised by the appeal.

B. Whose Case Is It Anyway?

Fortunately for the conscientious appellate attorneys, Justice Day is right in believing that most trial records are not so error-free that the attorney has no choice but to file a no-merit brief. … Even if a claim is a long shot, not likely to prevail in the particular court to which an appeal may be had, appellate counsel's duty of zealous representation requires that counsel, whether retained or appointed, present such a claim as effectively as possible. The case involving one or two relatively weak, but arguable claims thus does not usually present a problem for the diligent appellate attorney.

Much more difficult is the case with one or two very strong issues along with several weaker ones. … [There can be a dilemma that may be encountered by] an attorney when the client has a different view of how to proceed with the appeal.

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Reading 2 – *R. M. Pomerance*

Renee M. Pomerance (May 2002) *Appellate Advocacy: Presenting the Oral Argument*, (Ministry of the Attorney General, Toronto, Ontario: Canada)

…

The Role of the Advocate

Within the profession of law, the work of that advocate is highly demanding. Lord Chancellor Eldon graphically captured this intensity when he proposed the following advice for would-be advocates: "I know of no rule to give them but that they must make up their mind to live like hermits and work like horses"[9]. while the current reality may not be quite so harsh[10], the modern lawyer faces many daunting challenges in grappling with the forensic, personal, and public aspects of the advocate's role. On the forensic side, the advocate must strive for an encyclopedic mastery of the facts, however voluminous; a sophisticated fluency in the law, however complex; and divine insight into the subjective proclivities of the tribunal, however opaque. Armed with this knowledge, the advocate is to use all the elements style, rhetoric and persuasion at her disposal in an effort to sway the controversy in her favour. This is no mean feat. It requires hours of diligent, focused and concentrate effort. This task is not only time consuming; it can be all-consuming.

There is also a personal or human side to advocacy that poses its own distinct challenges.[11] It is common wisdom that the best advocates have an intuitive sense on human nature that comes from a wealth of worldly experience. We are not to cloister ourselves in the law, but rather, are to expose ourselves to the great works of literature and other expressions of the culture in which we live. To be a great advocate is not merely to be a good lawyer, but to be a good citizen, schooled in matters ranging from the common-place to the sublime. This includes an appreciation of the broader milieu and the perpetual interaction between legal doctrine and social context. As stated by Chief Justice Vanderbilt:

> …The advocate must know the economic, political social and intellectual environment of his case [and] the trends of the times. He must know whether he is working with against what Dice has called the assumptions of the age. [12]

While those words were written in 1950, they have never rung truer than in the Charter era, in which the Courts and the counsel who appear before them must wrangle with social and political issues that are often at the root of how we live as a society.

To be an advocate is to confront and transcend the limits of one's personal perspective –a world view that is the culmination of each person's unique background and experience. It is also to recognize the pull of personal morality, which exerts a profound influence on the difficult decisions that lawyers must make on a regular basis [14]. Similarly, the personal side of advocacy engages a broad range of human

emotion that can be triggered by adversarial litigation. It is the advocate's mandate to become enmeshed in a broad range of human affairs: some uniquely tragic; some impossibly contentious. While lawyer must approach their work with a strong sense of professionalism, they may nonetheless care very deeply about the interests they represent. The advocate shoulders a great deal of responsibility, but ultimately exercises very little control. Advocates are human and therefore not immune from experiencing frustration and disappointment.

There is, finally, what one might call the public dimension of advocacy. The public face looks outward to the perceptions and attitudes of those in the non-legal community. Regrettably, the reflection of gazing back is sometimes less than flattering. Advocates must contend with the growing cynicism of a public that has become increasingly skeptical of our judicial system and its ability to mete out justice. Trials are often seen as gamesmanship and the vindication of human rights are perceived as technicalities. The media has become increasingly activist and subjective in its coverage of legal events. In discharging their role, advocates must defend a system that, at least in some quarters, attracts distrust and disdain.

While demanding in many spheres, legal advocacy is nonetheless one of the most exhilarating and gratifying professional endeavours. It stimulates and ignites the passions of those who have embraced this role. However herculean the labour, it is invariably matched or exceeded by its rewards. As Justice Cardozo put it: "what we give forth in effort comes back to us in character. The alchemy is inevitable."[15] To be an advocate is to be something much more than merely a wordsmith or technician. Our moral courage, however you put it, it tests something much more profound and personal than our knowledge of legal rules.[16]

[Footnotes omitted]

Reading 3 – *C. F. Arey*

C. Franklin Arey, III [139]"Competent Appellate Advocacy and Continuing Legal Education: Fitting the Means to the End" *Journal of Appellate Practice and Procedure (Winter, 2000)* pp. 27 - *46*

2 J. App. Prac. & Process 27

Competent Appellate Advocacy and Continuing Legal Education …

Competence is demanded of every attorney. The very first rule of the Model Rules of Professional Conduct makes this command: "A lawyer shall provide competent representation to a client." [FN1] If the primary function of an attorney is to competently and vigorously represent the interests of his client, then competence should be a primary concern. [FN2]

To maintain and enhance this competence, an attorney should engage in continuing study and education. [FN3] Continuing legal education (CLE) programs are often justified as a method for promoting competence. [FN4] Even though the ability of CLE programs to maintain and enhance competence remains subject to debate, as of 1995 more than two-thirds of the states required some form of CLE for their attorneys. [FN5]

What does this all mean in the appellate practice context? Is appellate advocacy a distinct form of litigation, such that it merits special CLE programs? If so, what "competence" in ***28*** appellate advocacy should we attempt to promote? And what CLE programs will promote competency in appellate practice?

…

I. Is Appellate Advocacy Recognized as a Specialty (*Omitted*)

2 . What Constitutes Competent Appellate Advocacy

…

Rule 1.1 gives some assistance in defining competence: "Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." [FN24] The comment to the rule reiterates the importance of adequate knowledge, skills, thoroughness, and preparation; these requirements vary with the complexity of the matter at stake, the lawyer's experience, the preparation and study he can devote to the matter, and the possibility of association with or referral to a more competent lawyer in the field in question.

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[139] Chief Counsel, Arkansas Department of Human Services. Governor Mike Huckabee appointed Mr. Arey to serve as judge on the Arkansas Court of Appeals from May 1997 to December 1998, to fill an interim vacancy on the court.

[FN25] The comment also notes the possibility that a novice in a field can become competent to undertake a matter: "A lawyer can provide adequate representation in a wholly novel field through necessary study." [FN26]

The Committee on Appellate Skills Training turned to another American Bar Association report for a definition of competence. [FN27] The Committee's summary of this other report is worth quoting:

As the Cramton Committee has suggested, the development of a competent lawyer involves three components: ***33*** knowledge about law and institutions, fundamental skills, and the ability and motivation to apply both knowledge and skills to the task. The required knowledge is further defined in that committee's report as knowledge about relevant law--legal concepts, doctrine, and rules--and about legal institutions--their procedures, powers, and limits. Fundamental skills involve written and oral communication in a variety of specialized settings. [FN28]

This summary is similar in focus to rule 1.1 and its comment. There is a common emphasis on knowledge and skills that is worth developing further.

…

With these general considerations of the meaning of competence in mind, what specific knowledge and skills characterize competent appellate advocacy? I propose examination of three categories of tasks, abilities, or practices the appellate litigator typically encounters: (1) preliminary concerns; (2) brief writing; and (3) oral argument. My goal is not to suggest the right answer or method of approaching tasks in these categories, although that might occur incidentally; rather, I want to identify knowledge and skills that could be the subject of CLE programs designed to enhance competent appellate advocacy.

A. Preliminary Concerns

How attorneys address certain preliminary concerns can affect the credibility that courts assign to their work. Many of the decisions made before the attorney's pen hits the paper ***34*** govern what occurs in brief writing or at oral argument, or whether an appeal is even taken at all. At the very least, attorneys should be aware of these concerns and give them due consideration.

The first concern, of course, is deciding whether to appeal. Blindly pursuing an appeal can be detrimental to more than the outcome of the case: "[A] case which should not be appealed but is appealed nevertheless immediately deflates the credibility factor for the lawyer. The legal acumen and professional judgment of the lawyer is automatically suspect." [FN31] Instead, before making a decision, competent appellate advocates will consider factors such as the possibility of success, the length of time needed to complete an appeal, and the financial costs involved. [FN32]

In considering whether to appeal, attorneys must understand appellate courts as an institution. If their jurisdictions contain an intermediate appellate court and a supreme court, for example, they must determine which of those courts can address the issues raised and relief sought. This determination requires not only an

understanding of applicable court rules, but also an understanding of the concepts of "error correction" and "law development" as appellate court functions, the relationship between intermediate appellate and supreme courts, and any distinctions between them. [FN33]

If an appeal is to be taken, the record must be reviewed for error. "The skill that is perhaps the most important and unique to the appellate litigator is that of developing and working with the record on appeal." [FN34] The record must demonstrate that the issues were properly preserved. [FN35] Further, not all errors matter: The appellate courts only care about reversible error, not harmless error. [FN36]

***35** Appellate advocates must next exercise discretion and objective detachment in deciding which of these issues will be raised on appeal. One consistent admonition decries the "kitchen sink" approach of raising every conceivable issue on appeal. [FN37] "A storm of arguments--good, bad, and indifferent--can convince the judges that there is no merit to the case, even if buried in the deluge is a winning nugget." [FN38] A competent appellate advocate will evaluate the issues accordingly, "select[ing] with dispassionate and detached mind the issues that common sense and experience tell him are likely to be dispositive. He must reject other issues or give them short treatment." [FN39]

Competence requires appellate litigators to consider other hurdles before they begin writing. Does the case present an appealable order? [FN40] Will jurisdiction otherwise be proper in the appellate court? [FN41] Can the attorney navigate the "statutes, rules of procedure, and judicial doctrines that govern what and when a litigator must do to represent a client effectively in the appellate process"? [FN42] Moreover, can the attorney devote the time and resources necessary to bring this appeal, or would it be better to refer it to another lawyer?

Many of these preliminary concerns require skills that can only be refined through experience. Nonetheless, awareness of ***36** these concerns, coupled with the study and consideration necessary to address them, can go a long way to enhancing appellate advocacy competence.

B. Brief Writing

Competent appellate advocates approach brief writing conscious of the importance that briefs have in the context of the appellate court's work. Appellate judges have a tremendous caseload that does not permit misuse of their time. [FN43] In addition, briefs have for some time supplanted oral argument as the primary means of communicating with these courts.

[T]he roles of the brief and oral argument have been reversed. The brief is the central feature of modern appellate practice. This dramatic change, although discussed in a number of recent articles by judges on busy appellate courts, has not been recognized by many attorneys…. The appellate attorney must understand that *the brief affords the principal and perhaps the only opportunity he will have to present arguments on behalf of his client to the appellate court.* [FN44]

In this environment, competent appellate advocates understand that effective brief writing is required.

The attorney must accomplish two tasks through the brief: (1) inform the appellate court about the case; and (2) persuade it that the attorney's position is correct. [FN45] The court's need to be informed cannot be neglected. "Generally, the brief that best helps the court understand the case is the brief that best serves the client's cause." [FN46] Senior Judge Garth explained: "Your job is to educate and teach us. If you cannot do either, you are not prepared to discharge your appellate function." [FN47]

***37** The second task, persuasion, is crucial: "If a brief does not persuade, it fails." [FN48] Effective persuasion, in turn, requires the appellate advocate to maintain his credibility with the court. [FN49] Careful selection of the issues presented, thorough research, accurate statement of the facts and law, avoidance of hyperbole and partisanship, and good writing are just some of the many tools a competent appellate advocate will utilize to demonstrate his credibility, for the purpose of persuading the court. [FN50]

With a proper understanding of the appellate court's working environment, the role of the brief, and the two tasks to be undertaken, an appellate advocate should be prepared to address the case at hand. This essay would wander far off track if space were devoted to skills such as proper use of the record, legal research, and effective writing. It requires no citation, however, to emphasize the importance of doing these things well. Many of the authorities cited in this essay contain good advice on writing to inform and persuade appellate courts, and I highly recommend them. [FN51]

My limited experience as an appellate judge underscores the need to constantly remind the bar of these basics. The best briefs I read were clearly thought through before their authors made any attempt at writing. Good writers not only stated the standard of review, they applied it in their argument as well. Given the workload of the Arkansas Court of Appeals, I always appreciated a brief writer who remained focused, clear, and concise, without obvious partisanship. Unfortunately, a number of attorneys neglected these basics. Many squandered their credibility through partisanship, inaccurate citations, incomprehensible writing, and lack of focus throughout the argument.

Effective brief writing is a necessary skill for competent appellate practice. Knowing the importance of the brief in the context of appellate litigation should motivate a competent appellate advocate to exercise and hone this skill. Focusing on the tasks of informing and persuading, while exercising good ***38** research and writing skills, will, in my opinion, enhance the competence of the appellate advocate immeasurably.

C. Oral Argument

To acknowledge that briefs are the primary means of communicating with appellate courts does not imply that oral argument is irrelevant. Much more often than not, I found oral argument to be helpful, *as long as all involved were prepared.* I always found it useful to test my understanding of a case and my tentative decision through an exchange with prepared attorneys. Appellate judges agree that oral argument can be

helpful, albeit for various reasons and in varying degrees. [FN52] Oral argument skills are therefore important to competent appellate advocacy.

One aspect of this skill, of course, is effective use of public speaking principles. [FN53] As with writing skills, I do not intend to list these exhaustively; my point is that these principles should be studied and taught as part of any effort to promote competent appellate advocacy. Having watched an experienced trial attorney pace behind the podium while arguing to the United States Court of Appeals for the Eighth Circuit, I am convinced that emphasizing these basics should help lessen distraction from the exchange of ideas at oral argument. Advice on effective use of public speaking principles in the context of appellate oral argument is readily available. [FN54]

An important aid to effective oral argument is understanding its place in the context of the appellate court's decision making process. Because most courts will have read the briefs by the time of oral argument, they are prepared to go immediately into conference to decide the case after argument concludes. [FN55] Thus, an attorney's only direct, personal contact with the court occurs at oral argument, immediately before it discusses and decides the case. A competent appellate advocate will therefore regard oral argument as a conversation with the ***39*** court in what is, in effect, a beginning of its conference. "Lawyers should consider oral argument as the beginning of the conference dialogue. It is a window into what the panel thinks." [FN56]

This understanding should help an appellate advocate to understand the importance of questions at oral argument. This is the court's chance to ask any questions it may have after reading the briefs; this is when the court wants to get to the heart of the matter. [FN57] Wise advocates welcome the chance to personally answer the court's questions about the case, rather than allow them to be raised, and left unanswered, in the judges' case conference. "What makes for the best oral arguments? Not 'argument' at all, but answers to questions that resolve in your client's favor the doubts of the panel members." [FN58] I think good appellate litigators understand this, doing all that they can to encourage and answer questions from the bench.

Competent appellate advocacy requires extensive preparation for oral argument. Appellate judges repeatedly bemoan the lack of, and emphasize the importance of, preparation. [FN59] Further, because appellate advocates never know whether they will be besieged with questions or left to deliver a monologue, competent advocates will prepare for both possibilities. [FN60] This preparation should include a thorough review of the record, anticipation of the court's questions, and development of a focused argument. Really good advice concerning preparation for oral argument and responding to questions from the bench is available and should be consulted. [FN61]

My experience with oral argument as an appellate judge is much more limited than my experience reading briefs (which further underscores the importance of the latter). Many arguments were very good, including some in which counsel made skillful use of exhibits. I do recall being puzzled by one ***40*** attorney who seemed put off by questions from the bench; I will probably never forget the advocate who did

not seem familiar with a statute that was the basis for an award against his client, which he was appealing. These anecdotes suggest a failure to appreciate the importance of questions from the bench and preparation for argument. These things are understood by experienced appellate advocates, but the examples nonetheless reinforce my contention that these are the basics we need to emphasize to the bar at large, if we wish to enhance competence in appellate advocacy.

Oral argument clearly should not be neglected as a skill. Competence in this area includes the use of public speaking principles and thorough preparation. Further, we should be emphasizing the context of oral argument in the decision-making process and the related subject of questions from the bench. An understanding of these latter two points helps to focus a competent appellate advocate's preparation for oral argument.

3. What CLE Programs Should We Offer to Promote Competent Appellate Advocacy?

…

As a practical matter, three points merit emphasis. These programs are more effective when appellate judges are involved. I think that is why the Lunch with the Court of Appeals program, for example, was so successful: Appellate advocates want to hear the "consumer" say what works and what does not. Second, while they take more work, hands-on exercises at brief writing, record development, and oral argument are invaluable. Finally, feedback, judicial or otherwise, is good. A favorable opinion may be an indication that the advocate's brief was successful--it persuaded--or it may be an indication that the judge did a lot of work on the case. Feedback in an exercise is not that ambiguous.

Conclusion

Promoting competence in appellate advocacy serves two very important goals: It helps appellate courts in their decision making, and it serves the needs of clients. For these reasons alone, we should be promoting competence in the knowledge and skills that lead to competent appellate advocacy. Assuming CLE programs can enhance competence, some thought should be given to planning and structuring programs that promote competence in all areas of appellate advocacy. It is my hope that this essay has provoked such thought.

[*Footnotes omitted*]

Case Problem 1: *The Need for Clarity in Client-Attorney Contracts*

(*Names of the parties has been omitted and Ethiopian calendar is used as in the original version)*)

Federal High Court

File No- 125/92
Comp. No. 11808
Tir 5/1996 Eth. Cal

Judge: Hirut Mellese

Plaintiff …… Attorney A
Respondent …… Ato G

… The court has rendered the following decision after having examined the pleadings and oral arguments of both parties.

Judgment

The statement of claim filed by the plaintiff on Megabit 22nd 1992 states that the respondent left his house Woreda 10, Kebele 33, House No. 216 under the custody of a holder, who is his relative, when he went abroad in 1972 Eth. Cal. Due to the prevailing unjust practices at the time, the Agency for Government Houses took possession of the house. The owner returned to his country after change of the former government and he started efforts to recover his house. On Tir 18/1987, the respondent gave a Power of Attorney to the plaintiff, through two instruments, so that the latter can submit petitions and suits towards the recovery of the house and receive the house on his behalf.

[As stated in the Statement of Claim], the client-attorney contract was signed on Yekatit 3rd 1987 in which both parties agreed that the plaintiff would provide the services of representation based on her profession and her practicing license and that the respondent shall pay Birr 35,000 (Thirty Five Thousand) and 20 % (twenty per cent) of the benefits to be obtained from the judgment.[140] The plaintiff

[140] ከፍርድ ከሚገኘው ጥቅም ሀያ በመቶ ለመክፈል

took the case first to the Agency for Government Houses, and then filed a suit to Zonal Court. And finally, the plaintiff took the case to Ethiopian Privatization Agency and followed it up until a decision was obtained in favour of the plaintiff because it was proved that seizure of the house did not have statutory justification. As a result, the plaintiff received the house on behalf of the respondent.

[The plaintiff's statement of claim states that] the respondent has paid Birr 35,000, but has yet to pay 20 % (twenty per cent) of the benefits to be obtained from the judgment. The plaintiff stated that the house is worth at least Birr 2,600,000 (Birr Two Million Six Hundred Thousand) and claimed 20% of its value, i.e. Birr 520,000 (Birr Five Hundred and Twenty Thousand) or 20% of the proceeds from the sale of the house if it is to be sold by auction plus 10% of litigation cost.

The respondent's statement of defence submitted that the plaintiff has not produced evidence regarding the value of the house and that such request cannot be made unless it satisfies the requirements embodied in Sub-Articles 1 to 4 of Article 226 of the Civil Procedure Code. The respondent argued that the words '20 % (twenty per cent) of the benefits to be obtained from the judgment' do not apply to the value of the house, but only refer to the rent that was being collected by the Rental Houses Administration Agency without entitlement to seize and possess the respondent's house. The respondent further argued that the client-attorney contract which the plaintiff submitted to the respondent lacked clarity, and that the payment sought by the plaintiff is unfair and unreasonable. It stated that 'rights' are different from 'benefits' and the return of the house to the plaintiff based on the decision of the Ethiopian Privatization Agency is rectification to the violation that was made against the respondent's right and cannot be regarded as benefit. The relief sought by the respondent is dismissal of the suit and payment of litigation cost by the plaintiff.

The plaintiff submitted a reply to the statement of defence which reinforced the issues raised in the statement of claim.

These were the arguments raised by both parties. The court has examined the issues whether there is yet an unpaid amount which the respondent is contractually obliged to pay to the plaintiff, and if so, what is the amount owed?

The plaintiff's claim refers to payment to the services delivered. As stated by the plaintiff, the parties had agreed on the payment of Birr 35,000 (Thirty Five Thousand Birr) and 20 % (twenty per cent) of the benefits to be obtained from the judgment. The respondent has paid Birr 35,000, but is unwilling to pay twenty percent of the benefits obtained from the judgment.

The respondent contends there was an understanding between the parties that the plaintiff will, in addition to the recovery of the house, claim the amount of rental income collected by Rental Houses Administration Agency during its illegal seizure of the house, and that the words "benefits to be obtained from the judgment" refer to this income and not the value of the house. According to the respondent, the return of the house should not be considered as benefit; securing rights cannot be considered as obtaining benefits; and the respondent would have been obliged to pay 20% of benefits only if he had received the rental income collected by Rental Houses Administration Agency. …

The court has examined the client-attorney contract (Plaintiff's Documentary Evidence No. 3) signed by plaintiff and respondent. As stipulated under Article 1 of the contract, the respondent has agreed to pay Birr 35,000 for the professional services to be offered by the plaintiff, out of which Birr 27,000 shall be paid as first payment and the remaining Birr 8,000 and 20 % (twenty per cent) of the benefits to be obtained from the judgment shall be paid as final payment.

The reason why the respondent contended that "benefit" should be interpreted solely as rental income is not clear. There is no ground why the term benefit cannot apply to the return of the house that was improperly taken and which the respondent could not use for a long time. The respondent, on the one hand, contends that the term 'benefit' would have applied to rental income had it

been obtained, and on the other hand argues that no benefit derives from the decision.

The contention that there is no benefit obtained from judgment is not tenable. The respondent did not invoke a legal provision that supports this argument.

On the other hand, it is necessary to raise the issue as to what the term benefit refers to. Article 1735 of the Civil Code provides that "a contract shall be deemed to relate to such matters only on which the parties intended to contract, however general the terms used." For the term 'benefit' to be construed solely as rental income based on this provision, there must be an inference that the parties had intended such a restrictive interpretation. However, the respondent has not submitted evidence which indicates that the parties intended to solely refer to rental income. Nor does the overall content of the contract lead to such presumption.

There is no legal or contractual basis to interpret the formulation of the contract to mean that there could have been 'benefit' only if the respondent had been entitled to rental income.

