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What Appellate Advocates Seek from Appellate Judges and What Appellate Judges Seek from Appellate Advocates, Panel One

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WHAT APPELLATE ADVOCATES SEEK FROM APPELLATE JUDGES AND WHAT APPELLATE JUDGES SEEK FROM APPELLATE ADVOCATES

PANEL ONE
HONORABLE DAVID M. EBEL*
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JUDGE EBEL: I hope this can be a dialogue between lawyers and judges about what you would like us to do differently and what we would like you to do differently. On the panel we have Andrew Schultz, who is a practitioner at the Rodey firm in Albuquerque, as well as Judge Michael R. Murphy. Judge Murphy and I are both on the Tenth Circuit. In the audience we have Judge Mary Briscoe,[1] Judge Robert Kapelke,[2] and a number of practitioners who practice before us. I will ask Judge Murphy to speak about the judge's perspective and then I will ask Andy Schultz to speak briefly about the practitioner's perspective of what he would like to see judges do differently. Then I would like comments from the audience.

JUDGE MURPHY: It is difficult addressing this subject—perhaps more so for me than Judge Ebel—because for nine years I was a trial judge. During those years, when I was called upon to speak I could draw upon some very funny things that happened daily in the courtroom: scintillating cross examinations, really tough cases, and funny incidents. Now, for the past five years I have been relegated to the position of talking about appellate advocacy, not exactly the most titillating subject. But it is of great significance to an appellant who is trying to avoid a second consecutive loss and certainly important to an appellee who is trying to keep a winning streak going.

What I perceive an appellate judge is looking for in an advocate is someone who has an aura of credibility about them, someone who from the start of her case with the filing of a notice of appeal through oral argument has done something to create this aura of credibility. This in turn delivers the message that this is someone to whom we ought to listen.

The credibility for appellants begins at the threshold with the decision of whether or not to appeal. That decision is loaded with many factors. There are factors of strategy, factors of economics, and obviously factors of client relations. At the apex of all these factors should be the likelihood of success. With that in mind, I want to share with you some figures that were developed for me through our administrative office. These figures are for a twelve-month period. Now, I have checked these figures annually and they don't vary that much. They don't vary nationally or within the Tenth Circuit.

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For the twelve-month period ending June 30, 1999, out of 26,364 appeals terminated in all the federal circuits, only 10.2 percent were reversed.[3] The reversal rate was somewhat higher, 14.5 percent, for civil cases not involving the United States as a party.[4] In the Tenth Circuit, out of 1,622 appeals, 10.6 percent were reversed.[5] The reversal rate in private, non-government party cases was 13.3 percent.[6]

You can see that the Tenth Circuit figures correspond to the national reversal rate figures. These figures indicate that ninety percent of the time the district court got it right and that the appellant will likely not get a different result on appeal. Your chances as an appellant certainly are better in appellate court than in the lottery, but the lottery costs you a mere token. Compare that with the cost for the one-in-ten chance of winning on appeal.

This ought to be a message to folks that if you are going to appeal you certainly should not merely reargue what lost for you the first time. Of course, the other side of that coin is that if you did not argue it the first time, it will be deemed waived on appeal. Although I am not an advocate for specialization or for having a different lawyer on appeal than you had in trial, there is a category of cases where a second set of eyes could, perhaps, give a more panoramic view to help make that threshold decision of whether or not to appeal.

I want to switch gears and talk about briefs. I want to get into the process itself after the decision has been made to proceed with an appeal. The brief is the first item that any judge is going to see. It is also the last item any judge sees before completing a draft opinion. Your brief will be prepared and filed before you know whether you will have an oral argument. As a consequence, you must brief it as if there were no tomorrow. You must brief it as if there were no oral argument because it could be that there will be no oral argument.

Your brief is your response to the court's invitation. That invitation says, "Tell me why the district court was right or tell me why the district court was wrong." As a consequence, you need to seize every opportunity you can to develop an aura of credibility. I have a list of six things that help develop that credibility.

First, be obsessive. This should be an easy rule for lawyers. Be obsessive about adherence to every rule there is, whether it is a rule of court, rule of grammar, or rule of spelling. When the judges read briefs, they are not reading them to give grades, but the type of things that would come out if they were grading a paper do stand out. If there are misspellings, typos, or if it is sloppy, these things are an indication of the quality of the arguments. They destroy any likelihood that you are going to create an aura of credibility. You need to convince the court that you are someone that they ought to listen to.

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3. Statistics Division, Administrative Office of the United States Courts, Appeals Terminated on the Merits, by Circuit during the Twelve Month Period Ending June 30, 1999 (unpublished document, on file with the Tenth Circuit).

4. *Id.*

5. *Id.*

6. *Id.*

Second, you need to create a sense of readability. This goes beyond paper correcting. You need to make your brief easy to read. Use short paragraphs and subdivisions; all of this will help to avoid creating a visual fog of text.

Third, limit your factual statement to a readable and fairly chronological listing of the important and salient facts. Do not make it a digest of what the witnesses said.

