SideBAR

Spring 2011 · Published by the Federal Litigation Section of the Federal Bar Association

Opening Statements

Editor's Notes

Robert E. Kohn

The Federal Rules of Civil Procedure continue to change. Substantive federal law changes too. Procedurally speaking, in this issue John McCarthy and I review a proposal in Congress to amend Rule 11 by legislating sanctions. Meanwhile, John Rabiej reviews proposals that the Judicial Conference is considering to amend Rule 26 by clarifying the duty to preserve evidence. Alex de Witt explores recent Rule 26 amendments governing the disclosure of attorney communications with experts who testify. As Lauren Godshall points out, the future of Multi-District Litigation is uncertain because of a new ruling for arbitrating disputes that might have become national class actions. And the Western District of Pennsylvania has a new pilot program for appointing special masters for e-discovery issues, as we learn from Jennifer Keadle Mason.

Substantively, Kyle Beale brings us up-to-date on the Fifth Circuit's development of an important bankruptcy litigation issue. Emile Mullick explains that the Supreme Court has changed course over applying 42 U.S.C. § 1983.

We also benefit from the practical experiences of others. From Lauren Lonergan and Tara Reese Duginske, we learn

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Chair's Message

Shelline K. Bennett

Our section lives and breathes because you, our members, make so many impressive contributions to its work. This issue of SideBAR is evidence of those contributions. Moreover, just this month—thanks to the work of Board member Collin Hite of Richmond, Va.—the section is co-sponsoring a free webinar CLE on the role that historians can play as witnesses and experts in litigation. I am sure you will find it interesting and informative. The webinar is a collaborative work with the Association of Corporate Counsel, whose members will also be invited to attend without charge on May 25, 2011.

In the months ahead, section leaders Frank Carroll (vice chair) and Rob Kohn (secretary and treasurer) are working to produce a timely and exciting CLE program as part of the upcoming FBA Annual Meeting & Convention in Chicago. With the welcome participation of Chief Judges James Holderman of the Northern District of Illinois and Gerald Rosen of the Eastern District of Michigan, the CLE will address recent Supreme Court developments in four separate cases affecting class actions in federal courts. Board members Jim Martin and Tom McNeill are also working to organize the presentation, which is

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Inside this Issue

Persuading with POWER: Five Tips for Improving Appellate Advocacy

Jeff Justman

Of the many benefits of serving as an appellate law clerk, the opportunity to observe the best appellate advocates ranks near the top. This article distills qualities that distinguish the most compelling appellate attorneys.

1. Preserve Issues for Appeal

The best legal argument will fail if it has not been preserved. Good appellate lawyering, therefore, begins in the district court. Attorneys must preserve an issue before an appellate court may consider it. Law clerks observe with distressing frequency attorneys who offer potentially winning legal arguments, but failed to identify the errors to the district court. Appellate courts refuse to consider such unpreserved arguments for good reason: if the attorney deprives the district court of the chance to rule correctly, he should not be rewarded—and the district court should not be sandbagged—with a subsequent reversal. Three steps will ensure an issue is preserved:

First, attorneys should scrupulously follow the rules governing appellate review. Federal Rule of Appellate Procedure 10(a) lists three categories of information that an appellate court may consider: papers and exhibits filed in the district court, transcripts of proceedings, and a certified copy of the district court's docket. Any document or other information not covered by these categories cannot be considered. "Exhibit A" means nothing to an appellate court if it was not filed in the district court first, and an appellate court cannot consider information obtained in an untranscribed telephone call!

Second, attorneys ought to respectfully emphasize potential district court errors each time they occur even when the district court may disagree. Consider the repeat player: after losing an argument in the first case, he might be disinclined to raise the identical point in a similar, later proceeding, even though the appellate court could later agree. Instead, the repeat attorney should respectfully object to the district court's ruling while mentioning that the objection is simply to preserve the argument for appellate review. Some of the most compelling arguments involve attorneys who acknowledged previous adverse rulings but who respectfully objected to them.

Finally, an issue is only preserved when it is done so with specificity. All too frequently a lawyer believes she is preserving an argument with a generic or "running" objection to a judge's oral ruling. To the contrary, an objection to a district court's overall jury instructions doesn't suffice. The better practice is to specifically identify and object to the problematic language. Even if the district court disagrees, the attorney has preserved the issue.

2. Organize the Appellate Record

Organizing an accessible, user-friendly appellate record is a second practice of good appellate lawyers. Not only does a well-organized record endear its creator to appellate judges and their clerks, but it also enhances the presentation and overall understanding of the case.