Moreover, the respondent has invoked Article 1738 and has argued that the contract should be interpreted on his behalf. This provision applies only where ambiguous words are included in a contract and where it becomes difficult to interpret such words, and not merely because a party desires a certain line of interpretation. An interpretation which holds that "there is no benefit to be obtained from judgment or decision" renders the contract concluded between the parties superfluous. Article 1737 provides that contractual provisions "shall be given a meaning to render them effective rather than a meaning which would render them ineffective."

The court has not [thus] accepted the argument that the respondent is not bound to pay the 20 % [contingency fee].

The court has then examined the second issue of fact which relates to the amount which the respondent should pay to the plaintiff.

The two major arguments raised by the respondent in this regard are two, i.e. the value estimation for the house is exaggerated, and that a contingency fee of 20% for the services is unfair and unreasonable.

The court does not accept the argument that the amount payable to the applicant is unfair and unreasonable. The respondent has not raised a legally sound argument against the contractual obligation he entered into with consent and capacity.

With regard to the value estimation of the house, however, the plaintiff has not produced evidence; the court cannot accept the amount stated as the value of the house while the plaintiff states that valuation has not been conducted by professionals. Thus, the court has ordered Addis Ababa Land Administration Authority to submit the value of the house, Woreda 10, Kebele 33, House No. 216. The Authority has submitted its response in a letter dated Tahsas 23rd 1996. According to this letter, the selling price of the house is estimated to be Birr 620,942.98 (Birr six hundred twenty thousand nine hundred forty two and ninety eight cents).

Therefore, this court has rendered a decision that the respondent shall pay twenty percent of the value of the house (i.e. 20 % x 620, 942.98 = 124,188.59) which is Birr One Hundred Twenty Four Thousand One Hundred Eighty Eight Birr and Fifty Nine Cents.

In addition, the court has decided that the respondent shall pay court fee based on the amount decided, 10% of the amount decided as lawyer's fee plus Birr 2,000 (Two Thousand) for other … cost.

…

_____

Questions and Discussion

The following questions presuppose being objective from two pre-conceived assumptions: On the one hand, a respondent being reluctant to pay for the services (which involved a long time and effort) after having obtained a favourable decision; and on the other hand, plaintiff being unfair and unreasonable in seeking exaggerated contingency fee and taking advantage of the term 'benefit' which seems to be susceptible to some ambiguity. Discuss the following in pair and in class:

1. Is the word 'benefit', as used in the contract, ambiguous?
2. Does the return of the house to the respondent fall under the term 'benefit'?
3. Does the phrase 20% of the benefits to be obtained from the *judgment* apply to benefit from the *decision* of Ethiopian Privatization Agency? If there is ambiguity in this regard, how can it be resolved?
4. How does the principle of *sui generis* (Article 1735) apply in the definition of 'benefit'? Discuss whether this principle leads to interpretation according to mutual intention from *general to specific* or from a *narrower context to a wider meaning*. Comment on the court's analysis of the issue.
5. Edit the following contractual clause to avoid ambiguity from two perspectives: (a) to give the term '*benefit*' a *wide* meaning so as to include return of the house and rental income collected by Rental Houses Administration Agency, and (b) to alternatively give it a *narrow* meaning so that it can solely apply to rental income.

   "In addition to the amount stated above, the client shall pay the advocate 20 % (twenty per cent) of the *benefit* to be obtained from the judgment."
6. Comment on the balance obtained in the judgment and the methods used in issue analysis so that the plaintiff can be remunerated, while the liability of the respondent can be significantly reduced as compared to the amount stated in the statement of claim.

Chapter II
Appellate Brief

1. Specific Learning Outcomes

At the end of this chapter, students are expected to be able to:

a) discuss the need for accuracy, brevity and clarity in the preparation of effective appellate brief;
b) explain contents of appellate brief in civil cases based on the Ethiopian Civil Procedure Code;
c) explain contents of appellate brief in civil cases based on the Ethiopian Criminal Procedure Code;
d) illustrate what is meant by stating "grounds of objection to the judgment appealed from without any argument";
e) explain the significance of clarity, unity, coherence and sequence in brief writing;
f) discuss the need to avoid of long quotations in brief writing;
g) explain and illustrate the usage of appropriate diction and tone in brief writing;
h) state the structure of an appellate brief and petition to the Cassation Division of the Federal Supreme Court; and
i) draft and write up appellate brief.

Expected number of learning hours for Chapter 2 (Weeks 4 and 5)

- Class hours: *Two hours* per week
- Student independent workload: *Four hours* per week

2. Introduction

The issues raised in various courses such as Legal Research Methods, Pre-trial Skills and Appellate Advocacy regarding effective research, analysis, write-ups and communications apply to appellate briefs. A case in point is the theme involved in what can be referred to as the ABC of lawyering (i.e. 'Accuracy' of facts and the relevant laws identified, 'Brevity' of written and oral communication and the need for 'Clarity' of whatever is written or argued.

Many books and articles have been written on effective brief writing. Many of them are based on experience obtained over a long period of legal practice while others include perspectives from the bench. Most literature underlines the need to thoroughly examine the record and to identify, prioritize and sequence issues based on their strength. Moreover principles of good brief writing should be pursued while statements of issues, statement of facts, summary of the appeal, and points of appeal are written, edited and polished.

The Ethiopian Civil Procedure Code and Criminal Procedure Code embody provisions that deal with contents of the Appellate Brief. Memorandum of appeal in civil cases shall, *inter alia*, state "grounds of appeal" and "the nature of relief sought." [1] However, the grounds of appeal are required to concisely and under different heads state "the grounds of objection to the judgment appealed from without any argument and such grounds shall be numbered consecutively."[2]

Similar requirements are embodied in the Criminal Procedure Code which requires the memorandum of appeal to set forth, under distinct heads, the grounds of objection to the judgment appealed against "without any arguments" in addition to the requirement that "such grounds shall be sequenced consecutively."[3]

[1] Civ. Proc. Code, Art. 327(1)(e) & (f)
[2] Civ. Proc. Code, Art. 328

[3] Crim. Proc. Code, Art. 189 (1).

The Amharic version that reads "በክርክር መልክ ሳይተቹ" prohibits argumentative details and not 'arguments.' The appeal is thus expected to state the grounds for objecting the finding of the lower court without making the appeal argumentative. The word '*argument*' in the following readings can thus be understood as 'grounds of objection' and not as argumentative details prohibited under Ethiopian law.

The appellate counsel is expected to carefully address the contents of the appellate brief and follow the principles of good brief writing which according to Bentele and Cary (in Reading 1) includes clarity, unity, coherence, sequence, avoidance of long quotations, diction and tone. The other readings substantiate and add supplementary perspective to the principles of good brief writing, a set of skills which is not expected to pursue a monolithically similar style as long as the theme and underlying principles of effective brief writing are observed.

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3. Tasks (Weeks 4 and 5)

Task 1

You are expected to make a visit to a practicing lawyer's or a public prosecutor's office and carefully read an appellate or reply brief. The office you visit can also be a legal department of any public or private institution where you can find a brief. You may also visit an Appellate Court's Registrar. You need not copy the brief as long as you are allowed to read it and do the following exercises:

a) Are the requirements stated in Article 327 and 328 of the Civil Procedure Code, or Art. 189 of the Crim. Procedure Code in criminal cases satisfied?

b) Identify parts of the appellate brief which are introductory, that constitute its body and the part that has the relief and conclusion.

c) Identify the parts that have issues of the appeal, material facts, disputed findings of the lower court with regard to facts (if any) and the legal issues of appeal.

d) Comment on the organization and write up of the appellate or reply brief.

Task 2

You are expected to find a judgment of any court which you believe can be appealed from.

a) Identify issues of appeal.
b) List down the issues in the sequence of their strength.
c) Prepare an outline.
d) Write an appellate brief
e) Edit and polish your appellate brief after having read:
    i. the readings below, and
    ii. the sample appellate briefs (which you read during your observation visit) that are well written both in terms of substance and form.

Task 3

a) Prepare a chart and tally the principles of good appellate brief writing in the readings below
b) Writing styles of appellate briefs cannot be uniform; yet all good briefs share common denominators. Explain the statement.

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4. Readings (Weeks 4 and 5)

Reading 1- Ursula Bentele & Eve Cary, *Appellate Advocacy: Principles and Practice, Cases and Materials,* Chapter 7

Reading 2- Mary Beth Beazley, A *Practical Guide to Appellate Advocacy*

Reading 3- E. Gressman, *Winning on Appeal*: … (Effective Brief writing)

Reading 4- Andrew L. Frey and Roy T. Englert, Jr., *How to Write a Good Appellate Brief*

Reading 5- J. Byington, *How to Make Your Appellate Brief More 'Readable'*

Reading 6- Robin Jean Davis, *Effective Appellate Petition and Brief Writing*

Reading 7- J. H. Toal, R. A. Muckenfuss, S. Vafai , *Four Steps to Effective Appellate Brief Writing*

Reading 8- H. Pregerson & S. D. Painter-Thorne, *A Check list to Editing*

Reading 1 – *Bentele & Cary*

Ursula Bentele and Eve Cary (1995) *Appellate Advocacy: Principles and Practice, Cases and Materials*, 2nd Ed, (Cincinnati: Anderson Publishing Co.) Chapter 7, pp. 254 -285 [NB. New numbering is used for clarity]

The Appellate Brief

Introduction

The purpose of an appellate brief is to marshal the facts in a case and to present legal arguments on behalf of one party. It is the modern appellate advocate's most important means of persuading a court to rule in the client's favour. In more leisurely eras than our own, appellate practice was largely oral. Lawyers argued for hours and even days before the Supreme Court, and briefs were mere summaries of the points made at oral argument. Times have changed, however, and today the appellate brief is not only the most important, but often the only means of presenting a client's case as an increasing number of courts strictly limit oral argument.

The format of the brief is controlled by court rules. …. [I]t is counsel's responsibility to keep abreast of [the rules] or risk the rejection of the brief for failure to confirm. Certainly, a brief is more likely to persuade the court if it complies with the rules that the court has adopted governing how briefs should be written.

Many law offices, including prosecutors' offices and legal defenders' offices (as well as moot court honor societies) have their own style of brief writing. If you work in such an office or are participating in a moot court competition, you will, of course, follow the preferred format. Unfortunately, however, experienced appellate practitioners, whether real or moot, frequently do not make clear to their new associates (sometimes because they themselves do not know) which of their rules of brief-writing are simply a matter of style and a desire for uniformity within the office, and which are basic rules of good appellate practice. The fact is that once a court's requirements have been satisfied, the appellate advocate has considerable freedom in matters of brief-writing style; there are only a few generally-accepted, hard and fast rules. Indeed, placement of one's own personal stamp on a brief is desirable.

On the other hand, there are certain conventions of brief-writing, just as there are rules of etiquette that one might as well follow unless there is a good reason for doing otherwise. ...[I]n a particular case, there may be an excellent reason for summarizing the defense testimony before the prosecution testimony. Generally, however, one sets out the prosecution testimony first and this is the position in which judges expect to find it. There is nothing to be gained by surprising them unnecessarily with a variation from standard practice ... .

1. Know Your Audience

The most important rule of writing generally is to keep in mind your audience. When writing an appellate brief, your audience is, of course, an appellate court. ... This tells you that you need not spend time in your brief explaining basic concepts. ...

You also may know that your audience has particular ideas on the subjects about which you are writing because they have expressed them in prior cases. Thus, you know which arguments in your case will be a waste of time and which have a chance of succeeding. ...

Equally important as understanding what your audience already knows is keeping in mind what they do not know. What a court does not know is the facts in your case. Although at some point some or all of the judges may read the record in the case, in the first instance, and perhaps for always, the court will learn the facts of the case from the parties' briefs. This should indicate to you the importance of writing a clear, complete statement of facts. Likewise, although you can assume that the court is generally knowledgeable about the law, you should be aware that it may very well be unfamiliar with particular cases and statutes. ...

A final and extremely important piece of information you have about the audience for an appellate brief is the circumstances under which the judges will be reading what you write. ... [Y]ou are aware of the realities of modern appellate adjudication; the volume of appeals has increased so many times during the past few decades that your brief will be one of perhaps hundreds that the judges have to read that month. Put yourself in the judges' position and imagine the relief they must feel upon finding in the midst of the ceiling-high pile of their required reading an accurate, concise, self-contained, well-reasoned, thoroughly-supported, elegantly-written, carefully-produced brief. Obviously, such a brief will make your client's case stand out from the many as one worthy of the court's careful review and will provide the judges with a useful tool to help them in making their decision. Such consideration for the judge-reader can surely help to persuade him or her in your favor. And this, of course, is the Golden Rule of the appellate brief-writer. Be persuasive.

2. Preparing to Write the Appellant's Brief

2.1- Identifying Issues for Appeal

2.1.1- Assembling the Record

It is, of course, the job of the party seeking to overturn a judgment to come forward and explain in a brief what errors occurred in the proceedings below that require the appellate court to reverse the judgment. Therefore, the first step in writing the appellate's brief is to assemble the entire record of the proceedings in the lower court so that errors, if any, can be located. The record includes the pleadings (or the indictment and bill of particulars in a criminal case); any pre-trial motions and decisions; the transcript of hearings, trial and (in criminal cases) sentencing; written requests ... ; interrogatories and answers (in a civil case); exhibits; post-trial motions and decisions; and any other documents that might provide an issue for appeal.

2.1.2- Annotating the Transcript

After the entire record has been assembled, the next step is to read it through once quickly to get an idea of the nature of the case. Many appellate lawyers find it useful

after reading the pleadings to turn first to the opening statements and summations of trial lawyers to get an idea of their view of the evidence and the issues in the case and to hear their arguments on behalf of their clients. Appellate counsel is not required to adopt these arguments (except to the extent necessary to comply with preservation requirements ... , but it is helpful to know what another lawyer intimately familiar with the case thinks about its merits. A telephone call to trial counsel to discuss the case may also provide some information to put the record in context.

After the first, quick reading to familiarize oneself generally with the case and to get a gut feeling about the basic unfairness or fairness of the proceedings below, the transcript of hearings and trial should be carefully read and annotated. This means simply noting at what page important facts and legal arguments appear for easy reference later on. Record annotations are for an attorney's own use; you should develop whatever note-taking method works for you. The only purpose of the annotations is to enable you to write your brief without having to sift through the entire record all over again to look for the page at which a particular witness made a particular statement or a lawyer made a motion or an objection. Thus, you want your annotations to contain all of the important information while being as concise as possible; after all if your annotations are as long as the transcript, they will not be much of a time-saver when you are writing your brief.

Traditionally, lawyers used yellow pads with wide left-hand margins for annotating records. These are handy because objections to rulings can be specifically noted on the margin provided. Obviously, these days lap-top computers may be the preferred method, but do be sure to include notes of objections to make writing a preservation argument easier. ...

2.1.3- Listing Possible Issues

Once the transcript is fully annotated, a list should be made of every issue that might possibly be raised on appeal. Most of these will ultimately be discarded, but the first list should contain all nonfrivolous issues. Appealable issues generally fall into three basic categories. The first category is procedural, that is, whether the case is properly before the court. The second category contains those issues involving the sufficiency of evidence. The third category contains those issues arising out of the conduct of the proceedings below.

The first place to look for issues is therefore in the procedural history of the case. For example, did the plaintiff in a civil case exhaust all administrative remedies before filling suit in court? Did the defendant in a criminal case receive a speedy trial?

The second place to look for issues is in the indictment or pleadings to determine whether these were supported by the evidence at trial. Did the prosecution produce evidence of each element of the crime? Did the plaintiff produce sufficient evidence on each element of the statute or regulation ... ? Is the verdict supported by the evidence under the correct standard or review? Decisions on pretiral motions and hearings should also be exhausted to determine if factual findings are supported by the record.

... [For] issues in the third category... [the] court's evidentiary rulings at all stages must be examined. Has the court exercised its discretion appropriately? ... Did its procedural rulings comport with the applicable rules of civil or criminal procedure? Trial counsel's objections should alert you to possible issues, but the appellate advocate must also be on the look-out for unobjectod-to-errors. In particular, those rulings which interfere with a defendant's ability to defend him or herself should be noted, such as, for example, rulings excluding evidence or limiting cross-examination. Opening statements and summations should be considered with great care for errors of law or fact, omissions of necessary instructions and unfair marshalling of evidence.

...

Obviously, issue identification requires considerable familiarity with the substantive law governing the case, as well as a thorough command of the facts in the record. This familiarity comes with the regular practice of law in the appellate courts. At the beginning of your career you will simply have to research many issues that will not pan out. If you are not in an office where you are receiving careful supervision on your first cases, you should attempt to find an experienced mentor to read your records to make sure that you are not overlooking any issues – the greatest fear of any appellate practitioner. Even if your first briefs are imperfectly argued, you still may win as long as you have presented the court with the issue. If the issue simply isn't there, however, there is no way the court can decide it. Therefore, if limited help is available to you, ask for it at the issue-spotting rather than at the editing stage.

Even experienced practitioners must be conscientious about keeping up with the latest issues in appellate practice. Certain issues become "hot" while the courts lose interest in others. ... Appellate attorneys who stay abreast of opinions in the courts where they have active practices can often get a good sense of the issues to which those courts are especially sensitive, as well as those that are unlikely, despite objective strengths, to persuade the court to grant relief.

2.2- Selecting Issues for Appeal

Once a comprehensive list of possible issues has been made, the next step is to cross most of them off. A useful rule of thumb for the good appellate brief writer is that less is often more. This maxim refers not only to the desirability of concise legal arguments but equally to the selection of the issues to be raised on the appeal. A brief should never be cluttered up with harmless errors and make-weight arguments. Many experienced appellate lawyers believe that the key to an effective appeal is knowing which issues to omit. Of course, it is important not to omit issues about which a respectable argument can be made. And a lawyer may choose to include an issue simply because the client particularly wishes to raise it. It is possible, however, to damage a client's cause by diluting the strong points in a brief with a collection of weak ones.[4]

Unless a trial was unusually long, it is unlikely that more than two or three issues will present themselves, and there is nothing disreputable about a one-point brief. It is extremely difficult to imagine a good brief containing more than six good points.

[4] The Supreme Court acknowledged this point in Jones v. Barnes, 463 U.s. 745 (1983) ...

Indeed, if such a situation should arise, it would probably be a good idea to combine two or more arguments into a single point. A good question to ask yourself when debating whether to include another issue in your brief is whether a court that has already rejected your stronger points is likely to be convinced by this one.

2.2.1- Identifying the Strongest Issues

The relative strength of an issue can be measured in different ways. A clear, preserved legal error is strong in the sense that it may be likely to result in reversal. On the other hand, if in a criminal case, for example, it would result simply in the dismissal of a lesser count on which a shorter concurrent sentence was imposed, the issue is not so strong in terms of the relief it can provide for the client. In contrast, a less clear or unpreserved legal issue could nevertheless be viewed as strong if it could result in the dismissal of all charges or the entire complaint.

Of course, no matter how clear a legal error is, it cannot be considered "strong" if it is ultimately harmless. It is crucial that the advocate consider whether a clear error was mooted by events occurring later at trial, whether the court's ruling was supported by correct as well as erroneous reasoning, and whether there is any causal connection between an erroneous ruling or other impropriety and the outcome of the case. And, of course, preservation will affect issue selection. A serious but unpreserved error may have to be abandoned while a weaker issue may be included if trial counsel did a good job of preserving it.

2.2.2- Cumulative Error

Sometimes, a single error standing alone is weak in itself, but combined with another error creates a strong issue. For example, at the trial of defendant charged with murdering his wife, the erroneous admission of evidence that years before he had assaulted her may be a harmless error. Similarly, the defendant might not have been prejudiced by the refusal of the court to admit into evidence the wife's diary in which she described her happy marriage. Together, however, these two errors can add to a strong argument hat the defendant's right to present a defense and to fair trial was impaired. Similarly, while a single improper remark by a court or lawyer would not be worth raising, a pattern of impropriety could very well support a persuasive point.

A shot-gun approach to issue selection is to be avoided. It is not always possible, but is desirable, to organize even strong issues around a theme. For example, if a defendant's claim is that the jury awarded excessive damages to the plaintiff because it was aware that the defendant was well insured, it would be effective to make Point I the improper conduct of plaintiff's lawyer who mentioned insurance in opening; Point II, the failure of the trial judge to take corrective action when a witness blurted out that the defendant had lots of insurance; and Point III, the omission of a charge instructing the jury to disregard any collateral source of funds the defendant might have to pay damages, *i.e.* insurance. Less effective would be three points on entirely separate issue. In short, the way in which issues interrelate can be an important factor in determining their relative strength.

2.3- Ordering the Issues

Once the issues for appeal have been determined, counsel must next decide in which order they should be presented. As a general rule, the most persuasive point should go first. In other types of writing there may be something to be said for leading up to a forceful climax, but the brief writer who follows this pattern runs the risk of losing readers before they get to the crucial argument. Appellate judges do not want to be forced to read any more than is absolutely necessary. If your first point is convincing, the judge may not have to go on to consider your second point at all. At the very best, the reader who is persuaded by the powerful Point I is more likely to be well disposed to a somewhat weaker Point II.

At times, however, there is good reason for deviating from the strongest-point-first rule. … [I]t may be a good idea to group related issues together, either as separate points or as sub-sections of a single point if they are not quite strong enough to stand on their own. In this way, the ideas in the brief will flow smoothly.

Sometimes, one issue can pave the way for another. For example, if a strong argument can be made that the evidence failed to prove the defendant's guilt beyond a reasonable doubt, it should be Point I. Even if the court is not entirely convinced by this argument, it may view the trial errors raised in a subsequent point or points more sympathetically. In other briefs logic will dictate placing an issue first even if it is not the strongest; for example, an argument questioning the jurisdiction of the court should always be Point I because if there is a possibility that the court has no jurisdiction to hear the case, it makes no sense to make the judges review the other issues. Occasionally, an advocate who is familiar with the court in which the brief is being filed might place an issue first, even if it is not especially persuasive, if the court hearing the case has been particularly receptive to that argument in other cases.

The current order for points in a brief is therefore simply the one that makes the most sense in a particular case. Any order that can be justified rationally is acceptable. The appellate lawyer must think about the question, however, and not simply order the points either randomly or according to a rigid formula.

3. Preparing to Write Respondent's Brief

Respondent's preparation to write a brief is, of course, somewhat different from appellant's, although some of the steps are the same. The first thing respondent must do is to read the appellant's brief very carefully and make a list of the arguments made under each point in it.

Many arguments are similar to one another; so it is important to pin down precisely what appellant claims went wrong in the court below to avoid answering the wrong argument and leaving the real argument unanswered. For example, a criminal defendant's claim that his confession was improperly admitted at trial may have any number of bases. … Was the confession psychologically or physically coerced? Was it the fruit of the poisonous tree?

Once respondent has pinned down appellant's claims, it is time to read and annotate the record. Respondent will, of course, pay special attention to the portions

of the record on which appellant relies to support any claims of unfairness, but it is also important to read with the goal of putting those instances in the context of the whole record. Has a claimed error been cured elsewhere in the record? Did the court's charge as a whole set out the correct legal standards? Was the prosecutor's intemperate remark on summation a response to provoking conduct by defense counsel?

And, of course, respondent will be always on the look-out for what is missing from the record – objections to the court's rulings of which the appellant now complains – and changes in theory on appeal from objections which were made.

4. Writing the Brief

Once the issues have been selected, the next step is to start writing the brief. Every appellate attorney has a favorable way of writing a brief. Some start from the beginning and end at the end, while others prefer to write the argument first and the statement of facts last. Some select the order of issues first; others wait until the brief is written to order the issues. It is probably wise, however, to frame the Questions Presented first to narrow the issues and guide the writing of the arguments. It is difficult to answer a question that has not yet been asked and framing a question is a crucial step in clarifying one's own thoughts.

4.1- Statement of the Issues

… [The] prominent placement of the questions will generally ensure that, if nothing else is read, the Justices can at least get an overview of the issues addressed in the papers. Not infrequently, the Court's reaction to the questions presented will determine, not only whether to read on, but at least in a preliminary way, how to vote in disposing of the case. …

4.1.1-Terms and Circumstances of the Case

The requirement that (1) the questions presented to be expressed in the terms and circumstances of the case means that the question should contain facts sufficient to allow the court to come to a preliminary conclusion as to the correct answer. A question that asks "Whether the plaintiff was contributorily negligent" or "Whether the conduct of the defendant fell within the statutory prohibition" is meaningless. Without more factual information the reader can glean little idea of what the case is about, let alone begin to guess at an answer. Better formulations might be "Whether plaintiff's failure to fasten his seat belt prior to the accident rendered him contributorily negligent" and "Whether defendant's conduct, consisting merely of calling the complainant on an intercom to ask her out, fails to satisfy the requirements of the harassment statute." Similarly, instead of saying, "Did the officers have probable cause to search the defendant?" one might ask, "Was the search based on probable cause when the officers had received specific information accurately identifying the defendant as being in possession of a gun?" In other words, it is generally necessary to give the court the legally significant facts around which the issue revolves.

An exception to this rule is where you are intending to argue a broad, purely legal proposition. For example, "Whether a corporation is a person within the meaning of the act" is a good Question Presented. Frequently, appellate attorneys raise the same issue broadly and narrowly: broadly, for example on constitutional grounds to attract interest in the case, and narrowly on the specific facts so as not to sacrifice the willingness of more cautious judges to rule in the client's favor. The ability to raise the issue broadly will often make a narrower but still favorable resolution more likely.

4.1.2- No Unnecessary Detail

The admonition to include facts is qualified by the phrase (2) without unnecessary detail. This proviso means that the Question Presented should not be so lengthy and fact-specific that it obscures the rule of law. Only significant facts should be included in the question and these should be put into a category that would be applicable to other situations. Thus, instead of asking "Whether a ten-year-old girl who has played doubles squash only twice before and does not know that a warning is required when crossing the court can be found negligent for striking her 37 year-old partner and knocking our his two front teeth in an attempt to hit a ball on his side of the court without warning," a preferable question is "Whether an inexperienced child squash player who injures her adult partner as a result of her ignorance of the safety rules of the game can be found negligent."

Proper names, places, dates, amounts and other minor details should generally be omitted from the issues statement. Since the statement is the first section of a brief, the question "Whether the trial court erred in refusing to admit Jane Taylor's psychiatric record into evidence" is meaningless to a reader who is as yet unfamiliar with the case and has no idea whether Jane Taylor is the crime victim or a police officer or an eye-witness or the defendant's mother. Far clearer is the question "Whether evidence of the alleged rape victim's psychiatric record was improperly excluded."

4.1.3- Short and Concise

The third rule that questions should be [3] short and concise often runs into conflict with the rule that questions should be presented in terms and circumstances of the case. The challenge is to write a short, concise question that at the same time conveys a lot of information. That is why it often takes a long time to write a good Question Presented. Just keep in mind that the point of an issue statement is to make the question raised in the appeal immediately comprehensible to the reader. A judge should not have to puzzle out the meaning of a Question Presented and if asked to do so probably will not.

There are a few tricks for writing a concise Question Presented. First, put facts at the beginning of the question and the legal claim at the end. Thus, instead of asking "Whether the defendant was denied his constitutional rights to the adequate assistance of counsel and due process by the lower court's refusal to grant him an adjournment to seek a new attorney on the eve of the trial" it is preferable to turn the question around: "Whether the trial court's refusal to grant defendant's request for an adjournment to seek a new attorney, made on the eve of trial, denied him his

constitutional rights to due process and the adequate assistance of counsel." This saves the reader from having to wade through familiar material … before getting to the unfamiliar fact that the lower court denied defendant's untimely request to substitute counsel, which is the information that you really want to impart. Second, keep sentence structure as simple as possible. One way to shorten and simplify a question is to avoid all double negative forms of expression such as "Whether the court improperly refused to enjoin. …" A better formulation is "Whether the injunction should have been issued. …"

Another way to be concise is to omit any lengthy reference to the actions of the courts below, particularly when more than one court has already dealt with the matter. It is preferable to say simply what the proper court of action would have been. For example, it is far more complicated to parse "Whether the circuit court of appeals erred in overruling petitioner's motion to dismiss the indictment in the absence of finding by the military tribunal that the soldier had been guilty of desertion," that "Whether the indictment must be dismissed in the absence of a finding by a military tribunal that the soldier had been guilty of desertion." In short, by eliminating words and simplifying structure the question becomes comprehensible to the judge or law clerk on first reading.

4.1.4- Avoid Argumentation and Repetition (but don't be neutral)

The rule next cautions advocates to frame questions that are [4] not argumentative or repetitive. The advice to avoid repetition requires no discussion. The meaning of the warning against argumentation is not so obvious. It is certainly true that an issue statement should not be strident. More important, however, it should not present disputed facts as given. … Similarly, being nonargumentative means not overstating the applicable law. …

On the other hand, the question should not be framed with complete objectivity. Respondent's counsel should almost never accept the appellant's characterization of the issues and the *vice versa*. A good advocate is careful to frame the issues from the client's viewpoint. It is entirely possible to frame a question in a factually and legally accurate way while still leading the reader to the conclusion the advocate is urging. For this reason, it is generally preferable to have the question call for an affirmative answer. The effective Question Presented should cause the reader to respond "Well, yes, of course." … An example of opposing ways to frame the same issue would be:

Appellant	Whether by precluding cross-examination of the prosecution's principal witness on his commission of tax fraud the court's rulings deprived appellant of a fair trial and his right to confrontation?
Respondent	Whether the court properly exercised its substantial discretion over the conduct of cross examination when it precluded the defense from cross-examining a prosecution witness about the failure to file a single tax return?

Both of these questions are good because neither attorney could quarrel that the other's characterization of whether the facts or the law was inaccurate or misleading; both agree to the facts that tax fraud was the charge and that cross-examination was

precluded. Likewise, neither could fairly dispute that the defendant does have the right to a fair trial and confrontation or that a court has substantial discretion over the conduct of cross-examination. On the other hand, neither attorney would choose to adopt the other's Question Presented.

4.1.5- Match Question to Argument

The fifth and sixth aspects of question presented deal with the problem of what particular arguments will be considered "fairly included in the formulation selected." …

If various theories support the same result, the safest course is to include a question presenting each possible approach. The careful appellate attorney will not risk being stranded outside the "fairly included" boundary. …

4.2- Statement of Facts

4.2.1- Function

Most appellate practitioners agree that the statement of facts is the most important part of the brief because, as discussed above, while appellate courts are generally familiar with most legal issues, they do not know the facts of your case. Your first goal in writing a statement of facts is therefore simply to provide the court with the information it needs to decide the case in as clear and simple a form as possible. This means that all of the facts necessary for the determination of the issues you intend to raise must be included and all extraneous facts should be excised so that the important facts stand out.

While brevity and conciseness are laudable aims when writing a statement of facts, as they are when writing a Question Presented, it is preferable to err on the side of inclusiveness. An appellate court is capable of weeding out a few extraneous facts that you have omitted. That is why it is not unusual to find a brief in which the statement of facts is considerably longer that the argument.

The next goal of the statement of facts is to alert the court to the legal arguments that will follow. You have failed to write an effective statement of facts if the judge's response to reading it is "Well, that was interesting. So what?" Rather, a good statement of facts is one from which the legal arguments are apparent and flow naturally. A judge should understand upon reading the facts what legal arguments a party will be making.

4.2.2- Fact Selection and Organization

One of the most important tasks the appellate attorney must perform is the selection of facts to include in the statement of facts. The facts in a case fall into two different categories. The first category consists of the narrative of the underlying event or situation that caused the parties to end up in court –the crime, car accident, breach of contract, civil rights violation or whatever. The second category consists of the descriptions of the errors that are claimed to have occurred during the course of the

litigation and appellant wants the appellate court to correct. Both types of facts should appear in the statement of facts.

Your guide to which specific facts should be included in your statement of facts is your argument. This is why appellate attorneys frequently write the statement of facts last. For example, if you find yourself arguing that a particular issue has not been preserved, then you know that you must include a description of the trial attorney's objections. This may be as simple as saying "Over defense objection the witness testified that …" or it may require a more extended discussion.

…

Some lawyers choose to mention facts for the first time in the argument section of the brief in situations in which this adds to clarity. For example, where an appellant complains of prosecutorial misconduct on summation, it may be easier for readers to see the offensive remarks at the beginning of the argument on that point rather than to have to return to the statement of facts to refresh their recollection.

Usually, but not invariably, both the narrative of the underlying incident and the description of the proceedings are organized chronologically because this order tends to be the clearest for the reader in most cases. Thus, a typical statement of facts is a criminal case begins with a description of any pre-trial proceedings that present appealable issues. If there has been a pre-trial hearing, a summary of the testimony will be set forth, divided into the prosecution and defese testimony. The hearing court's decision will follow.

Next comes the account of the trial, again divided into prosecution and defense cases. If the prosecutor's summation is problematic, the improper remarks will be excerpted in a separate section. …

Finally, defendant's sentence should be set out. If an argument is being made that the sentence is illegal and excessive, facts [that support the argument] … should appear in the brief.

Many appellate lawyers like to begin their statements of facts with an introduction that puts the evidence about to be described in a favorable light. For example, in an appeal from a criminal conviction of a defendant for assaulting a police officer who was trying to arrest him, defense counsel on appeal began the statements of facts with an introduction highlighting the fact that the defendant had been acquitted of the underlying crime that was the basis of the arrest.

…

4.3- Summary of Argument

Some courts require that appellate lawyers briefly summarize their arguments in a separate section of the brief immediately following the statement of facts and before argument. Even in courts that do not have this requirement, many experienced appellate practitioners nevertheless include one in the well-founded belief that busy judges find them useful. The summary of argument should succinctly set forth each of counsel's arguments, ideally in one page. It can be organized in any logical

manner, but generally it should follow the organization of the brief. Writing a summary of argument can, incidentally, clarify one's own thoughts about the case and thus may be useful even if it is not included in the brief.

…

4.4- The Argument

One reason that inexperienced appellate practitioners find argumentative writing difficult is that generally they have not read many briefs. Rather, their legal reading has been limited, for the most part, to judicial opinions and law review articles and perhaps a few office memoranda. All of these documents have very different purposes from an argumentative brief, however, and therefore they are not good models for the appellate advocate to follow. Law Review articles, for example, are designed to give a broad overview of the law in a particular area and perhaps to express the writer's own opinions and policy considerations. It is the job of a court writing a judicial opinion to weigh both sides of the issue presented to it in a neutral manner and to explain the reason for its conclusion in a way that will be meaningful to the public as well as to the parties in the case. An office memorandum's purpose is to take a cold, hard look at the law affecting a client and perhaps to conclude that the client has no chance of success. Obviously the appellate brief that resembles any of these models is unlikely to be effective.

The single idea for the appellate advocate to keep in mind is that, regardless of the legal or factual issues in the case, every appellate brief has the same purpose. The purpose is to persuade the court either to overturn (in the case of appellant) or to uphold (in the case of respondent) the judgment of the lower court. This invariable rule should give you a point of reference that will guide you to write an effective appellate argument.

…[I]n deciding whether to reverse or affirm the judgment below, an appellate court is influenced by many considerations having little to do with the substantive law governing the issues raised on appeal. …

… [K]eeping in mind that your goal is either the reversal or the affirmance of the judgment in your case, you can see that in writing the substantive arguments it is crucial you link your legal discussion to your facts. An appellate court rarely wishes to read a dispassionate lecture on the steam-valve theory of the First Amendment. What it wants to hear from you is why the court below did or did not err in upholding a ban on picketing in the public library. The most fascinating legal discussion is of little help to a court trying to decide a case as long as it remains abstract.

4.4.1- Types of Arguments

Legal arguments are generally of two types: those that rely entirely on the application of a particular legal doctrine, and those based almost exclusively on the analysis of facts. The doctrinal argument tells the appellant court that the law … requires a certain result. Accordingly, the argument section of the brief should clearly and

forcefully set forth the applicable law, demonstrate that it was (or was not) applied correctly by the court below, and call for appropriate relief.

The fact-centered argument, on the other hand, analyzes the facts in light of the applicable legal standard, draws such inferences as naturally flow from the evidence, and tries to persuade the court that the result below was improper (or proper) given the facts adduced at trial. The entire argument may well be made without a single citation to authority. The focus, rather, is on the specific evidence adduces with an evaluation of the reliability and persuasiveness of that evidence.

Doctrinal arguments may also incorporate policy arguments. Policy arguments … rely on a broader range of authority than pure doctrinal arguments and may include law review articles by prominent commentators, psychological and sociological studies and other sorts of empirical evidence. Policy arguments have been relied on in such landmark cases as *Brown v. Board of Education* and in other cases involving important social issues as the legality of the Vietnam War, abortion, euthanasia, the death penalty, affirmative action, and the implication of computers and other technology on the First Amendment.

a) Structure of a Doctrinal Argument

The Thesis Paragraph

Although the different character of the different types of arguments will have decided impact on how they are framed, every argument should begin with a forceful thesis paragraph that sums up persuasively the argument being made in the particular point and captures the court's interest. Subsequent paragraphs in the point simply support the argument made in the thesis paragraph. In the doctrinal argument, the clear applicability of the settled law to the facts of the case should be stressed in the theses paragraph. …

…

The Legal Discussion

The second paragraph of argument begins the discussion of the law or the facts or the policies that provide support for the thesis sated in the first paragraph. One of the most common mistakes that inexperienced brief writers make is to begin their paragraphs with a discussion of various precedents[5] (in a doctrinal argument) or facts (in fact-centered argument) and end with a statement of a principle gleaned from those cases (or worse, leave the readers to glean the principle for themselves). It is far easier for a reader to follow an argument that is structured the other way around, that is, one that begins with a legal conclusion and uses precedent to support that conclusion.

Therefore, in a doctrinal argument, the paragraph should begin with a topic sentence that makes a legal point. This topic sentence is often a direct quote or a

[5] The book is written in a common law setting, and readers are expected to customize the theme of certain words such as 'precedents' because the Ethiopian legal system predominantly pursues the legal tradition of Continental Europe.

paraphrase of statutory language or a common law rule. For example, an argument on behalf of a near-sighted baby sitter who brought the wrong child home from the park might begin with the sentence "The defendant's 'intent to deceive a parent' is an element of the crime of substitution of children that must be proven beyond a reasonable doubt."[6] Or, an argument that "right-to-life" protestors must be permitted to demonstrate in the parking lot outside an abortion clinic might begin, "In places which by long tradition or by government fiat have been devoted to assemble and debate, the rights of the state to limit expressive activity are sharply circumscribed."[7] Some topic sentences can and should have an argumentative tone: "Even though it is beyond cavil that a defendant has a basic and fundamental right to be informed of the charges against him so that he will be able to prepare a defense, the People [i.e. the Prosecutor) here change the theory of the case during summations."

The important thing is that the topic sentence should make a point. … … Since most legal arguments require more than one paragraph of discussion, some paragraphs will be devoted to discussion of precedents that support the point made in the preceding paragraph. These paragraphs should begin with a transitional sentence indicating the connection with the preceding paragraph …

Following the topic sentence is the discussion on the precedents[8] that support the point made in it, for example, cases in which the prosecution did not adduce sufficient evidence to prove a child-substituter's intent to deceive a parent or which upheld or struck down bans on picketing in particular locations or in which a prosecutor did or did not change the theory of an indictment. Remember that the purpose of the discussion of the cases is to illustrate or amplify a point that you have already made.

Applying the Law to the Facts

When, and only when, you have made the reader fully familiar with the relevant law, you must apply the law to the facts in your case. A second common flaw in the briefs of inexperienced writers is the failure to keep the law and the facts separate. To be avoided is alternating discussion of law and facts in a single paragraph. Just remember, law first, facts second. The application of the law to the facts is the most important part of the argument. The legal discussion that precedes it is essentially background for your point that the existing law applied in your case requires a particular result.

After you have made your affirmative legal argument as to why your client should prevail, you can answer anticipated counter-arguments. Treatment of contrary authority should be kept short, to the point and a defensive tone should be avoided. If at all possible, present your counter-argument affirmatively, thus addressing the other side's argument implicitly without setting it forth in a neutral way or, even worse, as a terrible obstacle to be overcome. While counter-arguments must be anticipated and answered, the brief that sets out all of the opposing arguments and

[6] P.L. Sec. 135.55
[7] *Perry Ed. Assn. V. Perry Local Educators Assn*. 460 U.S. 37 (1983)
[8] Ibid

then answers them in a matter of a judicial opinion simply results in the court's hearing the adversary's argument twice.

… In other words, the goal for the advocate is to answer the opposing argument without actually setting it out.

Finally, after answering counter-arguments and distinguishing contrary authority, you should come to a brief's conclusion: "The injunction banning all picketing by abortion opponents, but not by pro-choice advocates, is overbroad and content based and therefore violates the First Amendment."

b) Structure of a Fact-Centered Argument

A fact-centered argument also begins with a thesis paragraph that sets out your argument in a nutshell. If differs from the thesis paragraph of a doctrinal argument in that it focuses on the key facts of the case in some detail. Following is an example:

> In this one-witness identification case, the elderly complainant was robbed at gun-point by someone who approached him from behind as he opened his apartment door and followed him inside. There the intruder tied the complainant to a chair, threatened to kill him if he moved, and ransacked the apartment, finally fleeing with various items that he found in his search. The understandably hysterical complainant subsequently described his assailant as a very tall, white man wearing sneakers and a baseball hat. On the basis of the description, the police detained the 5'9'' defendant who was in a near-by park and displayed him in handcuffs to the complainant. Unsurprisingly, the complainant identified defendant as the robber. Given the terrifying circumstance under which the complainant viewed the robber at the time of the crime and his inability to provide a detailed description of him to the police. The only reasonable conclusion is that his identification of the defendant as the robber was the product of the highly suggestive identification procedure.

The subsequent paragraphs of a fact-centered argument also must begin with forceful topic sentences and make legal points. For example, you might begin your argument by saying, "The eyewitness identification in this case is so unreliable that it is impossible to conclude beyond a reasonable doubt that the defendant is in fact the man who committed the robbery." After having made this point, you next want to support it. Rather than supporting your point with law, however, as you do in a doctrinal argument, you support it with facts. …

When discussing supporting facts, similar types of facts should be grouped together in paragraphs starting with topic sentences. For example, one paragraph might discuss the circumstances under which the victim observed his assailant at the time of the crime, including the lighting, distance and length of time the incident took. This paragraph would begin with a topic sentence making the point that the opportunity of the witness to view the robber was minimal.

Another paragraph might be devoted to the witness's state of mind and body at the time of making the identification. This paragraph would contain such facts as the witness's eyesight or degree of fear or preoccupation. (Did he, for example, testify that he kept his eyes at all times on the gun?) The topic sentence would point out that the

witness was physically and mentally incapable of seeing the robber clearly at the time of the incident.

A final paragraph will discuss the circumstances surrounding the identification. Was it a prompt, on-the-scene show-up? A line-up in which the defendant was the only person of his race? Was he displayed alone, handcuffed to a radiator in the police precinct? The topic sentence might make the point that the circumstances surrounding the subsequent identification were highly suggestive.

When discussing the facts in a fact-centered argument it is preferable *not* to let them speak for themselves because you can never be sure what they will say to a particular reader. It is important explicitly to draw the conclusions from the facts that you want the reader to draw.

As in a doctrinal argument, answers to counter-arguments follow the affirmative arguments. As with legal counter-arguments, factual counter-arguments should be set forth as affirmatively as possible rather than conceding at the outset that a fact is devastating to a client and then attempting to explain it away. … [T]he judicial opinion and advocate's brief would approach the task differently:

Judge	It is true that the eye witness was in the presence of the robber for a half hour while the robber ransacked his apartment. This fact is of less significance that it might be in other cases, however, because the witness has poor eyesight.
Advocate	The fact that the robbery took half an hour does not guarantee that the identification was reliable when throughout that time the near-sighted witness was without his glasses.
Judge	While it is true that appellant fled from the abandoned building upon seeing the police, this fact is only slight evidence of consciousness of guilt.
Advocate	Any number of innocent reasons exist to explain appellant's departure from the building at the time the police arrived.

As in the doctrinal argument, after counter-arguments have been refuted and contrary authority distinguished, the argument ends with a brief conclusion: "All of these factors lead directly to the conclusion that the defendant's identity as the robber was not proven beyond a reasonable doubt. Accordingly, his conviction should be reversed and the indictment dismissed."

c) Respondent's Arguments

For the most part, the same rules apply to both appellants' and respondents' arguments. There are, however, some differences arising from the different goals of the two sides and the fact that the appellant has the burden of coming forward first with reasons for overturning the judgement below. Respondents should not, however, see their job only as answering specific points tit for tat. Rather, as discussed earlier, respondent's goal is to convince the court that the proceedings below were fundamentally fair. Thus, respondent should not feel bound by appellants of the issues.

Often, the effective thesis paragraph in a respondent's brief restates the defendant's claim in a manner more favorable to the respondent's position. For example, in a case in which a defendant convicted of arson has argued that the evidence that he intended to damage a building was missing, the prosecutor's argument might begin with the following thesis paragraph:

Defendant contends that the evidence that he set five separate fires in a sofa in his [9]former girlfriend's apartment and then fled was insufficient to prove that he intended to damage the building. Defendant's claim is meritless. The Fire Marshall testified that the fire consumed all of the furnishings in the apartment; created an opaque wall of thick, black smoke from floor to ceiling inside the apartment; and generated heat intense enough to deteriorate the bedroom door. The evidence was ample to permit ... [a conclusion] beyond a reasonable doubt that defendant intended to damage the building and not simply to destroy his girlfriend's possessions.