There are both substantive and procedural components to a well-organized appellate record. Substantively, the record should include an addendum and an appendix. Physically attached to the appellant's brief, the addendum includes the most important document to the appellate court: the order(s) or opinion(s) being appealed. The appendix, on the other hand, includes any other necessary documents created as the case has developed. Joint appendices are usually more accessible than separately prepared appendices since they eliminate redundancies. Lengthy documents not relevant to the appellate issues should be omitted or excerpted, as long as the district court's docket sheet describes the case's procedural history.

Procedurally, good appellate advocates create an appellate record with "access points" common to many reference sources. Tables of contents, indices, and tabs dramatically increase a law clerk or judge's ability to find the needle in the appellate record's haystack. When possible, successful appellate attorneys file their documents electronically with their courts. In federal court, many districts have the CM-ECF system that allows attorneys to submit electronically searchable "PDF" files. These documents are immensely helpful when searching for a specific word or legal phrase crucial to a case's disposition. In short, good appellate advocates craft the record for maximum accessibility.

3. Write Concisely

Concision persuades. Convoluted briefs do not. A third quality of successful appellate lawyers, therefore, is concise writing with clear, plain language.

Successful appellate lawyers selectively choose issues for appeal. While it is tempting to raise every potential district court error, such a scattershot approach may undermine one's credibility. District judges are intelligent and only rarely make numerous reversible errors in one case. The best appellate lawyers identify their one or two strongest arguments, knowing the likelihood of success on appeal is often inversely proportional to the length of one's brief. In short, selectivity breeds credibility and persuasiveness.

More basically, good appellate attorneys do not use twelve words when five will do. Avoid lengthy metaphors and string cites. Active verbs (describes, explains, asserts) communicate meaning better than passive verbs (was, existed). And especially, eschew lengthy footnotes. They usually detract from, rather than enhance, an appellate lawyer's presentation. The rules for concise writing are almost too many to count, but a concerted effort to use short, clear sentences will invariably enhance the appellate lawyer's ability to persuade.

4. Edit the Brief

Though one of the last steps of writing an appellate brief, the editing process remains one of the most important. Good editing only enhances the organization, accessibility, and persuasiveness of the final product, especially when done with an eye towards technical and substantive accuracy.

Most obviously, good editors remove all technical mistakes. This involves more than simply using the spellchecking application in a word processing program, for computers will miss some of the more embarrassing typographical mistakes. (Consider

how a sentence involving a "public" employee would look if the letter "l" were omitted from the word). Instead, good editing requires multiple layers of peer review, both by those familiar with the case and with utterly no connection. Good editing involves paper printouts with red pen markings and multiple drafts. Finally, good editing simply requires time to ensure that all mistakes are corrected before a brief is submitted.

More than just avoiding typographical errors, the persuasive appellate attorney will also edit to increase the appellate brief's substantive accuracy. This requires citations to recent binding and persuasive authority and explanations of how those authorities parallel the facts of one's case. Substantive accuracy requires proper formatting and pin-cites. And perhaps most importantly, substantive accuracy requires an indication of contrary authorities. Taking these steps will only enhance the attorney's credibility as well as the brief's organization, accessibility, and concision.

5. Respond Directly to Questions at Oral Argument

The lucky appellate attorney will have the opportunity to advocate orally on the client's behalf. In a small but significant number of cases, the decision is swayed, one way or another, by an appellate attorney's performance at oral argument. The last suggestion for persuading with power, therefore, is to respond directly to questions at oral argument.

This practice is simple yet all too uncommon. When a judge asks a question, an appellate attorney's first answer should almost invariably be "yes" or "no." These responses tell judges that the attorney is serious about engaging in a frank discussion of the critical legal issues. All too often, however, appellate attorneys will respond to such questions with quips like, "that's not this case, your honor." Such nonanswers unfortunately convey that the attorney is not interested in discussing the nuances of the legal problem her case presents. Good appellate attorneys will not succumb to a tough judge's questions, but rather, will answer them directly and then explain why their clients should win anyway.

Pre-argument preparation for commonly asked questions enhances an attorney's ability to respond directly. Judges often ask appellants what error the district court committed below and where the appellant preserved that error. Appellees, on the other hand, must be prepared to support or justify the district court's decision. Both parties should be prepared to cite to the record and to any on-point legal authorities supporting their positions. In the unusual case, a direct response to a judge's question with a supporting citation could turn a losing case into a winning one!

Good appellate advocates have many different attributes, but from my limited experience, they all persuaded with "POWER:" they all preserved issues for appeal, organized user-friendly appellate records, wrote concisely and carefully, edited with substantive and technical accuracy, and responded directly to judges' questions at oral arguments. **SB**

Jeff Justman served two one-year terms as a law clerk to Hon. James B. Loken and Hon. Diana E. Murphy of the U.S. Court of Appeals for the Eighth Circuit.

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