The argument will then continue in a manner similar to appellate brief.

4.4.2- Scope of Review, Preservation, Standard of Review, and Harmless Error Doctrine

As [discussed earlier]... an important part of most appellate briefs consists of the arguments concerning scope of review, preservation, standard of review and harmless error. Of course, not every point will necessarily deal with all four issues, but almost every brief will have to deal with at least one of them.

If there is a serious scope of review issue in a case – that is, whether the case is properly before the court – it will require a point of its own. The point will doubtless be the first point in the brief since if the case is not properly before the court, the court can stop reading the brief.

Preservation (in a court that has the jurisdiction to consider unpreserved errors), standard of review and harmless error arguments, on the other hand, are included within the substantive law arguments to which they are connected. If there is a question about whether a particular issue is preserved, the appellant may choose to discuss it at the end of the point, on the theory that if the substantive law argument is sufficiently persuasive, the court may overlook the fact that the error was unpreserved. Respondent, on the other hand, will probably begin the point with discussion of preservation in the hope that the court will agree that the error was not preserved and will read no further.

Similarly, an argument that a particular standard of review favorable to a party should be applied to an issue will generally precede discussion of that issue. As with preservation, if the standard of review is clear, the disfavored party may omit discussions of standard of review, or at least downplay it, while the party it favors will put it at the beginning of the argument.

Finally, harmless error arguments follow the substantive discussion. Both appellant and respondent may give equal space to a harmless error argument. ...

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[9] "permit the jury to conclude beyond a reasonable doubt" in the original

4.5- Reply Briefs

A good appellant's brief should anticipate all of the obvious arguments that respondent will raise. Therefore, a reply brief should generally be unnecessary. On the other hand, an appellant will occasionally think of a possible argument that respondent might not raise, and it will be unwise to bring up the subject unless it is in fact argued by the adversary. If there is a possible argument that may be raised by respondent but is unimportant or easily answered, appellant may also rightly choose not to clutter up the brief answering it. In either situation, the issue, if raised, may be answered in a reply brief. …

In any event, reply briefs should be used only to correct and address new matters of fact or law raised in respondent's brief and not adequately addressed in appellant's principal brief. ...

4.6- Supplemental Briefs (Omitted)

4.7- Principles of Good Brief writing

4.7.1- Clarity: Paragraphing and Transitions

The greatest aids to clarity in brief writing, as in other expository writing, are unified, coherent paragraphs that begin with strong topic sentences. "Unified" means that a paragraph should express a single idea – the one in the topic sentence. "Coherent" means that every other sentence in the paragraph should support the main idea.

If you keep these rules in mind they will help you to edit your own work. First, look at your paragraph. Does it have a topic sentence? If not, think about the point you are trying to make and put it in a topic sentence. Next, check your paragraph for length. Does it take up a full page? Probably the paragraph lacks unity. Check to see where you may have added a new idea and begin a separate paragraph.

Finally, check for coherence. Does every sentence in the paragraph support the point made in the topic sentence? If not, rethink what you are trying to say.

The second important aid to clarity is transitional words. These are words that make an explicit, logical connection between each sentence and the next. Some writers appear to use these words and phrases randomly, which is very confusing to the reader. For example, look at the difference in meaning in the following sentences that results from adding a different transitional word to "Jones went to the movies. Smith went shopping."

Jones went to the movies, but Smith went shopping.
Jones went to the movies; therefore Smith went shopping.
Jones went to the movies despite the fact that Smith went shopping.
First, Jones went to the movie. Then, Smith went shopping.
Jones went to the movies because Smith went shopping.
Jones went to the movies while Smith went shopping.
Jones went to the movies. Furthermore, Smith went shopping.

Again, think of exactly the point you want to make. Do you want to express a cause and effect relationship between two events? A chronological sequence? Does the second sentence give an example of a point made in the previous one or is it making an additional point? In short, transitional words tell your reader the logical connection between ideas so that the reader can follow your argument more readily.

Two final admonitions are, first paraphrase rather than quote. Long quotations are difficult to read simply because they are singly spaced. More important, they break the flow of an argument and are rarely precisely to the point. They require the reader to stop thinking about your case, begin thinking about the case from which the quote has been taken and apply the reasoning in that case to your case. This is a lot of work for a reader and most refuse to do it. They simply skip over long quotes and you have lost your opportunity to make your point. If you want to quote, excerpt a sentence or phrase and weave it into your sentence. The rule of thumb is that if a quote is so long that it must be single-spaced (more than 50 words) cut it and paraphrase.

The second admonition is to avoid footnotes in briefs for the same reason you avoid long quotes: They seldom are read. … It is often tempting to bury a bad fact in a footnote, but do not do it; the technique is transparent and may lead the court to think you are being dishonest. …

4.7.2- Diction and Tone

Your choice of words is, of course, as important in a legal argument as it is in the statement of facts. While the advocate has more leeway when characterizing facts in argument than in statement of facts, intensifying adverbs and adjectives should be used sparingly and precisely. If a party's conduct was "outrageous," that idea will emerge if the conduct is described accurately in detail. Similarly, describing a lower court's decision as a "travesty of justice" is unconvincing even if in your case it happens to be an accurate description of what went on. Showing the precise evil consequences that flawed from the decision will be far more persuasive than editorial comment. Prosecutors, in particular, are advised to maintain a judicious tone in keeping with the notion that their role is to see that justice is done, not to win at any cost.

Also important, weed out of your writing the legal jargon that seeps insidiously into every lawyer's brain. Phrases such as "the instant case," "the case at bar," "said witness," "sweeps within its ambit, " "pass constitutional muster," all serve to make legal writing stilted and wordy. If a word or phrase appears only in legal writing (with the exception of a few terms of art), it is a clue that it is jargon and that you should find an English substitute. And remember, just because a court said it does not mean that it is good writing.

Finally, avoid humor in briefs. You never know what an anonymous reader will find amusing and if you do not take your own case seriously, why should the court? ...

(*Examples on pages 286 to 295 have been omitted*)

Reading 2 : *Mary Beth Beazley*

Mary Beth Beazley (2006) A *Practical Guide to Appellate Advocacy* (Aspen Publishers), pp. 1-6

A Practical Guide to Appellate Advocacy

...

... People read differently when they read for a purpose, and because they read differently, you have to write differently.

...

We all make thousands of decisions every day, both consciously and unconsciously. ...

If we want to be better writers, we need to identify the important decisions that must be made, so that we can make them consciously and thus more effectively. Too many of us go into default mode when we write. We don't think about which issue we want to argue first, second and third. We don't identify what our best points are, and we don't consciously decide to state them as effectively as we can or to put them in the places in the document where we know that readers will be paying the most attention.

And that's the other thing most of us don't think about, either: the people who read our briefs. We know that we're writing a brief to a court, but too many of us, I fear, have some vague, dreamy notion that our brief is being read by a panel consisting of Oliver Wendell Holmes, Thurgood Marshal, and Sandra Day O'Connor – at the peak of their judicial and intellectual powers and on a free day with nothing to do but wonder at the fascinating complexities of our arguments.

Well, life's not like that. First of all, many of our briefs will be read by law clerks as well as judges, and sometimes by law clerks alone. Your readers will be real people with their real lives. People who have phones that ring, computers that bring them email messages, and colleagues who knock on their doors, and interrupt their work. People with families and deadlines. People a lot like you, except they're a little further down the road that you are now, if you are a law student. Or they took a different road from yours, if you are a practitioner.

So instead of reveling in the complexities of your argument or throwing a bunch of authorities at a busy law clerk, you have a different job to do. You have a look at those complexities and make them easy. You need to find and explain the rules and policies that govern your argument and show explicitly how they connect or don't connect to your client's case, and do it so clearly that the judges will wonder why they didn't notice before how obvious the answer is. You will follow the court's rules, too, so that it won't be distracted from your tight, clean argument by unprofessional

errors. And you'll use honest persuasive techniques to make sure that your readers get the best opportunity to read and understand your arguments.

You'll remember that the audience for a brief wears two hats. You have to write for both the "reader" and the "user." Most of us think of law clerks (and judges) as "readers," reading the brief sequentially from beginning to end. At some point, however, they act as "users": They are hunting for a particular authority or argument, or they want to know immediately what each sentence, paragraph, or section is about, because if it isn't about what they care about, they want to skip it. So when you write and revise, you have to remember both the reader and the user, and write in a way that helps them both.

You should be practical about your own behaviour as a writer and self-editor. You will learn how to identity the important decisions that you have to make, and to take steps that will help you to recognize what information you've included and what information you've left out of your argument.

By being practical about both your audience's needs and your needs, you can learn how to use the resources available to create documents that are easy to read and easy to use.

1.1- Know Your Audience

The first thing to realize as you prepare to write a brief is that you are writing to a busy reader. ...

... Even less busy judges are reading 12,000 pages per year. Or an average of 50 pages *just of attorney briefs* per day.

Remember these statistics when you ... file ... an appeal, to the number of issues to argue, to (especially) how to organize and write the brief. Your goal should be to produce a document that can be understood by a busy reader the first time through without reference to outside sources.

1.2- Follow An Effective Writing Process

Because your reader is so busy, you should keep in mind as you make your brief-writing decisions:

(1) The law upon which you base your argument should be complete and accurate. No judge wants to waste time considering arguments that must be rejected. Furthermore, if you have failed to identify a significant legal authority or an important legal, ethical, or policy argument, you should presume that no one else will dig it up either.

(2) Your arguments must be organized and written in a way that makes them easy to read and understand. Write with your audience in mind, and presume that your audience is intelligent but ignorant of the specifics of your case. If your point can't be understood without a struggle, it probably won't be understood at all.

(3) You must avoid mechanical problems of all types. First, as a matter of professionalism, you should follow the local rules of the court about format requirements and other ancillary matters. In some courts, failure to follow the rules will get a case dismissed; in others, it may result in your brief being returned so that you can try again to comply with the rules. Even if you escape these sanctions, you hurt your credibility with the court when you make technical mistakes. Second, proofread carefully to avoid typographical errors, citation form errors, ... Although these errors may not seem legally significant, they waste time and hence annoy the reader.

(4) You should use persuasive techniques that make the most of your fact and your arguments but that do not violate ethical rules or otherwise hamper your credibility with the court. If your persuasive methods go too far, all of the work you have devoted to writing a legally valid, well organized, and error-free document will be wasted. The court may well discount your arguments, or even stop reading your brief, if it believes that you cannot be trusted.

Not coincidentally, these four policies represent four different focuses in the writing process. It is impossible to make each of these focuses totally separate. For example, you cannot help but notice your content while you are reviewing your organization. By forcing yourself to pay special attention to each of these areas, however, you make it easier to create an effective brief.

1.3- How to Use This Book

... Although you are writing with the complete product in mind, your end product will usually be better if you follow a writing process that focuses your attention on only one task at a time.

As you begin your writing process, focus your attention on gaining an understanding of the legal issues that your case presents and of the legal authorities that govern those issues. Get to know the facts of the case, and plan and execute your research. ...

When your research is fairly complete, focus your attention on how to structure your argument. You might even write a rough draft of your argument as a method of trying to understand how the law and facts relate. After you have gained an understanding of how the legal issues of your case relate to the legal authorities, use the rewriting stage of [the] writing process to think about how best to organize the document so that your reader will be able to understand the legal issues as well as you do. You can do this by writing a draft of just the argument section of the document that (1) uses the arguments and authorities that you think are necessary, (2)uses an effective large-scale organization, and (3) includes a full analysis of each legal issue. Because this type of draft is focused on large-scale or "macro" concerns, you may wish to think of it a "macro draft." ...

After you have created a macro draft of some kind, review and revise your written argument a few times, focusing on these two important features of content and organization. Check your authorities, and supplement your research if necessary.

Eliminate weak arguments, and devote your attention to strong ones. Make sure that each section of the argument is focused on just one point. ...

Next, create a draft of the entire document, including everything from the cover page to the certificate of service. Because this type of draft broadens its focus to include small-scale or "micro" concerns, you may wish to think of it as a "micro-draft." ...

After you have created your micro draft, review the way that you have presented your arguments. For example, make sure that you have laid out your arguments clearly and organized them well. Take a look at the signals you are sending to the reader and the user through your headings, roadmaps, and topic sentences, and revise them as needed. Evaluate your statement of the case to verify that it presents the facts in a positive light without stretching the truth. Review each element of the brief in this way to make sure that you are presenting an accurate and effective legal argument. ... (Use) persuasive writing techniques both in the arguments and in those "special" elements such as the questions presented, statement of the case, and the summary of the argument.

In the polishing stage of the writing process, pay attention to sentence structure, grammar, citation form, and format details so that you create a final draft that is complete, well structured, and free from distracting technical errors. ...

…

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Reading 3- *E. Gressman*

Eugene Gressman,[10] Winning on Appeal: The Shalls and Shall Nots of Effective Criminal Advocacy" *Criminal Justice* (Winter 1987) pp. 10- 46

1-WTR Crim. Just. 10

…

Effective brief writing

Briefs on the merits are the keys to successful appeals. While appellate courts sometimes dispense with oral argument, they never dispense with the filing of briefs. Considering the mass of written material competing for an appellate judge's time and attention, an effective brief should be well-organized, well-written, persuasive, lucid and concise. If it has all those characteristics, it is more likely to be fully read and to have an impact. A poorly constructed brief may unduly prejudice an otherwise meritorious appeal, for the judge's first and often lasting impression of a case may come from reading, or trying to read, a party's opening brief. What, then, are the critical components of an effective brief?

Outline. Logical organization is a prime component of an effective brief. Once the record has been mastered and the legal research completed, the first task of the brief writer is to prepare a logical outline of the facts and legal arguments. Outlining will prevent the brief from becoming a disjointed outpouring of the attorney's stream of legal consciousness. Organize the facts in their most attractive and readable form, and the legal arguments, point by point, in their most logical and persuasive sequence. Revise the outlines if necessary. And above all, do not begin to write without an outline in hand or in mind. As the experts tell us, the first principle of composition is construction-determining the shape of what is to come and then pursuing that shape.

Know your audience. A second factor that shapes an effective brief, including its organization, is a knowledge of what the particular appellate court in which the appeal is pending expects to learn from the brief. The judges of that court, including their law clerks, are the prime audience to whom the brief is addressed. Generally, that means that counsel should be familiar not only with the court's own rules respecting briefs but also with the court's jurisprudence and attitudes about the particular issue before it. Put yourself in the position of a judge of that court. Ask yourself, 'What do I as a judge need to know about this case, how do the arguments

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[10] Eugene Gressman *is the William Rand Kenan Professor of Law, University of North Carolina at Chapel Hill, and the co-author of* Supreme Court Practice *(6th ed. 1986).*

being advanced fit into our standards of appellate review, and what do our established precedents say on this matter?' Then frame your arguments accordingly.

A new perspective. A closely allied admonition is to cast the brief in different terms and perspectives than were advanced in the court below. An appellate court is usually not a forum for *de novo* arguments. But in pursuing the issues raised in the lower court, a memorandum or brief that either won or lost the case in the trial court may be quite inadequate as an appellate brief. The appellate document must be constructed with the different and more restricted functions of the appellate court in mind. Remember that an appellate court is often disposed to give great weight to the judgment of the trial judge, particularly in discretionary***13*** matters, and to overturn a jury verdict in only the most egregious situations.

An affirmative approach. One proposition often ignored is to construct the brief in an affirmative fashion, leaving no doubt in the reader's mind that you really care about your case and that your legal position is eminently correct and represents the best policy. Write with conviction and a dignified passion. You need not identify with your client, but you should identify with and believe strongly in the principles of law you are advocating. But remember that it may not be enough to show that the lower court erred for the reasons it stated or that you advance. The appellate court may discern other grounds on which the conviction should be upheld, such as the overwhelming evidence of guilt that renders the legal errors harmless. So anticipate that possibility and prepare your arguments accordingly.

Use a few strong arguments. Do not attempt to present and brief too many issues. The decision below is not likely to be wrong for 27 different reasons. Select only those issues that in your best judgment would justify a reversal of the conviction. And of those few selected issues, put the strongest one first in the argument sequence. If you put the weakest issue or argument first, the judicial reader may acquire an impression that your case is weak, an impression that subsequent strong arguments may not be able to dislodge.

Strive for credibility. The brief writer must strive to achieve credibility with the court in all portions of the brief. Facts must be stated accurately and fairly. Citations must be accurate. Arguments must also accurately reflect the state of the law and the record. Nothing is more harmful to counsel's credibility than to have opposing counsel, or the court itself, point out some crucial misstatement in the brief. Above all, be candid. Do not be reluctant to admit that there are some weaknesses in your argument, or that there are some precedents against your position. Candor begets credibility. Then the court will be far more receptive to your argument that the conceded weakness is not crucial to the result.

Use headings. In the argument portion of the brief, use short affirmatively stated headings and subheadings in bold face or italic type. This gives the reader a short eyecatching introduction and summary of your arguments in a manner more meaningful than just using 'I' or 'A'. It is also helpful to insert these headings and subheadings in a table of contents at the start of the brief; this serves as a quick initial summary of the entire argument. Finally, the initial paragraph under each heading or subheading should affirmatively summarize, in more detail than appears in the

heading, the argument that follows. Nothing is more conducive to disinterest than a dry introductory paragraph that restates established law or regurgitates the history of the Fourth Amendment.

Avoid long quotations. In the course of an argument, quotations and footnotes should be sparingly used, and italics and underlining used even more sparingly. Some judges studiously avoid reading long quotations from court opinions. All that is needed is a short summary of the holding, or a quotation of one or two critical sentences or phrases. Footnotes, if used at all, should never contain an affirmative argument. Footnotes are often ignored by rapid reading judges. Their only legitimate purpose is to act as receptacles of lengthy citations or to compare or refer to a proposition that is not before the court. A footnote, in other words, is justifiable only if it contains matters that can be safely ignored by the rapid reader seeking to follow the thread of the argument.

Highlight policy. As a case goes up the appellate ladder, it becomes increasingly important to build policy considerations into the appellate brief. Far more than a trial court, an appellate court has the capacity to reconsider its past precedents, to advance or retreat from a given policy, and to make a so-called 'right' decision. That entitles the brief writer, if confronted with a bad precedent, to argue that the precedent should be reexamined in light of newer or better public and judicial policies.

Better writing. Finally, and perhaps most importantly, an effective brief must be well-written. The principles of good writing are no secret, but too few lawyers bother to respect them. Even experienced writers need constant refreshers. No better refresher course can be found than in that timeless little gem *The Elements of Style*, by Strunk and White (now in its third edition). Read that slim book periodically from cover to cover, for it demonstrates how strong and effective the English language can be when it is properly used. Among the book's admonitions are: (a) make the paragraph the unit of logical composition; (b) use the active rather than the passive voice, such as 'The court held,' rather than 'It was held by the court;' (c) put statements in positive form by making definite assertions and avoiding tame, colorless, hesitating and noncommittal language such as 'it is submitted that.'

Rule 17 of *The Elements of Style* is critical to an effective brief. It tersely states: 'Omit needless words.' That rule is an adjunct of the principle that the brief should be written with nouns and verbs, not with adjectives and adverbs. Legal writing has long been plagued with unnecessary words-'obviously,' 'who is,' 'very,' 'clearly,' 'plainly,' to name but a few. You will be surprised how many of these words clutter even your final draft. Remove them ruthlessly. You will instantly strengthen the sentences in which they appeared. The brief then becomes more readable, more interesting, and, it is hoped, more persuasive.

One last note about briefs. When the last draft is finished, read it aloud to yourself or to someone else. A sentence that is hard to verbalize is probably written poorly.

Reading 4: *Andrew L. Frey and Roy T. Englert, Jr.*

How to Write a Good Appellate Brief

Andrew L. Frey and Roy T. Englert, Jr.
http://www.appellate.net/articles/gdaplbrf799.asp (Accessed: June 11 2009)

… Usually the first non-boilerplate item in an appellate brief will be something called the "Questions Presented" or the "Issues Presented" or the "Statement of Issues." This section can be critical. It is difficult to underestimate the importance of clear, effective framing of the issues: In advocacy, as in life, first impressions last. Unfortunately, many briefs state the issues in a way that either impairs the author's credibility or confuses the court's understanding of what the appeal is about.

Advocacy has a role in drafting the questions presented, but it is a mistake — and a common one — to slant the formulation of the issue too obviously in your own favor. Consider an extreme example: Suppose your case presents a question of whether exigent circumstances entitled police officers to enter your client's dwelling without a warrant; the police say they acted to prevent the destruction of drugs that could be used as evidence. In such a case, you should not present a question such as "Whether the Fourth Amendment has been suspended as a result of the 'War on Drugs.' " You may, if the situation warrants, want to suggest to the court that the search was unreasonable and that excessive zeal in the "War on Drugs" explains the government's behavior (and the trial court's ruling condoning that behavior) — but save the point for the argument section. If you start out so contentiously in the question presented, the court will conclude that you are unwilling — or unable — to ever be balanced. It will cast a skeptical eye on everything else you say and assume that it is all slanted. Your credibility — a key element of a brief — will be gone.

You can preserve your credibility for formulating the issues on appeal even-handedly; but there is another challenge: You must also make the questions comprehensible. If the judges cannot understand what the case is about from the initial substantive exposure to your writing — a statement they expect to be clear — they may have far less patience with the parts of your brief that may legitimately be complex.

A good brief writer can formulate clear, neutral-sounding questions but frame them in a way that tends (subtly, of course) to suggest the answer the writer seeks. The question should not present your argument, but it should express a clear point of view about the case.

An example from one of our recent cases may demonstrate the distinction. It was an antitrust case. Our opening brief (for the appellants) stated five issues presented and did so in less than half a page. We slightly loaded one of them with what we thought were helpful facts:

Whether defendant can be labeled a "monopolist" under Section 2 of the Sherman Act because it owned the only bowling center in a small area, even though

uncontradicted evidence showed that defendant lacked power to exclude competition or control price. …

Remember, the Questions Presented section is likely a judge's first exposure to your side of the case. It is a place to provide a concise overall view of what is at stake. It is not a place to bury a judge in detail. If judges must wade through facts, the significance of which is not immediately apparent, they may have a hard time grasping what your arguments are about.

Another key to successful appellate litigation (at least for the appellant or petitioner) is to limit the number of questions presented. Here again, there are no universal rules: Two questions presented are *sometimes* too many and five are *sometimes* too few. But it is fair to say that judges are more likely to give full attention to fewer issues than to many. An appellate lawyer must resist the temptation (and the pressure from client or trial counsel) to include many issues in the hope that, somehow, lightning will strike one of them. And it is never good advocacy to present two or more questions that simply rephrase what is really a single legal issues. …

No Argumentative Statements

We now come to one of the few absolute — but, unfortunately, often violated — rules of brief writing: The Statement of Facts should *never* be argumentative in tone. The Statement of Facts is for telling the court what the case is about. The *argument* portion of the brief is for contention about the significance of those facts. Nothing impairs a brief writer's credibility more than an emotional, sarcastic, plaintive, or visibly one-sided Statement of Facts.

In order words, in the Statement of Facts, understated advocacy works best. A judge will be more prepared to believe that your client should win if your statement seems objective than if it editorializes. A judge will be more inclined to accept the fairness of your statement if it acknowledges the other side's strongest points and introduces — but does not argue — the facts or concepts you will later use to counter the other side. Remember, judges are lawyers, too, who are accustomed to careful analysis of facts and authorities. If your statement presents your case in a fair but favorable light, you do not need to carry every argument all the way to its logical conclusion at that point. You certainly need not drown the reader in rhetoric.

… It may be appropriate to describe both parties' evidence, but you should never present only the version favorable to you when that version has been rejected by the factfinder.

Of course, it is essential in the Statement of Facts to describe the record accurately. An answering brief that can show that you have distorted the record, or quoted material out of context, or otherwise arguably misled the court, can be devastating. The resulting loss of credibility will — you may be sure of this — undermine the reception that every other part of your brief receives.

This does not mean, however, that advocacy plays no role in drafting the Statement of Facts. Quite the opposite. Although the *tone* must at all times remain neutral and

dispassionate, artful selection, emphasis, and organization of facts can go far to shape a reader's perception of the case.

The trick for the *appellant* is to make the reader feel that the statement presents a fair description of what happened — an account of the material facts leavened with a recognition of the presumption of correctness that fortifies the factfinder's resolution of factual disputes — yet, at the same time, have the reader come away with the feeling that the outcome of the trial court proceedings was none too sensible or fair.

Conversely, if you are the *appellee*, you will try to suggest that the appellant has distorted the facts, which, when correctly described, make the trial court outcome seem fair, reasonable, and almost inevitable.

…

[Reply briefs]

…

The reply brief must be (relatively) short, (relatively) punchy, and selective. Sometimes it will follow the same structure as the opening brief, but sometimes it will not. What it *must* do, to be effective, is identify from the start one or more overall themes in the argument or arguments with the best chance of winning and explain to the court where the appellee's brief, which it just read, went fundamentally astray.

The function of a reply brief is to respond to an adversary's arguments. The court can look back to your opening brief as a reminder of the overall structure of your argument and to answer nagging questions. It is therefore usually unnecessary to retrace all the steps of your logic in the reply brief, and it is far more acceptable in a reply than in an opening brief to concentrate on sharply focused (but polite) debate. Sometimes, however, your adversary may have confused things so much that re-emphasizing the structure of your arguments will be the most useful thing to do in reply.

If you must put a rhetorical flourish somewhere in your briefs — and sometimes that may be useful — the beginning or end of the reply brief is the place to put it. Rhetoric turns appellate judges off when they see it as a substitute for analysis. By the time they read your reply brief, however, the judges should know that you are prepared to analyze — and have analyzed — the issues fully. Having, in a way, paid your dues, you have more leeway for a catchy phrase or metaphor at the beginning of the reply brief. This may help dramatize the central defect in the adversary's brief, which the judge will have just read; such a phrase at the end of the reply brief may be the last word the judges read before they put down their papers.

Do not strive to write a pithy ending for its own sake, however. Litigation gives its authors and editors a style sheet that advises: "Formal conclusions are not worth the trouble. Start at the beginning, go to the end, then stop." The same goes for reply briefs.

…

Reading 5 - *J. Byington*

Jonathan Byington "How to Make Your Appellate Brief More 'Readable'," *Advocate* (July, 2005) pp. 17 - 18

48-JUL *Advocate* (Idaho) 17

How to Make Your Appellate Brief More "Readable"

This article discusses ways to improve the readability of appellate briefs. It is a synthesis of suggestions from several state appellate judges, [FN1] numerous articles on appellate practice, [FN2] and my own observations. An appellate brief should be written for its reader. Its purpose is to persuade the reader that the lower tribunal's decision was either right or wrong. Although the methods of persuasion are as numerous as the personalities of the attorneys who utilize them, all persuasive briefs share one fundamental attribute--they are readable. A brief is readable if it communicates clearly. Attaining readability demands more than mere grammatically correct sentences or the absence of spelling errors. It requires writers to invest extra effort to adjust every aspect of the brief so the reader's job is easier. The affect on the reader should be the driving force throughout the brief-writing process because a brief that is easy to understand is persuasive.

Credibility is Earned, Not Assumed

Credibility is one of the most important virtues of a readable brief. A brief is credible if it is trustworthy or believable. An attorney's credibility requires years to establish and a single moment to destroy. Likewise, a brief loses credibility the instant it starts to mislead the reader. A brief can mislead by misrepresenting legal authority, exaggerating the facts, misquoting something, not providing a spot cite or mischaracterizing portions of the record. As a general matter, the reader's perception of the writer's credibility will affect how the brief is read. Writers must ensure their brief builds credibility instead of destroying it.

Organization is Essential to Making Your Brief Readable

Much like building a house without a blueprint, a brief written without a preliminary outline runs the risk of omitting vital components and resulting in a disjointed product. An unorganized brief places an unwarranted burden on the reader. In contrast, a readable brief places each piece of the puzzle with the end picture in mind. It leads the reader, piece by piece, until the entire picture is revealed.

Writers should start the brief-writing process by determining what they want the court to do. Correctly stating the issues is an important factor in obtaining the desired result. Each issue should be analyzed separately and arguments should be structured in the same order as the issues presented. The strongest argument should be stated first. The strongest argument is the argument on which the reader is most likely to

agree with the writer. If a writer is representing the respondent, the brief should be structured in the same order as the appellant's unless there is a dispositive issue.

The Standard of Review Shapes the Appeal

[Omitted]

Use the Statement of Facts to Provide a Context for Compelling Legal Argument

Readers want to learn the facts that are in the record, not the attorney's opinions, conclusions, or interpretation of the facts. There is a difference between advocating and arguing. Although facts should not contain argument, wise writers will produce a recitation of the facts that advocates in their favor. To increase readability, make the facts a story. Unfavorable facts should be included and put into perspective. This allows writers to characterize the bad facts in a way that favors their position. It also decreases the strength of their opponent's use of the facts. Addressing bad facts also enhances the writer's credibility and makes the reader feel like the facts are being recited accurately. Do not include immaterial dates or pleadings in your statement of facts. A writer should include everything the reader needs to know and nothing else. Remember that the reader is not familiar with the case and needs some background to obtain a complete picture of what has happened. Depending on the issues and the standard of review, an appellate brief rarely needs to include every fact or pleading that was submitted to the trial court.

In general, every sentence that states a fact should contain a reference to the record. References should cite to the original source (i.e., a deposition or trial transcript) instead of the district court's findings of fact. Citing to the record gives the reader the opportunity to refer to the original source if necessary. It also helps keep the writer from exaggerating substantially from the facts in the record. When advocating, do not slant the facts to the point of losing credibility. Cite the record at the end of a paragraph if all of the facts in the paragraph come from the same page of the record. If two or more sentences in a paragraph come from different pages in the record, cite the corresponding page in the record after each sentence.

Minimize the Significance of Your Opponent's Strengths By Discussing Them

In addition to discussing unfavorable facts, writers should address their case's weaknesses and diffuse their opponent's strongest arguments. This includes recognizing opposing authority, the boundaries of the standard of review and opposing policy concerns. Addressing your opponent's strengths also builds your credibility. Only address your opponent's strongest points and do not dwell on them. Otherwise, it will imply you are overly concerned with your opponent's position.

Personal Attacks On Opposing Counsel or the Trial Court Are Counterproductive

If the purpose of your brief is to persuade, belittling opposing counsel merely diverts the reader's attention away from the substantive issues. It breaks the flow of persuasion. Although some writers cannot resist the temptation to call opposing

counsel an "inept moron," the better way to convince a reader is to show how baseless opposing counsel's arguments are. Attacking the weaknesses of your opponent's assertions is much more persuasive than denouncing your opponent's character.

Similarly, insulting or demeaning comments about the trial court simply tarnishes credibility. Many appellate judges used to be trial judges. In addition, appellate judges and trial judges are peers. Persuading appellate judges to agree with the writer on substantive issues is extremely difficult if the judges are shaking their heads disagreeing with the writer's demeaning comments. A writer should attack a wrong decision without assaulting the decision-maker.

Headings Enhance Readability Because They Orient the Reader

Just as landmarks on a map help explorers find their way, headings help the reader know what the arguments are and where they are going. Effective headings advocate the writer's position instead of merely labeling the topic of the section. Headings should summarize the essential factual and legal argument of the succeeding section without being a "copy-and-paste" of the issues presented. Each issue should have a separate heading and, if appropriate, the elements of each issue should have their own sub-headings.

Attachments Ease the Reader's Burden and Increase Comprehension

Attachments are an under-utilized source for brief writers. Maps, charts, diagrams or tables often convey information much more effectively than raw, plain text. For instance, a timetable can replace long procedural histories or complicated chains of title. In moments, a color-coded subdivision plat can convey what would have required twenty pages of metes and bounds descriptions.

Attachments must already be in the record and should cite to their corresponding location in the record. Place attachments in an appendix at the end of the brief. If you have more than one attachment, put a tab between them. Attachments can include the Memorandum Decision and Order that is being appealed as well as other key documents or language. In terms of the writer's quest to make the reader's job easier, attachments can be the "Holy Grail."

Use Citations to Strengthen, Not Lengthen Your Argument

In general, string citations are unhelpful and should be avoided. The applicability of a "well-settled" rule does not depend on how many citations follow it. Wherever possible, use pinpoint citations (citing to a specific page) for both authority and the record. If writers truly have their reader in mind, they will rarely cite authority without providing the reader the exact location of the proposition being cited. Citing a source without referring to specific material within the source suggests it does not directly stand for the position the writer is asserting. It also obligates the reader to cull through the entire source to find the relevant language. Forcing the reader to spend time and energy researching your assertions prevents the reader from focusing on the substance of your argument.

Write Quotations So They Will Not Be Skipped Or Skimmed

Long block quotes are often skimmed or skipped. A reader will be more likely to read a block quotation if the writer explains why the quotation is important before requiring the reader to read it. For example, before quoting important statutory language, the writer should explain why the statute is being quoted and what the reader should obtain from reading it. The writer should also use ellipsis to shorten long quotations to include only the essential points. Break up quotations by paraphrasing and remember to cite the paraphrase using a pinpoint citation. When paraphrasing or using ellipsis, a writer should be cautious not to slant the paraphrase to the point of misleading; otherwise, credibility will be lost when the reader checks the original source.

A Brief Filled With Gimmicks is Not Persuasive

Do not repeatedly use italics, bold, underlining, capitalization or multiple exclamation marks for emphasis!!! It is disruptive and distracting. As far as labeling the parties, it is more persuasive to refer to them by name or status (i.e., employer or buyer) rather than appellant or defendant. Writers should label the parties consistently and not refer to their client by name and the opposing party as "the defendant."

A Readable Brief Requires Extra Effort--But Readability Results In Persuasion

Writers must bear the burden of making their briefs readable. Prevailing on appeal depends primarily on the persuasiveness of the brief. A readable brief enables writers to convince readers without the readers noticing they are being influenced. Readers think they have come to the conclusion themselves when, in reality, the writer has been holding their hands throughout the entire process of persuasion. Applying the principles in this article will aid the writer in that endeavor.

[Footnotes omitted]

Reading 6- *R. J. Davis*

Robin Jean Davis "Effective Appellate Petition and Brief Writing,'' *West Virginia Lawyer* (March, 1998) pp. 7 – 8

11-MAR W. Va. Law. 7

Effective Appellate Petition and Brief Writing

An effective appellate petition and effective appellate brief writing are of great importance. .... Writing petitions and briefs that appellate judges can easily and quickly understand is both an art and a science. The Justices read so many petitions and briefs that it is critical that the principal points are capable of being quickly understood and absorbed on a first reading. If the essential points are buried in writing that is convoluted, obscure, rambling or digressing, there is a good chance the point may be missed. There are a few principles that appellate advocates should remember when preparing material for submission to the Court.

Simplicity and Conciseness

Good writing style demands brevity. The use of short, simple, declarative sentences should be followed. The issues should be set forth in a simple and uncomplicated fashion. One way to preserve clarity is to express only one thought in each sentence. This practice avoids the problem of sentences which need to be read several times in order to be understood. The one idea per sentence rule enhances the readability of any brief or petition. Further, it helps in organizing the flow of ideas. Additionally, skillful editing can strengthen the document. Do not underestimate the importance of editing and rewriting.

Compliance with the Rules of Appellate Procedure

To persuade appellate judges, the successful advocate must create in the judges a sense of confidence in oneself. An easy way to build that confidence is to demonstrate that the rules are clearly understood. …. It is surprising how often the petitions and briefs do not comply with these rules. A concerted effort should be made to meet the requirements of the Rules.

Standard of Review

One legacy left by Justice Cleckley was the attention to and the application of the appropriate standard of review. In preparing the petition and the briefs, appellate attorneys must address the standard of review applicable to the issues being raised. The appropriate standard of review governs the analysis of the issues. Setting forth the standard of review provides the justice a framework within which to consider questions presented.

Issues

Keep the number of issues raised to a minimum. Develop the confidence to focus the brief on the real issues. Leave out the non-meritorious issues. Frivolous issues generally detract from good arguments. The issues should be presented in descending order of importance. Tie the issue to the facts and circumstances of the case. The issues should be couched in terms relevant to the case. It is often not helpful to simply cite general propositions applicable to thousands of cases. For instance, an issue heading "The evidence was insufficient to support the verdict" tells the Court absolutely nothing. The ideal statement of an issue incorporates the individual aspects of the case and the general principles that make the issue one of broader application. The formulation of the issues should be fair and accurate.

The Facts

A good statement of the facts is the heart of the petition or brief. Every other part of the pleading relates to and depends upon the statement of facts. The goal of the Court is to do substantial justice. Where substantial justice lies generally depends upon the perception of the facts of the case. The statement of facts must be clearly and precisely written. The facts should be supported by references to the record. They should be set forth in a logical and understandable manner.

Citation to the record is critical. It is extremely frustrating to read what one considers to be an important fact and then to be unable to locate the support in the record. Appellate advocates must be accurate and candid in stating the facts. The facts should not be shaded or misstated. Adverse facts should not be ignored because your adversary will address them. Avoid the temptation to argue in the statement of facts. Be objective in the presentation of the facts. Inaccuracies and distortions will undermine your credibility with the Court. The facts need not be boring. Tell the Court the facts in a compelling narrative. Paint a picture or tell a story.

The Discussion of Law

The facts and the law should not be treated as separate entities. The facts of the case are central both to the statement of facts and to the argument. In the argument the lawyer may want to editorialize on the facts in order to relate them to the law. In this section of the pleading, the lawyer has the opportunity to persuade the court. Here there should be argument and advocacy. Cite the most relevant cases supporting the argument. Use cases and precedent artfully. Do not overstate past precedent. Case citations should support the logic of the argument. Avoid emotional and personal attacks on your adversary and the trial judge. Avoid the use of per curiam decisions as support for your argument. As this Court routinely notes, per curiam decisions are of no precedential value.

Length

… The effective appellate advocate spends substantial time drafting and redrafting. The editing process will insure that the petition or brief is concise and well-organized.

Reading 7- *Toal, Muchenfuss & Vafai*

Jean H. Toal[11], Robert A. Muckenfuss, Shahin Vafai "Four Steps to Effective Appellate Brief Writing,'' *South Carolina Lawyer* (May/June, 1999) pp. 37 - 39

10-JUN S.C. Law. 37

Four Steps to Effective Appellate Brief Writing

… Like any other form of writing, the appellate brief is effective when characterized by logic, clarity and simplicity. It is ineffective when marked by disorganization, obfuscation and complexity.

The objective is to make the argument so clear, comprehensive and compelling that the appellate court will have no other option but to rule in one's favor. These goals can be achieved through four major steps: strategically identifying the most significant issues; concisely discussing the applicable law; thoroughly analyzing the law and the facts; and persuasively offering viable solutions.

STEP 1: Identifying Significant Issues

The first step in effective brief writing is identifying the few issues that are most likely to lead to a successful result on appeal. Loading the brief with an excessive number of issues lessens its persuasiveness. In contrast, focusing on a few key preserved issues allows the appellate court to more carefully consider the appellant's arguments.

The lawyer who discusses numerous issues is like an amateur enthusiast firing a machine gun, hoping to randomly hit some object. However, the advocate who homes in on a few issues is akin to the skilled marksman carefully aiming a rifle at select[ed] strategic targets. The latter approach is much more likely to produce the desired result. Therefore, it is wise to limit the number of issues discussed in the brief; typically, there is little reason to exceed four issues.

…

After the most significant issues are identified, the appellate lawyer must articulate a statement of the client's position as to each issue. The position should be set out in one or two sentences. Although the position statement should not be overly detailed, it should nevertheless be complete enough to epitomize the argument that will follow. A good test of the adequacy of a position statement is whether it can be used by the court to state a rule or holding.

…

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[11] *The Hon. Jean H. Toal is an Associate Justice of the South Carolina Supreme Court. …*

STEP 2: Discussing the Law

Having set forth the client's position on an issue, the lawyer should then present the law supporting the position. At this step, the lawyer should discuss relevant statutes, cases and other authorities. The legal propositions enunciated by the authorities should be identified and cited. Rather than summarizing important cases or statutes, it is usually better to quote the precise language. In this way, the lawyer can quickly convey to the reader that the precedent is being accurately presented.

…

As part of setting forth the relevant law, it is important to reference the standard of review to be applied by the court. Appellate courts are not in the business of retrying cases (although in some instances, they may take their own view of the evidence). Often, the appellate court takes a very deferential view of the findings below. Thus, the outcome of a case may well turn on the standard of review being applied. The applicable standard of review should be briefly mentioned for each major issue.

STEP 3: Conducting the Analysis

The third, and perhaps most critical, step of effective brief writing is the analysis. Briefs typically do a competent job of identifying issues and the parties' positions and then presenting the law; however, briefs are sometimes weak in the analysis. It is the analysis that wins or loses cases. The effective appellate advocate will carefully apply the law to the facts of the case. The facts may have been set out previously in the brief. The law may have been described. This does not mean that the reader will automatically apply the law to the facts. Rather, the lawyer must create this link for the reader.

In carrying out the analysis, the lawyer's job is comparable to instructing a traveler on how to find his way to a location across a city. The lawyer points to the transportation resources available-the facts and the law. He then gives the traveler detailed directions-the analysis-as the traveler may not be able to find his own way to the destination. The lawyer must specify how to get there, street by street. If a street name is omitted, the traveler may miss the road. Further, in giving the directions, the lawyer cannot distract the traveler by excessively describing all the scenery that will be passed. If anyone can follow the directions and reach the destination, then the lawyer has done the job. So it is with legal analysis.

…[T]he lawyer should set out and apply the … letter of the law. At this level, the exact words of the statute, or the precise elements of a common law test, are considered and linked to the facts. The writer should first show how the literal language of the law is satisfied (if, in fact, this is the case). This is the most basic and persuasive level of argument.

… (If it favors the client's position), the lawyer can argue at the level of policy. What is the spirit of the law? What were the … policy rationales for enacting the legislation?

In conducting such analysis, the lawyer should legally or factually distinguish unfavorable authority cited by the opposing side. It is best to first present one's own arguments, then address any arguments that the opposing side has raised or will likely raise. By anticipating arguments of opposing counsel and effectively dealing with them, the lawyer can lessen the impact of such arguments when the court reads them in the opposing counsel's brief. The lawyer should also reflect on the following questions: What is the narrowest basis on which the court can affirm the case? If the court would want to reverse, what ground would it use? What obstacles need to be removed in order for the court to rule in one's favor?

Sometimes it is helpful to describe the historical development of the law on an issue. For example, at first glance it may appear that cases on a single issue take contradictory positions. ... This type of broad-spectrum analysis is one of the most powerfully persuasive techniques in appellate advocacy.

STEP 4: Suggesting Viable Solutions

The effective appellate brief should conclude the analysis by suggesting a viable solution to the court. In essence, this step of the brief answers the following question: "If the appellate court desires to rule in my favor, how should it do so?" …

An appellate court may be more likely to rule in a party's favor when it sees that the party has offered a practical resolution. For instance, the court may wish to adopt a particular approach, but it may not immediately know how. It may have difficulty fashioning the appropriate wording or test. An inexperienced appellate advocate will ask the court to find its own solutions. The seasoned practitioner will suggest reasonable and clear solutions. …

Conclusion

Some fundamental principles lie at the heart of effective appellate brief writing. By recognizing and taking steps such as identifying significant issues, conveying relevant authorities, analyzing the law and facts, and suggesting realistic solutions, advocates will be more successful in persuading the appellate courts of this, or any other, state.
...

Reading 8- *Pregerson & Painter-Thome*

Harry Pregerson & Suzianne D. Painter-Thorne, "The Seven Virtues of Appellate Brief Writing: An Update from the Bench'' *Southwestern Law Review* (2008), pp. 221- 234 (with omissions)

A Checklist to Editing

(Appended to the article entitiled *The Seven Virtues of Appellate Brief Writing*: *An Update from the Bench, pp. 232-234*)

I. STYLE

A. Omit unnecessary words. …
B. Minimize the use of long introductory clauses or phrases. [FN32]
C. Use verbs rather than nouns made from verbs. For example, rather than "it was the contention of the appellant," say "the appellant contended."
D. Use familiar, concrete words.
E. Use short, declarative sentences.
F. Arrange sentences to keep related words together. [FN33] …
G. Use the active voice whenever possible. [FN34]
H. Use one tense in fact statements and summaries. [FN35]
I. Place the important or emphatic words of a sentence at the end. [FN36]
J. Avoid emphasizing text by using bold, italics, underline, or all caps.

II. GRAMMAR (*Omitted*)

III. CITATION AND AUTHORITY (*Omitted*)

IV. ORGANIZATION

A. Use sections and section headings effectively.
B. Make sure that your section headings, standing alone, present the gist of your argument.
C. Use transitions between paragraphs and sentences to show the relationship between your thoughts.

V. LOGIC

A. Does each sentence, paragraph, and section say something?
B. Is every fact relevant? Is each necessary to the issues before the court?
C. Does each thought follow from the previous one?
D. Is each thought explained or illuminated by the statements that follow?
E. Are nonobvious conclusions supported by citation or argument?

[*Footnotes omitted*]

Case Problem 2: *Identification of Issues and Appellate Brief Writing*

In File No. Civil Appeals 9366 (Tir 2nd 1995 Ethiopian Calendar) two Appellants to the Federal Supreme Court claimed that the will made by the deceased Woizero Woinshet (on Sene 28th 1984 Eth. Cal) has been repealed by the subsequent acts of the deceased after she made the will, because she had sold most of the property stated in the will. They claimed that the clauses in the will shall not be applicable in the remaining items stated in the will and they invoked resort to intestate succession thereby claiming to be entitled as heirs at law.

The appellants also argued that the will is void because it has disinherited the first appellant who is heir at law.

The Federal First Instance Court decided that the will is invalid because four witnesses did not sign on the will immediately. Typed will was signed by the deceased Woizero Woinshet and witnesses were not present when the deceased dictated her will to the person who typed her will although four witnesses have signed on the will.

The Federal High Court reversed the decision of the Federal First Instance Court accepting the respondent's argument that the four witnesses have signed on the will in the presence of the testator after the will was read to the latter in their presence.

The majority decision of the Federal Supreme Court cited Article 881 of the Civil Code and related it to the issues and facts of the case. The court stated that the will is not written by the testator. Yet, the will indicates that it was read to the testator in the presence of her spiritual father (የነፍስ አባት) and four witnesses and was signed immediately after it was read.

The Court noted the core argument of the appellants that the witnesses were not present when the will was being type written or dictated. The Federal Supreme Court, however, ruled that the elements required in Article 881 of the

Civil Code are the requirement that the will must be read in the presence of witnesses and that it must be signed immediately. The Court found that the law does not require the presence of witnesses while a will is being dictated or written.

According to the dissenting judicial opinion, the words used in the document presented as will do not belong to the testator, and the witnesses were not present when it was being dictated and written. The dissenting judge invoked Article 857 of the Civil Code which requires a will to be strictly personal to the deceased, and noted that the Civil Code provisions stated in the introduction of the will show that another person had drafted the will to the deceased who never had legal training.

The dissenting judge stated that the will was not made in the presence of witnesses, and was signed after it was prepared by another person elsewhere after which it was brought to the deceased as a draft contract thereby proving that it was not signed immediately.

Review Exercises

1. Complete the following sentences in not more than three lines and discuss them in pair and in group.
   a) The majority opinion of the Federal Supreme Court held that ...
   b) The minority opinion held that …
2. Frame the core issue/s involved in the case.
3. A number of issues have been raised by appellants: prioritize them in the hierarchy of their strength.
4. The appellants have raised the issue that part of the property stated in the will was sold and exchanged. Does such act prove the repeal of wills?

5. The issue of disherison (excluding an heir at law from inheritance) has been raised. The Supreme Court did not discuss the issue even if it raised the issue in its initial paragraph. State the possible reasons for it.

6. The minority opinion has raised Article 857. Elaborate the argument by including a policy reasoning that wills are not expected to be prepared and drafted by lawyers, but written verbatim based on a testator dictation while making the will.

7. Article 881 (1) provides that "A public will shall be written by the testator himself or by any person *under the dictation of the testator*." As indicated in the minority opinion, the will, for instance, includes Civil Code provisions (Articles 881, 883 and 885) thereby proving that this part, at least, was not dictated by the deceased who never had any legal training. Is dictation by the testator a requirement under this situation in which the will is typed?

8. Assume that the decision was given by the Federal High Court.
   a) Write an appellate brief to the Supreme Court if you support the minority opinion.
   b) Write the respondent's brief if you support the decision of the majority.

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Chapter III
Oral Argument

1. Specific Learning Outcomes

At the end of this chapter, students are expected to be able to:

a) discuss the purpose of effective oral argument;
b) state the tasks required towards effective oral argument;
c) explain the elements of preparation in appellate advocacy;
d) discuss the significance of an outline in oral presentation;
e) develop an outline for oral presentation;
f) organize information in a manner that facilitates quick reference to facts and the law during oral presentation and response to questions; and
g) conduct rehearsal for oral presentation and response to questions as a prelude to the moot court rounds during Weeks 8 to 15.

Expected number of learning hours for Chapter 3 (Weeks 6 and 7)

- Class hours: *Two hours* per week
- Student independent workload: *Four hours* per week

2. Introduction

Oral argument is the appellate lawyer's opportunity to persuade judges on behalf of his/her client by presenting the case to the appellate court in person and by responding to questions from the bench. Experienced appellate attorneys pay utmost attention to the substance of their oral argument rather than superficial rehearsal and empty rhetoric.

The first reading discusses the tasks that are required in appellate advocacy towards making effective oral argument. These tasks are classified into two major phases: preparation and presentation. The phase of *preparation* includes efforts and diligence towards knowledge of the facts in the record, knowledge of all laws relevant to the case, selecting key points for oral argument, anticipation of difficult questions, updating research regarding new developments after the appellate brief is filed, knowledge of previous decisions of the court on similar issues, preparation of an outline and practicing the oral argument pursuant to the style of the appellate court. The reading further forwards basic pointers towards the *presentation* of oral argument and also indicates the rare events when it may be preferable not to argue.

The second reading by Renee M. Pomerance follows the same classification regarding oral arguments. The reading discusses the phases of preparation and argument and it forwards the tasks involved in each phase. The last three readings give more flesh to the structure laid by the first two. The merits of every additional literature on skills and methods lie in new dimensions and perspectives brought forth by every other author. So does each reading in this unit embody some new perspective in spite of sharing a similar theme.

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3. **Tasks** (Weeks 6 and 7)

a) *Court watching and observation report on oral argument*: You are expected to watch oral argument in an appellate court and submit a brief report on your observation regarding the issues presented, summary of facts and arguments made by both parties.

b) *Courtroom Procedures*:

i. Write down the statements made by the bailiff and the judges while the parties were called upon.

ii. Write down the statements made by the parties while stating their appearance in court.

c) Comments:

i. Comment on the level of preparation of the appellant and the respondent.

ii. Comment on the presentation skills of both sides.

iii. Comment on the appellant's and the appellee's response to questions.

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4. **Readings** (Weeks 6 and 7)

Reading 1- Ursula Bentele & Eve Cary, *Appellate Advocacy: Principles and Practice, Cases and Materials,* Chapter 8

Reading 2- Renee M. Pomerance , *Appellate Advocacy: Presenting the Oral Argument*

Reading 3- M. Albert Figinski "Oral Argument – *View from the Bar– Suggestions From One Advocate*

Reading 4- E. Gressman, *Winning on Appeal*: (*Oral Argument with Impact*)

Reading 1 – *Bentele & Cary*

Ursula Bentele and Eve Cary (1995) *Appellate Advocacy: Principles and Practice, Cases and Materials*, 2nd Ed, (Cincinnati: Anderson Publishing Co.) Chapter 8, pp. 297 -307

Oral Argument

Oral argument provides a valuable opportunity for the appellate advocate to use personal persuasive powers on behalf of a client. Direct communication with the judges who are to decide the case also presents a unique opportunity to answer any of their questions about the case that remain after they have read the briefs. Although there is considerable debate among appellate lawyers and judges concerning the value of oral argument, with some judges even declaring it a waste of time, the effective appellate practitioner must develop the skill of good oral advocacy for those cases, whether they be few or many, in which the oral argument may make the difference. In addition, in most moot court competitions, the oral component of a team's performance can be decisive.

Many beginning appellate attorneys make the mistake of viewing oral arguments as an actor regards opening night. The courtroom becomes a theater, the judges are the audience, the lawyers are actors, the brief is the script, and the argument is the end result of weeks of rehearsal. This notion is all but guaranteed to produce an ineffective oral argument. An argument is not a performance and judges do not behave like a polite audience. They do not sit quietly and attentively while the lawyers deliver carefully rehearsed lines. On the contrary, they interrupt the play with questions and demand to change the script mid – scene. This is disconcerting to the lawyer whose goal is to get on with an eloquent soliloquy. The only solution is to revise one's notion of oral argument.

It is not difficult to deliver a good oral argument if one understands clearly its purposes and limitations. Oral argument has four principal purposes. First, it is an opportunity to put a human face on the case. While it is unlikely that argument alone will convince the court of a party's position, a clear, forceful presentation can certainly make a case more memorable and may help to convince a judge who is wavering. Moreover, the failure to argue may leave the impression that the attorney does not think much of a client's cause.

The second purpose of oral argument is to focus the court's attention on the one or two crucial issues in the case. The brief has provided the court with the careful analysis of the law on which the arguments rest. The goal of the oral argument is to distill the essence of the case and to present it to the court in its simplest and clearest form.

Third, oral argument is an opportunity for the judges to ask questions about the issues they still find troublesome after reading the briefs. Questions from the bench

should not be viewed as annoying interruptions, but should be welcomed as opportunities to put judges' doubts to rest.

Finally, oral argument is a time to update the brief with any new legal developments that have occurred since it was filed with the court, to correct any factual errors that may have been contained in the briefs, and to answer any new arguments raised by the adversary that were not worth addressing in a reply brief. Of course, if you intend to raise new law at oral argument, you must supply your adversary in advance with a copy of the case.

Understanding the limitations of oral argument is as important as grasping its purposes. The most obvious limitation is time. A typical argument lasts no longer than fifteen minutes. Therefore, thought must be given to how to use the short time allotted in the most effective way. The second limitation is simply the inability of most people, including judges, to absorb large quantities of detailed information when it is presented to them orally. Law students know from attending their classes how much or how little one can take in at a sitting. Most people understand complicated ideas better in writing.

Accordingly, standing before the court and reciting the points in the brief is a waste of precious argument time. Oral argument should be used to supplement the brief and to do what it cannot do rather than to rehash it in a less effective way. If one keeps these ideas firmly in mind, the method of preparing for and presenting a good oral argument becomes clear.

[I]- *Preparation* [for oral argument]

1. Know the Record

Many appellate benches today, both real and moot, are "hot." That is, the judges have read the briefs and perhaps part of the record in the case before oral argument. The judges cannot, however, be expected to know the facts in a case as well as the attorneys handling it. One of the principal jobs of the advocate is to answer questions about facts that may have slipped a judge's mind or that a judge simply missed in reading the written material. Even seemingly minor details must be at counsel's fingertips. An otherwise brilliant oral argument can be damaged by any misstatement of fact or by inability to respond to a judge's inquiry about a point in the record. In particular, counsel should be prepared to respond to questions concerning preservation of issues. It is good practice to be able to point to the precise page in the transcript at which an objection was made. There can be no surprise questions about the record. Inability to answer them can only reflect careless preparation.

2. Know the Law

The oral advocate should also be familiar with both the legal principles and the facts contained in the cases on which both sides have relied in their briefs. This is not as obvious as it seems, since weeks and even months may have gone by since the briefs were filed. It is easy to forget the details of cases; while it is unlikely that a court will want a discussion of basic legal principles with which they are familiar, a judge may

very well ask whether the case is similar to or distinguishable from a cited case on its facts. Good preparation is simply a matter of rereading the cases and perhaps making a few notes on file cards to serve as a reminder of the holding and important facts in each case. The advocate should also be prepared to answer questions about the appropriate standard of review.

3. Select the Points for Oral Argument

Given the limitations of oral argument mentioned above, it is simply impossible to discuss more than two or, at most, three issues at oral argument. There will not be enough time and the court will not be able to take them in. Counsel must determine … the key issues on which victory in the case turns and concentrate on them. Other factors to be considered are whether the adversary has made any particularly troublesome arguments that require response or whether a particular issue is so clear and so well covered in the brief that there is little of interest to add at argument. Besides the substantive issues, counsel may also want to deal with any doubts concerning preservation, whether or not a particular error was harmless, and the relief being requested.

4. Anticipate Difficult Questions

Once the points have been selected for argument, the next step is to try to anticipate the questions that may be asked. By the time most lawyers have filed their briefs, they have become entirely convinced of the rightness of their client's cause and the impossibility of losing the appeal. Now is the time to step back from the case and to give it an honest appraisal. The appellant lost below. What was the reason? Respondent may want to think about why appellant has gone to the trouble and expense of the appeal (and in some cases a reason that the court has agreed to hear it). The advocate is well advised to ask the hard questions, the ones that go directly to the weakness of the case.

The place to start looking for the hard questions are the adversary's brief. It should be read carefully to determine the strongest arguments and the best responses. One should remember, however, that courts are not bound by the arguments made in lawyers' briefs. Judges may have concerns of their own that the adversary did not raise. The advocate must be prepared for these questions as well. It is here that the assistance of colleagues and even non – lawyer friends and relations can be a big help. Often an intelligent lay person's skepticism (Well, what was he doing on the roof with a hatchet at 1:00 in the morning?) can pinpoint a problem in the case that the attorney has overlooked. Rather than rehearsing a canned speech, it is far better that an oral advocate practice answering difficult questions clearly and confidently.

5. Update the Research

The effective advocate will do some last minute research shortly before oral argument to make sure that in the time between the filing of briefs and argument none of the cases relied upon has been reversed or overruled and that no relevant new cases have been decided. Many lawyers now do a quick computer search for information on the very morning of oral argument. That may be unnecessary, but surely counsel would

be embarrassed to learn from the court, at the beginning of the argument, that the precedent on which the case turns was reversed two weeks earlier. Likewise, updating research may afford a great opportunity to buttress an argument with a brand new case having, of course, informed the adversary.

6. Know the Court; Know the Judges

Just as your brief was shaped by knowledge of the different functions of various levels of appellate courts, so should you keep in min when preparing for oral argument that not all appellate courts are alike? Generally speaking, intermediate courts are more concerned with doing justice on the facts of the particular case, while high courts tend to focus on broader policies and the implications of rulings for other litigants and for the public at large. The higher the court, the more likely it is that you will be faced with questions outside the narrow area of the law you have briefed. After all, if the Justices of the Supreme Court declare a particular criminal penalty imposed on a minor invalid, they have to consider the consequences of that ruling, not just for other similarly situated minors, but also for the law relating to minors in other areas of the law. Therefore, the advocate in a high court would do well to prepare to answer questions related to the legal issue but outside the narrow confines of the case being argued. In an intermediate court, on the other hand, the judges are much more likely to focus on the specific facts of the case at hand, so that here detailed knowledge of the record is more important.

Information about the particular judges sitting on an appellate court may also be useful to counsel. Attorneys arguing before the United States Supreme Court will almost certainly have thought about each Justice's prior opinions on related questions, and may in fact tailor their arguments so as to maximize the chances of securing that one crucial swing vote. Similar research can be done about the judges of other courts. When judges sit in panels, counsel should find out as much as possible about the judges who will be sitting on the day of the argument. The first step is to research other opinions the members of that panel have written. It can be very helpful to know that a judge hearing one's case wrote the majority opinion in another favorable case , or dissented in a case relied on by one's adversary. In these days of computer research, extensive investigation of decisions by individual judges is not difficult.

Checking with an attorney who has argued before the same judges can also provide valuable information about the people who will be deciding the case. For example, one attorney learned to his dismay, after he had dispensed with a microphone at oral argument, that one of the three judges was deaf and could not hear an unamplified word but was sensitive about revealing this fact. Learning some inside information about the personal peculiarities and concerns of the judges, as well as knowing their opinions on various legal questions, can be an important aid in framing an oral argument.

7. Outline the Argument

Most lawyers have a personal preference regarding notes for oral argument, and it makes sense to use what works best for each individual. With the understanding that the advocate will not be giving a speech, but rather simply making a couple of

forceful points and answering questions, however, certain methods recommend themselves.

First, it is generally agreed among experienced appellate practitioners that it is not a good idea to write out a whole argument. Not only is it unlikely that one will get a chance to deliver it, but the prepared speech may actually be a hindrance when questions about particular issues are asked in an unexpected order. A lawyer may never get back on track and therefore fail to make important arguments.

A better idea is either to make a short outline on which points can be checked off as they are addressed or make a short outline on which points can be checked off as they are addressed or to make notes on a few file cards, one issue per card, which can be shuffled as appropriate. This way, if the court asks few questions, counsel can simply make the arguments in the order outlined. If the court interrupts frequently, on the other hand, the advocate will have no trouble reorganizing the points on the spot. The notes should be written in large enough print so that they can be seen just by glancing down. Remember, the point is to know the case so well that only a glance is necessary to jog the memory.

Although the entire argument should not be written out, many lawyers do find it helpful to write out an introduction and a conclusion. A written introduction can be comforting, even if in the end it is not used, if one is afraid of being struck dumb with nervousness upon approaching the bench. A written conclusion can be helpful at the end of an argument, in which questions have been far ranging, to bring the court back to the main point. Both the introduction and conclusion should be short.

The introduction should not begin with a recitation of the facts. It is not a catchy way to start and the first few sentences of an argument can be important in attracting the court's attention. One can assume, moreover, that the judges know the basic facts. If they do not, they will not hesitate to ask. This is not to say that if a particular fact or facts are crucial to the resolution of the case they should not be mentioned. They should, however, be woven into the legal argument and not set out as a separate statement of facts. For example, instead of beginning the argument with a chronology of the identification procedures engaged in by the police, it is preferable to begin by saying that none of the indices of a reliable identification are present in the case and then go on to discuss the facts surrounding the witness's viewing of the defendant.

Appellant has the initial task of capturing the court's attention in the face of what is probably some shuffling of the papers from the previous case and remnants of thoughts, and possibly even discussion, lingering from the issues presented by earlier advocates. If there are such distractions, appellant's counsel may wish to start by reminding the court of the nature of this case and its procedural history. Once the judges are focused on the advocate, however, it is best to seize the opportunity by making a forceful and concise statement of the strongest point that calls for reversal of the judgment or order. Lengthy preambles are to be avoided: today's busy and impatient appellate judges are eager to get right to the heart of the issues in dispute.

Here the difference between real courts and the practice followed in moot court competitions is worth noting. The almost universal practice in law school

competitions is to begin with a "road map" listing the issues to be addressed, in the order in which the advocate plans to address them. In part, this introduction allows the first student to signal to the bench which issues he or she will be arguing, and which are reserved to the second member of the team. Only very rarely will argument time be divided in actual courts, so that the judges need not be alerted in this way.

8. Practice the Argument

A moot court with a video camera is obviously the most luxurious way to practice an argument. If, however, there is no one with whom to practice an no camera, one can practice at home with a mirror in the manner of previous generations of appellate lawyers. For the beginning appellate advocate, out – loud practice is the only way to ensure the ability to express the ideas in one's outline. Many advocates find it helpful to express the same idea in a number of different ways, so that the idea becomes second nature, yet the particular way it is expressed does not sound rehearsed. Practicing an argument out loud may also reveal which words you tend to stumble over, awkward transitions, and gaps in logic. Discovered in time, such problems may be solved by finding alternative phrases, reorganizing the order of points to flow more smoothly, and thinking any logical gaps in your argument. The more you practice, and the more you test your arguments before others, whether they be colleagues in your office, fellow students, or other intelligent willing listeners, the better your argument will be. Indeed, for moot court teams, the conventional wisdom is that the team that practices the most, and before the widest diversity of benches, has a decided advantage in any competition.

When beginning a career in appellate advocacy it is also a good idea to observe other lawyers argue, either in moot or real court. Having a clear idea of what to expect is helpful in overcoming nervousness and becoming acquainted with the rhythm of an oral argument. It is particularly useful to attend a session of arguments in the same court where you will be appearing. Each appellate court has its own way of approaching oral argument: beyond differences in rules (such as permitting or refusing to hear rebuttal), courts also have somewhat different styles, and the more you can adapt to that style, the better your chance of persuading that particular bench of the merits of your case.

[II]- *Presentation*

Moot court societies often stress the formal aspects of oral argument: Don't wiggle but don't stand rigid, use your hands but not too much, look the judges in the eye but make sure your eyes sweep the bench, don't take so many papers to the podium that you look weighed down but don't take so few that you appear cavalier, *ad infinitum*. Often these admonitions become paramount to content of the legal argument.

When analyzed, however, it becomes apparent that these warnings are simply the common sense rules of civilized discourse. It is not an idea peculiar to appellate advocacy that no one is persuaded by a person who mumbles or shouts, interrupts, harangues, has distracting mannerisms, doesn't answer questions straightforwardly and is either disrespectful or obsequious. Judges are no exception. If one keeps in mind that the purpose of oral argument is to inform and persuade the court, correct

behavior before the bench will follow. Whatever behavior serves a lawyer well in formal situations in the rest of life will be equally effective in court. Some people are naturally amusing, others serious, others dramatic and others low key. No particular personality is required to be a good oral advocate. Indeed, the shyness of a lawyer arguing for the first time can serve to make a case stand out. The advocate who is prepared and takes the job of representing a client seriously will do well. That having been said, a few pointers are helpful.

1. Getting Started

Appellants argue first and sit on the left, respondents second and sit on the right. Appellants in some, but not all, courts may reserve time for rebuttal. It is important to find out in advance if your court permits, frowns on, or outright prohibits rebuttal. When the case is called, the appellant should go directly to the podium while the respondent sits down at counsel table. Appellant can wait to begin speaking until the judges appear to be paying attention, but counsel should not wait to be invited to speak. Although there is no particular formula, a standard way to begin is, "May it please the court, my name is Abe Fortas. I represent the petitioner Clarence Earl Gideon."

While an attorney is arguing, both the opposing attorney and co- counsel should be unobtrusive. Counsel should not make faces or groan while an adversary is arguing. Co – counsel should avoid passing notes to the lawyer who is arguing as it is distracting to both the attorney who is arguing and to the court.

2. Demeanor

A lawyer's demeanor should, of course, be normally polite and respectful to the court. Judges are customarily addressed as "Your Honor." Counsel should not be unduly humble, however. A lawyer at argument is a professional doing an important job requiring intelligence and skill, not a peasant pleading for indulgence from the emperor. One commentator has used the phrase "respectful equality" to describe the appropriate demeanor of a lawyer at the bench.

An argument should not be read and should be made in a sufficiently loud conversational tone of voice to be easily heard. No one can be persuaded by someone who is inaudible. The judge who has to strain to hear may once ask the attorney to speak louder, but then will probably give up. Also to be avoided at argument are quotations and case citations. They break up the flow of an argument.

Finally, counsel should become aware of any distracting mannerisms he or she may have. Most people are unaware of their own bad habits. Videotape is a valuable tool to help one see oneself through the eyes of the court, tapping a pencil or twisting a ring or rocking backwards and forwards. In the absence of a video camera, candid criticism from a colleague should be solicited.

3. Answering Questions

Oral argument provides a unique opportunity to find out what aspects of the case are troubling to the court and to address them. The lawyer should stop talking as soon as the court interrupts, listen carefully to the question and try to answer as clearly and

persuasively as possible. An appellate lawyer should never refuse to answer a court's question either by telling a judge, "I'll get to that later," or by answering a different question, or by claiming that the question is not relevant and that something else is . Occasionally a judge's questions may seem off the mark, but even they should be answered without visible impatience. A judge bothered by unanswered questions will remain unpersuaded. To the extent possible, counsel should integrate the court's questions into the argument rather than simply answering and then jumping back to the different argument being made before the judge interrupted.

Because it is so important to answer a court's questions as they arise, it is bad practice for co – counsel to divide their argument time so that each one argues a separate point and has to refer questions to the other. This is often done in moot court simply so that all team members get a chance to argue, but in real life it results in an ineffective argument. Even in moot court competitions, a team member should be able to answer questions on all issues presented by the case.

It sometimes does happen, even to the well – prepared lawyer, that a court asks an unanticipated question. In this case a lawyer must try to answer as best as possible. If it is not possible to answer, it is better not to waffle but to say "I don't know," and offer to find out.

Not all benches behave the some way at oral argument. Occasionally, for example, the advocate is faced by the silent bench. This can be even more unnerving than being bombarded with questions. If the judges ask no questions, the advocate must simply be prepared to make the arguments selected as forcefully as possible and sit down. The hostile bench is another phenomenon encountered at oral argument. Sometimes, judges make clear that they simply do not accept an argument. In this situation, it is better to move on to the next point than to continue to try to convince a court that has already made up its mind on that particular issue. It may be, however, that only one or two judges are unconvinced; be sure that you have gotten your point across to those silent members of the bench who may be on your side.

4. Concessions

Among the most important skills of the appellate advocate, and one that takes practice and experience to develop, is knowing when to be flexible and when to stick to one's guns. Courts often try to wring concessions from lawyers. It is critical to distinguish ahead of time, as much as possible, between what cannot be conceded without landing on that slippery slope that concedes away the case, and what may safely be given up in the interest of perhaps winning the vote of a judge not willing to go quite as far as the advocate would like. Faced with a posited concession that the advocate has *not* anticipated, the cardinal rule is to think before you speak. The moment you spend thinking may seem endless to you, but it is far preferable to either being saddled with a damaging concession (such as not infrequently make their way into opinions: "Even counsel for respondent agreed…" or being forced to backtrack after further questioning demonstrates where the slippery slope has led. In addition, an advocate who spends moment thinking about a judge's question gives the positive appearance of taking that question seriously – not a bad impression to make.

Advocates should be wary, not only of making dangerous concessions directly, but also of being lulled into agreeing with a judge's characterization of their position that, while not directly contrary to the claim, states it in terms that might amount to a less favorable formulation than is appropriate for the client. When a judge says, "aren't you really arguing, counselor …" it is important to make sure that what follows really is a correct statement of the position being argued. If necessary, a judge may be asked, politely, to restate the question. Again, the embarrassment of appearing not to have paid attention is not as damaging as the possible agreement with a position that turns out not to reflect accurately the claim being presented. Of course, if the judge's formulation *is* correct, counsel should not hesitate to agree.

5. Respondent's Argument

Respondents have a more difficult and, at the same time, an easier job when preparing for oral argument. It is more difficult because the respondent does not know what points appellant will argue. Therefore, respondent's attorney must wait until the argument is actually in progress before making a final determination about the points to which response should be made. On the other hand, respondent has the advantage of listening to appellant's argument and learning ahead of time which issues interest the judges and which they have already made up their minds about.

Respondent's attorney must therefore go into court prepared to argue anything. Once there, the attorney must listen carefully to appellant's argument and quickly organize a response, both to what appellant has said and to questions the court asked during appellant's argument. Respondent is, of course, free to argue any point raised in the briefs, whether or not appellant has chosen to argue it orally, if that will help the client's case. Generally, however, if appellant has nothing to add to the arguments contained in the brief, then respondent, too, may decide to address the issues that appear to be more hotly contested.

One caveat: while the court's questioning of appellant's counsel may give some idea of the court's thinking on the issue, it is dangerous to assume that a judge's questions necessarily reflect that judge's views. Some judges love to play the role of devil's advocate, hammering away at the weaknesses of first one advocate's arguments, and then those of opposing counsel.

6. Finishing Up

When all points have been made, the advocate should sit down even if the argument time has not elapsed. Courts appreciate brevity. If , on the other hand, the time signal goes on before the advocate is finished, the advocate should complete the sentence or answer to a judge's question, and then ask for permission to go on if something crucial has been omitted. Most courts will grant permission if they are interested in what is being said.

7. Rebuttal

Even courts that permit rebuttal generally do not like it Rebuttal time reserved does not have to be used, and should be waived if a lawyer has nothing to add. Its purpose is only to address new matter raised by respondent at argument that appellant could

not have anticipated. For the most part rebuttal is properly used only to correct actual misstatements of fact by respondent. Rebuttal should not be used to repeat an argument already made or to make an argument forgotten the first time around. In moot court, points are taken off for improper rebuttal, and in real life a lawyer risks antagonizing the court

[III]- *When Not to Argue*

In general, one should not pass up an opportunity to persuade the court of a client's cause. There are infrequent occasions, however, when it may be preferable not to argue.

As a tactical matter, for example, appellant might forego oral argument on a clear, well– preserved issue of prosecutorial misconduct in a criminal case with gruesome facts in which the proof overwhelmingly demonstrated the guilt of the defendant. The court in such a situation might be tempted to use oral argument as a forum to berate the prosecution for its error, and then, with a clear conscience, affirm the judgment as unaffected by error declared harmless. Similarly, if opposing counsel has submitted a very weak brief, an advocate may determine that little would be gained and much might be lost during an additional opportunity to communicate with the court.

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Reading 2 – *R. M. Pomerance*

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Appellate Advocacy: Presenting the Oral Argument

Nothing is so difficult to believe oratory cannot make it acceptable, nothing so rough and uncultured as not to gain brilliance and refinement from eloquence.

Marcus Tullius Cicero [1]

… I make three arguments of every case. First, came the one that I planned as I thought- logical, coherent, complete. Second was the one actually presented –interrupted, incoherent, disjointed, disappointing. The third was the utterly devastating argument that I thought of after going to bed that night.

Justice Robert H. Jackson, U.S.S.Ct. [2]

I. Introduction

It has been said that a trial is a search for truth and that an appeal is the search for error.[3] Appeals differ from trials in many respects, and these distinctions have multiple implications for those who practice criminal law.[4] Whatever the forum, the advocate's goal is to persuasively influence the outcome-"to resolve a controversy between human beings according to ... rules of fair play that have for their grand objective the substitution of reason for force". [5] While certain rules apply across the board, appellate advocacy tests different skill-sets and involves different strategies for success than does trial litigation. An argument presented to a panel of judges will be framed very differently than a plea to a [trial court]. Legal argument is governed by similar principles in both venues. The difference is that a lawyer debating a point of law before a trial judge can exploit the malleability of the record, a liberty denied counsel on appeal. Once the matter has reached an appellate court, the evidence is in, the ink has dried, and counsel must live with a factual foundation that is indelibly set. Save for limited exceptions, the factual findings and credibility determinations immortalized in the transcript are immune for retrial or review[6].

Countless texts and articles have been written on the art and science of advocacy, it is impossible to capture the collective of these sources in a single paper, and it is humbling to try to contribute to the mass of work in this area. Some comfort can be gleaned from the fact that certain themes tend to permeate the literature. The following will begin by briefly examining the role of the advocate and its many dimensions. The paper will then turn to its main focus: the principles that govern the preparation and presentation of oral argument on appeal. It will be assumed that the factum has already been drafted and filed,[7] and that counsel are preparing to present

their case in a provincial Court of Appeal, as distinct from the Supreme Court of Canada.[8] While preparation and presentation are discussed under separate headings, it is difficult to draw a bright line between the topics. Comments made in connection with one may well have application to the other.

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III. The Preparation and Presentation of Legal Argument on Appeal

A. Preparation

Preparation is the lynch-pin of effective advocacy. Its importance cannot be overstated. While this paper is concerned with oral argument – as distinct from factum writing – it would be a grave mistake to assume that the task of oral advocacy is restricted to the performance of counsel in court. To the contrary, as noted by Justice David Watt, the art of advocacy extends well beyond it visible manifestation to encompass" all that which precedes the formal presentation of evidence, addresses or argument, whether at trial or on appeal." [17] The hidden work of the advocate – the arduous and isolated hours spent preparing, crafting and honing submissions- is the key to successful oratory. Words that appear to flow effortlessly at the time of the hearing may reflect the end –product of many hours of thoughtful reflection. The apparent ease and spontaneity of counsel's delivery is often directly related to the amount of painstaking work that preceded it.

Preparation methods tend to be idiosyncratic. Over time, a lawyer will develop a routine that best suits his own temperament and style. Systems may vary, but the object is always the same – to achieve a full mastery of the case and a working facility with the arguments *before* entering the courtroom door. While appeals are more predictable than are trials, the oral hearing can take unanticipated twists and turns. Counsel must be ready for every contingency. The best way to prepare for the unexpected is to have a thorough, working knowledge of the case. It could be said that, for any given appeal, counsel effectively prepares for two arguments. The first consists of what counsel would say if the court sat mute during the hearing and did not interrupt with any comments or questions. This free-standing narrative would convey each essential point necessary to support counsel's conclusion- nothing more and nothing less- and contemplates a smooth sail towards the desired destination. The second argument is the one that actually takes place. Counsel is rarely given licence to stand up and deliver a soliloquoy. Be it minor turbulence, judicial headwinds or the "prefect storm", the appeal panel will almost always intervene in some fashion or another that takes counsel off the charted course. The dialogue with the court is one of the most invigorating aspects of oral advocacy. But the advocate must know how to ach his destination in both calm and stormy seas, and must be able to access reserves that will keep the boat from sinking. [18]

While effective preparation involves several tasks, I suggest that three are amongst the most important: 1) mastering the facts; 2) structuring the outline of the argument; and 3) crafting the opening remarks.

i) The Facts

The overwhelming consensus is that the facts matter; that they matter a great deal; that they can matter more than anything else; and that they are often dispositive of the appeal.[19] The law is never applied in a vacuum. Save for abstract constitutional challenges, the ultimate question is always *how* the legal principles apply to the particular case before the Court. The facts tell a story. They define the equities of the case and, to this extent, may themselves exert a persuasive impact on the Court. The power of the narrative can and should be exploited by the advocate. As Binnie J. observed in R.v.Rose, [20] "… the same underlying facts can be used to create very different impressions depending on the advocacy skills of counsel."[21] Moreover, while the appeal panel will often be cognizant of the leading cases in the area, they are most less likely to be intimately familiar with the minutia of the record. This is often where counsel can be of greatest assistance. The most important facts will have been summarized in the facta. Nonethelelss, counsel must have a keen appreciation of *both* the forest *and* the trees. One must aim for a deep and comprehensive understanding of *all of the* evidence, in order to field a potentially broad range of questions from the court, and where necessary, to answer or correct one's opponent.

The hearing will often take place some months after the factum was drafted. By this time, the transcript may have become something of a distant memory. After reviewing the briefs, the next step in preparing the case should involve refamiliarization with the record. Some portions of the transcript can be skinned; others will require a more careful reading. Certain passages may assume a new significance as the hearing looms large. The level and intensity of review will depend on the evidence, the issues, and the quality of counsel's pre-existing recollection. Nonetheless, a return visit to the transcript is never a wasted trip. It is often indispensable and permits the facts to become firmly and vividly embedded in the mind's eye. The appeal book, containing copies of relevant exhibits, should also be given proper attention. The exhibits may facilitate a spatial comprehension instances, the exhibits essentially *are* the case, as with many frauds and economic crimes. In either event, one can presume that there was *some* good reason for presenting these items to the trier of fact. That same reason commends review by counsel on appeal unfortunately, the appeal book will sometimes prove inadequate to the task. For example, where photographs are concerned, the black and white photocopy machine is an unkind tool. Counsel acting for Respondents have been known to receive appeal books containing pages of what could fairly be mistaken for grainy Rorschach blots. Colour photocopies are now used more frequently, but here the copy is indecipherable, the original exhibit should be reviewed, as should those exhibits that are not capable of reproduction and do not appear in the appeal book at all. [22]

Appellate advocacy also demands a certain manual dexterity with the record. The fact must not only be embedded in the mind; they must be accessible at the fingertips. During the hearing, counsel must be able to turn to relevant portions of the transcript or appeal book with ease, dispatch, and unwavering accuracy. The court will often ask to be taken directly to a portion of the evidence. Ineffective fumbling and page turning will leave a less than stellar impression. For those of us who lack a photographic memory or a perfect system of mnemonics, there are various tools that

can make a voluminous record more manageable. Consider the use of summaries, tabs, a master index, a list of important references, and /or itemized notes on transcript covers or spines. Counsel may also wish to prepare a book of excerpts containing the most salient features of the record to be filed in advance.[23] However accomplished the point is simply that counsel must be able to deftly manouevre through the factual landscape. It helps to have a roadmap.

ii) The Structure of the Argument

While "readings" are an accepted practice in the literary world, they have no place in a criminal courtroom. To the contrary, to merely recite the contents of one's factum in court is the antithesis of true advocacy. The factum is best viewed as a springboard for oral argument. It should not be ignored- it is good practice to advise the court while paragraphs of the factum correspond to the argument at hand –but neither should the written brief define oral presentation. [24] The point of oral argument is to build upon what has been written, buoyed by the wisdom of hindsight and the foresight of what one's opponent might say. It can generally be presumed that the appeal panel will have read the factum in advance and will not be requesting an encore. Moreover, the very structure of the factum impedes crisp and succinct oratory. The factum erects an artificial barrier between the facts and the law. Oral argument provides an important opportunity for synthesis. Ideally, the facts and law will be fused into a seamless presentation that sways or compels the court toward the desired conclusion.

An oral presentation is only as good as its organizational structure. Counsel must decide which points will be advanced and how they fit together to form an integrated whole. Counsel may choose to follow the sequence of arguments as they appear in the factum. But even the best facta warrant critical appraisal when deciding how best to present the oral argument [25]. There is much to be said for stepping back, taking a long hard look at the case, and examination whether there is a more compact and compelling way of packaging counsel's submissions. There usually is, particularly when the argument is complicated and counsel are bound by strict time limits.[26] The idea is to reduce a mass of material into a logical , cohesive structure that allows argument to unfold in a concise and orderly way, while avoiding unnecessary repetition. In some cases, the structure of the argument will be quite obvious. In other cases, finding the perfect flow can be maddeningly elusive and time consuming. Yet, once the task is complete, it reaps many rewards. After the structure has been set, the finer points of argument tend to fall into place quite naturally. Building the structure facilitates good advocacy. It also fosters a deep understanding of the issues, by forcing counsel to think each pint through to its logical conclusion. Lawyers who have done so will be well-equipped to move around within the subject matter without losing the main focus. A one page flow-chart, recording the sequence of points and how they interrelate, can serve as an invaluable aid during the thrust and parry of submissions.

iii) Planning the opening

It is fair to say that the Court will be most attentive to counsel when they first rise to their feet. These first few moments are critical and set the tone for what is to follow.

This is the first, and perhaps the most opportune, time to seize the court's interest and attention. It is the time when the panel is most likely to be poised with pen and paper waiting to record counsel's words. It is the time when counsel is least likely to be interrupted. In short, it is a time that is not to be squandred. Opening statements have traditionally consisted of bland recitals along the lines of: "This is an appeal from the judgment of so and so…" But why not choose a more enticing introduction? Pithy, evocative language, designed to stimulate interest, will magnify the impact of opening remarks. The advocate should aim to get straight to the point, identifying the central issue; counsel's position; and why it should prevail. Counsel may wish to provide the court with an itinerary-"I will be making three points" – and then conveying each in a single sentence. The opening must be concise, or it will be mistaken for argument. At the same time, it is beneficial to scrupulously plan each word of the opening in advance. Condensing complex ideas can be tricky. The perfect turn of phrase is more likely to materialize while sitting at a notepad or computer than while facing the gaze of an expectant panel having just approached the lectern. This prescription for a concise introduction may seem an ineffective antidote to blandness. But it should not be forgotten that: "Brevity is the soul of wit."[27] The opening salvo that sizzles from the tongue to explode in the judges' minds is more likely to be found in the simple search for clarity than it is anywhere else.

B. Presenting the Argument

As was stated by Justice David Watt: "… the oral argument of an appeal is the climax of a case."[28] It reflects the culmination of "the long and wearisome work" [29] carried out during the tenure of both the trial and the appellate proceedings. Its significance lies in the opportunity to engage in a personal, two-way communication with the judges. It is the most direct, but also the final opportunity, to convince and persuade the Court. Once argument is complete, and the court has risen, the perfect retort that pops into counsel's mind will either be doomed to obscurity, or will live on in regretful tales told to every one but the panel that is deciding the case.

Various authors have succinctly described the cardinal qualities that counsel should strive for during oral argument. Some have referred to the three "Cs": clarity, conciseness and candour.[30] Justice Estey coined the three"Bs": "… be brief, be clear, and be gone."[31] However expressed, the message is clear. Counsel must aim for brevity, precision and, above all, honesty in advancing their cause. Counsel is also wise to adopt the perspective of the tribunal when crafting and presenting oral argument. [32] As Alan Gold put it: "Argue unto others as you would have them argue unto you."[33] This adage has several performance implications, but one warrants particular mention. We tend to focus on the lawyer as the one who seeks to persuade, but it has been observed that judges are, themselves, a species of advocate. According to one commentator: "Every judgment is … an attempt to persuade counsel fellow judges and the public of the inherent validity or "rightness" of the conclusion reached"[34]. If this is so, it suggests that that goal of advocacy is, not only to persuade the court that *it* agrees with you, but to demonstrate that others will likely be convinced as well.

Arguments should always be advanced with confidence, but never with disrespect, counsel should not shy away from bold speech, but should never resort to the inflammatory. Language should be conversational but not colloquial. Counsel should maintain eye contact, a comfortable stance, and a keen awareness of all members of the court. Lately, there has been a discernable shift away from undue formality in appellate courts. Reference to M'Lord and M'Lady is highly discouraged in some venues.[36] Used too often, the phrase: "It is respectfully submitted" can clutter up oral speech and distract the listener. Be that as it may, traditions of decorum and civility remain touchstones of the Canadian approach to advocacy. While litigation is not a "tea-party", "Counsel and disagree, even vigorously, without being disagreeable."[37] Some have bemoaned the apparent decline of civility amongst Canadian lawyers[38], but reparative measure have been taken in some jurisdictions[39] and Satates[40]. One can only hope that we never will. As stated by Justice Warrant Burger, civility is the necessary "lubricant" that stands "as a barrier between a courtroom and a bar room brawl."[41]

Counsel for the Appellant enjoys a great advantage in being the first to speak. It is she who sets the stage for the hearing of the appeal. The power of the opening statement has already been discussed; above the question is where to proceed after the opening has been delivered. Counsel is well advised to avoid a length stand-alone recital of the facts. This is not to say that facts should be ignored. It is only to say that they are best woven into and the web of legal argument. A succinct overview of the facts can sometimes provide context for the legal issues. However, on the assumption that the Court has read the facta, any stand-alone statement of facts is best reduced to the salient highlights. Counsel should move quickly to the heart of the appeal. As it was put by Justice John Laskin: "There may be a few cases-such as a long appeal – that require a more elaborate introduction, but in most appeals, forget the windup and make the pitch."[42]

When it comes to the legal issues, counsel must aim to be selective. If too many pints are raised, there is a risk that any gems will be lost in the surrounding rubble. Justice George Finlayson has suggested that: "As an *aide memoire* to be attached to every counsel's brief, permit me to sate unequivocally that no judge in a single trial has made more than three reversible errors ."[43] Restrict your argument to your best pints and, whenever feasible, present the most compelling ground first. An early demonstration of merit will inspire confidence and set a positive tone for the case as a whole. The spill-over effect may increase the apparent attractiveness of other grounds that have less intrinsic merit.

As part of preparation, counsel should always try to anticipate questions from the bench. The advocate's utopia consists of a world in which every question has been forseen in advance and answered in devastatingly clever terms. Reality is rarely, if ever, so kind. On the other hand, it is much easier to predict what one's opponent will say, as fair notice should be contained in the Respondent's Factum. It is a mistake for the Appellant to proceed as if counsel for the Respondent has gotten lost on the way to the hearing. It is far more effective to directly address and dismantle the Respondent's arguments before he has even had a chance to make them. Similarly, counsel should candidly confront and deal with" unruly facts and uncooperative legal

arguments[44]" that are germane to the person charged with possession of stolen property. One can generally assume that hidden warts and imperfections will be happily exposed by one's opponent, or worse yet, the court. When this happens, the potential harm can extend beyond the case and injure the case and injure the advocate's most precious commodity-his or her credibility.

Counsel should exercise restraint when deciding what, if any, source material should be read aloud to the Court. Where a case is relied upon, it can be quite enough to simply identify the authority, where it is found in the materials, and the proposition that it stands for similarly, relevant facts can often be summarized without forcing the court to listen to endless recitals from the transcript. On the other hand, there will be occasions where a passage in a case is so pith, persuasive, or dispositive that counsel can do no better than to take the court directly to it. Similarly, certain exchanges in the transcript may be so vital or compelling that they cannot be suitable paraphrased.[45] Where a passage is to be read, it should be identified in advance, and kept as brief as possible. As John Davis put it: "There is something about a sheet of paper interposed between speaker and listener that walls off the mind… It obstructs the passage of thought as the lead plate bars the X-rays. [46] All of that said, counsel must know where to find extra ammunition should she come under fire. A hostile challenge from the court can occasionally be defused by taking the court to relevant precedents or portions of the evidence.

Much has written on how to deal with questions posed by the Court. As pointed out by Justice Binnie in his oft-quoted paper[47], different types of questions will call for different forms of response. However, Justice Binnie's general advice – "listen before you leap" – holds true for all categories. Counsel must resist the temptation to fill any apparent silence with immediate verbiage. The answer *may* be at the tip of the tongue and allow for instantaneous response. If not, taking a few moments taken to collect one's thoughts will spare the advocate the indignity of collecting them aloud. Moreover, a precipitous response may pain counsel into a corner that she does not wish to inhabit. Questions will often jump from issue to issue, interrupting the flow of counsel's argument. However, this should not be seen as an unwelcome intrusion. To the contrary, questions identify the court's key concerns and the issues that it finds most troubling. Counsel should seize upon this information and address such matters as quickly as possible. Questions should never be entirely deferred or left hanging; one risks losing the attention of the inquisitor. So long as all of the relevant points have been made, it will not usually matter whether they were made out of sequence. Occasionally, counsel's entire performance will consist of a Socratic dialogue with the Court. Where questions do fall into reprieve, a useful transitional phrase-"If I could return to the issue of x"- can help restore the thread of argument that preceded the onslaught. Some questions will have a distinctly hostile flavour. When challenged, counsel should stand firm and politely defend her position with every arrow in her quiver. Yet, at a certain point, it may become depressingly obvious that nothing more can be said to address the court's concerns. A submission is not made more convincing through repetition may more than a foreign language is made understandable through shouting. To avoid invoking the ire of the Court, counsel

should take note of when it is time to sit down or move on, perhaps with the signal: "I don't believe that I can be of any further assistance on this issue"

Certain rules have special application to counsel for the Respondent. The first and perhaps most obvious point is that the Respondent must be responsive. This requires flexibility. Counsel must be able to quickly modify a planned presentation to meet the contingencies of the hearing, as defined by both the Appellant and the court. The Respondent's chair offers a unique perspective. By the time counsel rises to his feet, he will have already witnessed the exchange between his opponent and the Court. This can provide a helpful, albeit tentative, barometer of the Court's views. The respondent should never become smug merely because the Appellant's counsel received a rough ride. This may signal that the Court is unconvinced. But there is no guarantee that the Respondent will not be met with the same type of reception. The court may wish to test the limits of both parties' positions. Moreover, the Respondent faces certain disadvantages. The Appellant has had the first monopoly on the court's attention. Effective counsel can imprint a portrayal of the facts and issues that may be difficult for the Respondent to dismantle. The Respondent faces an even greater incentive to more straight to the issues, and to troubleshoot in areas that appear to have piqued the interest or concern of the Court.

Finally, there is the issue of reply. This topic is probably best addressed by saying absolutely nothing at all. At least, that seems to be the proper approach in the vast majority of cases. [48]

[*Footnotes omitted*]

Reading 3 – *M. A. Figinski*

M. Albert Figinski, "Oral Argument – View from the Bar – Suggestions From One Advocate", *Appellate Practice for the Maryland Lawyer*: State and Federal, Second Edition (2001). Section VI, Ch. 32

The Maryland Institute for Continuing Professional Education of Lawyers, Inc. 2001

APML MD-CLE 32-397

Oral argument is a precious, brief opportunity to make the case come alive for the appellate judges. It is the chance to tell the decision makers directly — face to face — why the results addressed in the briefs should be adopted. Oral argument is not oratory. [FN1] Effective oral, appellate advocacy is a clear and vigorous defense of the thesis presented in the carefully crafted briefs and preserved in a well-made record. Effective oral advocacy articulates why a party should win, and responds to questions from the judges.

One of Maryland's finest appellate advocates, the late Alfred L. Scanlan, summed up the essence of oral appellate advocacy when he wrote: [FN2] Oral argument should be a colloquy — not a soliloquy. The appellate advocate should hit only the major points of his case. His argument should be an exercise in persuasion — not an oral treatise. He should not bog down in giving detailed facts or in the extended analysis of cases. It is also most helpful, too, to have a short paragraph in mind which sums up the essence of counsel's case and to state it at some time during the course of the argument, preferably near the beginning — but somewhere.

Above all, the appellate lawyer should be flexible in oral argument. He should be ready to change emphasis, shift oratorical gears and even abandon an argument if the situation seems to require that it be done. Finally, he should always keep in mind Lord Coke's advice to the advocate when he said: "To speak effectively, plainly, and shortly becometh the gravity of this profession. Truth takes small delight with varnish of words and garnish of flowers."

It is essential to realize that oral advocacy is an art form; there is little scientific precision to it and what works for one advocate may not work for another. An advocate's personality largely determines the presentation. There are few "rules" or inhibitions. Some might be phrased thusly:

- Don't read an oral argument.
- Don't read lengthy quotes from the authorities.
- Don't duck questions.
- Don't be a wisenheimer.
- Don't insult or talk down or make light of (a) an opponent, (b) the judge below, or (c) the judges on appeal.

How important is oral argument? For different judges it weighs differently. The briefs, of necessity, establish the scope of the appeal and provide the legal foundation for the argument. Briefs are read by the judges before argument. Some judges treat oral argument as nothing more than a sop to the Bar which could well be abolished. Many judges, however, come to oral argument ready to be persuaded or, at least, helped in their quest for proper decision. In order to help those judges willing to listen, an effective oral argument can play an essential role in the outcome of the case. [FN3]

How to prepare for oral argument? The advocate who says that he or she will "wing it" or simply read over the briefs the night before argument, probably wastes an opportunity to prepare to present an effective argument to the judges willing to listen. Proper preparation for oral argument would include, of course, a rereading of the briefs, a review of the main cases or authorities that have been relied upon, and a resort to the record, where appropriate, to refresh recollection of the critical facts and to have their reference at hand. This kind of preparation requires more than a few sleepy moments the night before argument. It requires thought in advance. Any preparation should focus on the questions that could be in the minds of the judges who may hear the appeal. There is no more effective preparation process than to conjure up the questions likely to be asked, with thought given to how those questions can be handled with maximum benefit to the appellate cause. Preparation may be easiest when the advocate has presented the case below and written the briefs on appeal. When the case is inherited for appeal, it is much more necessary to prepare extensively before oral argument. In any event, it may be helpful to "rehearse" an argument, by making it aloud alone, or by discussing it at some length with a knowledgeable colleague. Some advocates even write out the argument which is not read at argument. [FN4] I prefer a one-page list of points to be made — in reality a checklist to be used as a prompting device at the podium.

How to begin the argument? No advocate should go to the lectern without at least having in mind a good, concise statement of why his or her side should prevail. A pithy paragraph stating why the advocate should win should be prominently stated in the argument, preferably early on, before the court's questions intervene. It is rather wasteful for the advocate to begin with either a recitation of how the case came to the appellate bar or a recital of the facts demonstrated below. In Maryland, the judges can be expected to have read the briefs before argument, and oral argument should not be a rehash of what is already in the briefs. Oral argument should focus on the distinctive facts, or law, which will win the case. There is no better opening, in my view, than to say, for example: "May it please the Court; This appeal from the Circuit Court for Baltimore City compels reversal of the judgment because . . . ."

Scope of argument. An appeal may present numerous issues. It is, however, impractical to attempt to discuss each one of many issues in oral argument. Rather, the advocate should focus on the principal or main arguments and leave the lesser arguments to the briefs.

Phrasing the argument. Speak loud enough to be heard, and slow enough to allow the rhetoric to be absorbed. Simple declarative sentences, with punch and emphasis, are suggested. If a long, compound sentence threatens to flow from the lips, the advocate should stifle the thought. Rephrase it to be direct and meaningful. Avoid florid phrases or stilted language. There is no reason to encumber an argument with concoctions such as "it is our submission that . . ." or "we would contend that . . ." Try to talk to the court, engage it in conversation and be natural, not a caricature of some pontificating pundit.

Dealing with questions. It is absolutely imperative that an advocate be prepared to answer questions. Questions should be anticipated. Answers should be rehearsed. Answers should be concise. Where necessary, answers should direct the questioner to places in the record which support the advocate's position or to elements of the case which underlie the answer. If a question cannot be answered, it is doubtful that the case can be won, unless the advocate can show that the question and its answer are immaterial to the resolution of the appeal. In response to questions, it is important to have a colloquy with the questioner — eye contact and a serious effort to convince the questioner of the appropriateness of the answer.

The advocate should not be afraid to respond forcefully to a question. A personal experience comes to mind. Before the Fourth Circuit, I had the misfortune of arguing an appeal similar in many ways to a case decided adversely just shortly before oral argument. [FN5] As appellant, I anticipated being asked why the prior decision did not control. Before I reached the podium, a jurist put the question. My response was immediate, ticking off various distinctions between the prior case and the one being argued. I had prepared for the question; I presented a concise, thoughtful answer; from a technical standpoint or debating perspective, the judge was bested. Regardless, several months later, a per curiam opinion found the prior decision controlling, a personal example that form does not overcome substance … An advocate should always remember that it is his or her case, not the court's case that is being argued. Consequently, it is essential that the advocate tell the court why he or she should win. Answer their questions, and battle the interrogators. It is essential that the advocate not concede where it is unnecessary to concede and to be resolute in favor of the cause.

A concise set of rules for an advocate was phrased by Chief Justice Charles Evans Hughes who wrote:

> The advocate learns to be courteous, but never obsequious, always the gentleman. He learns how important it is to keep one's temper, never to appear nervous or to lose poise; never to be petty, wordy, repetitious; to know when to keep still; to express himself candidly, concisely, always going directly to the power; to use a rapier rather than a club; to have one's papers so arranged that whatever may be needed will be immediately at hand so that he does not have to fumble; to be so well prepared that he is ready for any emergency; not to be tied down by brief or memoranda and always to show spontaneity as well as alertness. [FN6]

The particular position of the appellee. If an advocate represents the appellee, the advocate has the benefit of hearing the court's reaction to the appellant's oral arguments. It is critical for appellee's advocate to be flexible enough to play off the way the appellant's oral argument was received. Of course, the appellee's advocate should have prepared a several paragraph opening, but it should not be used if the advocate can pick up on an unanswered question or a question wrongly responded to by the appellant and to make hay with that argument. Nothing works better than to pick up on a critical point dropped, or missed or ducked by an appellant.

Some final words. It is very difficult to explain, in writing, how to make an effective oral argument. One only learns how to make effective oral arguments by making them. Each oral argument is an ad hoc effort and must, of necessity, follow its own pattern. Oral argument, like appellate advocacy in general, is an art form, not a science. It is not something which can be committed to formula or rote. Instead of reading about how to make oral arguments, it probably would be more helpful to an advocate to go and listen to them. If a person has never been to a court, I would suggest trying to get there in advance to acquaint oneself with the surroundings and the ambiance of the courtroom.

Appellate court clerks are a genuinely helpful group. They always seem to have time to respond graciously to questions from lawyers. If one doesn't know what the little lights on the lectern mean [FN7] or where to sit, [FN8] don't be afraid to ask. Generally, there are but two seats at each counsel table. If, for some reason, you want to move in a third chair or move out one chair, ask the clerk for permission beforehand — don't move the furniture without permission.

Oral argument, after all, is the advocate's final opportunity at persuasion. Give it your best effort. The next thing that will occur will be the court's opinion, one hopefully influenced by the persuasive exposition of the advocate.

[*Footnotes omitted*]

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Reading 4- *E. Gressman*

Eugene Gressman,[1] "Winning on Appeal: The Shalls and Shall Nots of Effective Criminal Advocacy," *Criminal Justice* (Winter 1987), pp. 10- 47

1-WTR Crim. Just. 10

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Oral argument with impact

Judges differ as to the impact of oral argument on the outcome of an appeal. Some say it has little or no effect. Others … feel that an oral argument may change their minds ... Whatever the impact, the very nature and the content of oral arguments have undergone significant changes in modern appellate times. The caseload crisis has imposed severe time limits on oral presentations … . Intense questioning from the bench may turn the best prepared argument into shambles.

What should appellate counsel do to prepare for the courtroom battle? Every lawyer must prepare and proceed as individual talents and backgrounds permit. Trying to cast oneself in the image of another may lead only to uneasiness and artificiality. Yet there are certain fundamental precepts, drawn from ***47** experience, that apply to all despite their individualized differences.

Concentrate on a few issues. Thoughtful selection of issues to be argued orally is a basic technique of any skillful advocate. Most cases have one, or only a few, master issues deserving of the court's attention during the short time span of an oral argument. Neither time nor good strategy permits discussion of all the subordinate and less important considerations. Leave those matters to the brief. Ferret out and concentrate on the one or two issues that may win the case for you.

Try for spontaneity. Proper selection and limitation of issues simplify the next task: preparing for the oral presentation. Avoid, however, preparing the entire argument in writing and then reading it verbatim to the court. Most courts forbid or frown on that practice. And avoid preparing a long, detailed outline. The goal, rather, is to prepare the prospective argument in the form of a short outline, preferably reduced to a single card or sheet of paper. Selecting only a few points for discussion naturally leads to a short outline, containing only a few numbered sentences or phrases as reminders of the key points to make. Assuming the lawyer is fully conversant with the case, and has used the outline as a base for practicing the

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argument, the necessary details of the courtroom argument achieve a high degree of spontaneity. Since only a few glances at the outline are necessary, almost constant eyecontact can be maintained with the judges.

Rehearse. As just indicated, once the outline has been prepared, the oral argument should be rehearsed time and again, either orally or in one's mind. Creating a moot court out of one's peers is also helpful, particularly in experiencing the kinds of questions that might be asked by the real judges. Such rehearsals may reveal soft spots in the argument or the need for further revisions or reductions in the outline. These trial runs also aid in simplifying and clarifying the expression of the argument, eliminating awkward or complex phraseology. In addition, rehearsing permits the advocate to adjust the length of the argument to fit within the time allotted by court rules. Allowance must also be made for questioning from the bench; if the court is known for its intensive questioning of counsel, the argument rehearsed from the outline should not exceed one-half the allotted 15 or 30 minutes.

Be flexible. Another mark of an effective appellate counsel is resilience in the courtroom. Resilience is the ability to answer a judge's inquiry fully and instantly even though the prepared sequence of argument is altered or shattered. Avoid at all costs the remark 'I'll come to that point later, your Honor.' Here again, reliance on a short outline facilitates such resilience. Outlines are so flexible that they can even be abandoned to meet the exigencies and flow of the courtroom dialogue. If counsel's argumentation is fixed by a written-our argument, counsel may be unduly disturbed by a seemingly out-of-order question from the bench.

Try to be candid. As in briefs, candor is an essential element of effective oral advocacy. Most cases on appeal not only have two sides to every issue but some weak points as well. Evasion of those points is a cardinal sin. Evasion goes far to destroy both the credibility of counsel and the effectiveness of the oral argument. It is far better to address the weakness and attempt to explain away its significance.

Make your introduction short. The oral argument should open with a brief statement of the issues to be addressed. Give only those few facts that are necessary to understand the legal issues, unless the appeal presents fact-bound issues. Remember that most judges will have read the briefs before the oral argument and will know the basic facts. They do not have the time, nor do you, for a long introductory statement. Go immediately to the first and presumably the controlling or most important issue. Remember that your role is to attack (or defend) the judgment of the court below, and your arguments should reflect that fact. An appellate court is simply not a forum for making *de novo* arguments such as might be appropriate in a trial court.

Be respectful. In addressing the appellate court, counsel should speak in measured and respectful terms. Counsel should be confident and assertive, but not condescending. An oral argument should not be a peroration to a jury or an occasion for loud oratorical flourishes. It is an occasion for a gentle but firm attempt to persuade the judges to decide the case in favor of your client. If the judges are properly motivated by the argument to a sympathetic point of view, you have done your job.

Stress policy. Part of the motivating aspect of an oral argument is an emphasis on the public or judicial policy consequences of a decision in favor of your client. How would such a result square with the governmental interests being asserted in the case? What are the long-range consequences? How many prisoners would be released if you win? In short, is it the 'right' or 'equitable' decision for the court to reach?

Careful rebuttal. For those in the position of arguing for an appellee or respondent, the oral argument rules of conduct are much the same. But there is one difference. Bottomside counsel is necessarily in a rebuttal position, making it possible to weave into the oral presentation (a) answers to contentions just made by the preceding counsel and (b) answers or comments on bench questions put to the preceding counsel. A most effective opening for appellee's counsel is to address a proposition or comment made at the very end of the preceding argument. As to rebuttal argument by appellant's counsel, the best advice is not to make any unless the case has been seriously wounded by opposing counsel. Nothing annoys a court more than a rebuttal that does no more than repeat or summarize what was previously said.

Do not exceed your allotted time. The last oral argument command is: sit down when the red light flashes on the lectern. You may finish the sentence you are delivering, but say no more. Of course, you are expected to answer any overtime questions asked from the bench; then the extended argument is on the court's time, not yours. But above all, do not ask for an extra minute in which to sum up. Oral arguments no longer need neat conclusions or summations, for time is too precious and there are most likely other cases to be heard immediately afterwards. Occasionally the presiding judge may allow a few extra minutes as compensation for the court having taken so much of your allotted time in questioning. But don't count on that.

If all of these suggestions are taken into account, counsel will have met the highest standards of appellate advocacy. Whether that is enough to win is another matter.

Case Problem 3: *Preparation for Oral Argument and Presentation*

(*Name of the appellants has been abbreviated and Ethiopian calendar is used)*

Federal High Court

Comp. No. 30394
Yekatit 30/1997 Eth. Cal

Judges: Kassahun Bogale, Filipos Aynalem, Assefa Abraha

Appellant …… S. & A. Construction Works Contractors

Respondent…… Ministry of Water Resources

… The following decision has been rendered the examination of the file.

Judgment

The basis of the appeal is the statement of claim presented to the subordinate court by the plaintiff, i.e. current appellant, on Nehassie 13th 1995 Eth. Calendar, in which the appellant stated that it had entered into a contract with the respondent regarding Besaika Lake Project. The plaintiff stated that the parties had agreed to refer any dispute to arbitration pursuant to Article 67 of the contract.

In its statement of defence submitted to the lower court, the respondent argued that the contract is an administrative contract and cannot be referred to arbitration. The subordinate court in its decision dated Megabit 3rd 1996 held that the contract entered into by the parties which requires submission of the case to arbitration is invalid because the contract is an administrative contract.

The appeal was lodged against this decision and the revised appeal dated Miazia 2nd 1996 contended that the decision of the lower court in finding the contract as an administrative contract contains error in law and that the contract does not imply the uninterrupted participation of the administrative authority (i.e. the respondent). The appeal also argued that the contract is a contract of construction works and is not related with public administration. It thus

requested the reversal of the lower court's judgment and that the dispute ought to be referred to arbitration council for decision.

In its session on Hedar 19th 1997, this court, upon examination of the appeal, allowed an appellate litigation to examine whether the lower court had arrived at its decision after having ascertained that the contract can, in accordance with Article 3132 of the Civil Code, be considered as administrative contract.

In its response dated Tahsas 1st 1997, the respondent argued that the contractual terms of both parties are connected with public services and that the construction works are related with the alleviation of the public's economic and social problems. The respondent further argued that it had entered into the contract in the course of its function as an executive organ and that it is following up the implementation of the construction works thereby requesting the court to reject appeal and affirm the lower court's decision.

The appellant's reply to the respondent has reiterated the arguments forwarded in the appeal. This appellate court has also heard the oral arguments of the parties. The following issues are framed based on the facts presented and the relevant laws:

1. Whether or not the contract concluded is an administrative contract?
2. Whether or not arbitrator should be appointed for the parties?

The basis of dispute between the appellant and the respondent is the construction contract dated Miazia 10th 1993 Eth. Calendar in which the appellant agreed to construct dam to the respondent. The Court found that although Article 1675 *ff* of the Civil Code on contracts in general seem to be applicable, Article 3132 stipulates that the activity requires uninterrupted participation of the administration authority (the respondent). The court further found that Article 3132 shall apply to this contract and that the principal party for the services and bearer of obligation is the appellant. Thus, the contract cannot be regarded as an administrative contract. Apparently, the respondent is an administrative

authority and the activity is indirectly connected with public service. However, Articles 3131 and 3132 show that not all contracts can be regarded as administrative contracts solely because they are concluded with administrative authorities and involve public service. Therefore the contract concluded between the appellant and the respondent is a contract of construction works and not an administrative contract. In effect, the respondent has no ground to refrain from assigning an arbitrator towards the settlement of the dispute.

We have thus reversed the subordinate court's decision in accordance with Article 348/1 of the Civil Procedure Code and have unanimously decided that the parties shall settle their dispute through an arbitrator assigned by mutual agreement, and in case this is not possible, the appellant can file execution proceedings so that the court can designate arbitrators. The appellant is entitled to claim the litigation cost and damages.

…

Review Exercises

1. Compare the Amharic and English versions of Article 3132 and discuss whether there is inconsistency in content. In case there is inconsistency, how can we resolve the problem?
2. Article 3244 of the Civil Code provides that "A *contract of public works* is a contract whereby a person, the contractor, binds himself in favour of an administrative authority to construct, maintain or repair a public work in consideration of a price." How do you relate Articles 3132 and 3244?
3. According to Tecle Hagos (Mizan Law Review, March 2009, Vol, 3 No. 1, pp 5-6) the law categorizes the following as "administrative contracts, *ipso jure*, as per Art.3132 (a)." These are:
   i) Government concession contracts: Arts.3207- 3243,
   ii) Public construction contracts (Public works contracts): Arts.3244- 3296, and,

iii) Government supplies contracts (Public supply contracts): Arts.3297- 3306.|

Does this mean that the elements of Article 3132 do not apply because these three contracts are *ipso jure* administrative contracts?

4. Articles 3244 to 3296 of the Civil Code deal with *contract of public works*. Can we say that the contract in the case above is a *contract of public works* and thus an administrative contract which, according to Article 315(2) of the Civil Procedure Code, cannot be submitted to arbitration if dispute arises between the parties?

5. If you are against the decision of the Federal High Court how would you address the policy issue of efficiency because construction works need prompt solutions to disputes rather than lengthy judicial proceedings?

6. In *Zem.*[2] *PlC vs. Illubabor Zone Education Memria* (File No. 16896, Tikimt 16 1998 Ethiopian Calendar) the Federal Supreme Court Cassation Chilot has reversed the decision of the lower court and allowed the dispute between the parties to be resolved by arbitration. The reasoning of the Cassation Chilot was the following:

> "… The Cassation Chilot has examined the case. We have found that the issue is whether it was proper to conduct judicial proceedings by setting aside the contractual clause which stipulates that disputes shall be settled through arbitration.
>
> … The lower court has rejected the claim of the petitioner on the ground that 'Article 24 of the contract provides that any one of the contracting parties may seek performance through the law or arbitration' and it doesn't say that the dispute will be resolved only through arbitration. However, the Cassation Chilot has examined Article 24 of the Contract and found that it requires the parties to resolve their dispute through negotiation, and if that fails through arbitration.
>
> In the presence of this clear contractual agreement and even after the court was notified that this case was pending in another court, the lower court did not accept both grounds. As it is known, Article 1711 of the Civil Code clearly provides that contracting parties can freely determine the object of the contract subject to such restrictions and prohibitions as provided bylaw. And Article 1731(1) provides that provisions of a contract that is formed in accordance with the law are binding on the parties as though they were law. We have found error of law in the lower

[2] The name has been shortened.

court's decision of the case while Article 24 of the contract clearly states that disputes shall be settled through arbitration.

a) Is *Illubabor Education Memria* an administrative authority? If so can the contract it concluded with *Zem. PLC* be regarded as a *contract of public works* that falls under Article 3244?

b) Discuss the applicability of Article 315(2) of the Civil Procedure Code and the impact of the Federal Supreme Court Cassation Chilot's decision in future cases that involve similar issues. Can we say that a Cassation decision can only interpret and not annul or amend Article 315(2)?

7. Read the provisions which you think are relevant to the case and other secondary authorities such as articles, and decide which side you would like to represent. In case you don't agree with the decision of the Federal High Court, write an appeal to the Federal Supreme Court. Or, write the respondent brief based on an appellate brief written by another student.

8. Pair yourself with another student with whom you will team up as counsels for applicant and respondent. You will then change sides and argue in the position you had not taken earlier.

a) Prepare for oral argument by using the tools and techniques discussed in the readings of this unit.

b) Argue before the class (or a group) in a non-formal setting so that the experience can be a prelude to appellate moot court.

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