Fourth, make your product truly brief. There is a psychological message in brevity and it goes somewhat like this: my case is so simple that it doesn't take me 14,000 words, 1,300 lines, or thirty pages; I ought to prevail in less than that amount of space.

Fifth, make only sound arguments and eliminate the weaker ones. Justice Frankfurter, reflecting on this point, once said that it's like a clock striking thirteen. It puts all the other ones in doubt.[7]

Sixth, be selective with the issues you present, whether you are an appellant or a cross appellant. Adhere to Justice Jackson's admonition that legal contentions, like currency, depreciate through overuse.[8]

EBEL: Andy, give us your best shot at what it looks like from the practitioner's point of view.

SCHULTZ: I appreciate all the comments that Judge Murphy made, but I'm going to take a step from there. I am going to assume that, as an appellate practitioner, I have done my job. I have read the rules, I understand my responsibilities for preparing a brief, and I have met with my client. We've decided to appeal or we were dragged into the appeal by the appellant. Now we are in front of the court. What do we do? What would we like to see?

I think appellate advocates have a sense that once a case goes to the Tenth Circuit it drops into some holy abyss over which we have absolutely no control. Our briefs are submitted and that's it. We don't know whether we are going to get oral argument. If we get oral argument, we're not sure why. We go to oral argument, and we have no idea what's going to happen there. When we're done, we don't have a clue what happens next. Clients start calling and asking when we're going to get a decision. Not only can't we tell the clients anything, we have no source of information.

Compare that to the trial level where we have a great deal more control and a great deal more access to knowledge. We can file motions, get in front of the court,

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7. The reference to Justice Frankfurter could not be found. The author of a law review article uses a similar reference while remarking that the Fifth Circuit Court of Appeals "seemed to treat the district court's findings as the clock that strikes thirteen—that is, an event that not only seems patently incorrect but also makes one question all that has come before." Stuart Minor Benjamin, *Stepping into the Same River Twice: Rapidly Changing Facts and the Appellate Process*, 78 TEX. L. REV. 269, 360 n.340 (Dec. 1999). In addition, the Fifth Circuit made a reference in *Aguillard v. Edwards* noting that "[l]ike a clock that strikes thirteen, a rule that produces such a result as this cannot be sound." 778 F.2d 225, 227 (5th Cir. 1985).

8. Justice Jackson stated:

> One of the first tests of a discriminating advocate is to select the question, or questions, that he will present orally. Legal contentions, like the currency, depreciate through over-issue. The mind of an appellate judge is habitually receptive to the suggestion that a lower court committed an error. But receptiveness declines as the number of assigned errors increases. Multiplicity hints at lack of confidence in any one....[E]xperience on the bench convinces me that multiplying assignments of error will dilute and weaken a good case and will not save a bad one.

Jackson, J., *Advocacy Before the United States Supreme Court*, 25 TEMPLE L.Q. 115, 119 (1951), *quoted in*, Jones v. Barnes, 463 U.S. 745, 752 (1983).

and talk to law clerks. We have a sense that we can do something. But there's this edifice at the Tenth Circuit that becomes rather stupefying, even to the most experienced appellate advocate. So if the question is, "What would we like to see from appellate judges?" The response is, "A sense of greater accessibility and information would help an inordinate amount."

When we are in the advocate's role writing a brief, no matter how careful we think we are, how succinct we think we are, or how much verbiage we have eliminated, there are a lot of issues we want to raise. We want to make sure there is nothing we are overlooking. Once we submit the briefs and the panel has had a chance to review them, we'd like some feedback.

Tell us what judges want to hear at the oral argument. If we raise eight issues, and there are only two that the panel has any interest in, why not let us know? Write us a letter. Tell us that you've read our briefs and the panel would like us to focus on particular issues. Or tell us which questions the court would like us to address.

Some appellate judges say that while this is a great idea, the lawyers will not follow it. Lawyers are set on what their oral argument is going to address. Lawyers will say, "We got your letter, but here's what I want to tell you." There is a simple solution to this problem. Make it a rule and enforce it like you do with briefs. If an advocate writes a brief that does not comply with your rules, you reject the brief. Or write your opinion telling the lawyer, "Because you didn't follow this rule, we're not going to consider that argument; we're going to consider that argument waived." If the court were to enforce the same sort of rules at oral arguments that it does with briefs, advocates would get the message that it is something the court thinks is important. In short, if the judges were to let us know what they want to hear while at oral argument and that we only get one shot, we would make that the best shot possible.

Another issue that comes up is why the entire appellate process can't be a little bit more cooperative. Going through the appellate process is no different than when you're a third-year law student having to compete in moot court. You get the problem, do the research, and write the brief. You have a set form for oral argument and you wait for the result.

At the appellate level, I would like the process to be a little bit more cooperative. All the parties understand that there is a question at issue. Maybe it's an issue of constitutional interpretation, maybe it's a question of interpreting a former Tenth Circuit case, or maybe it's a question of statutory interpretation. Why do we have to have oral argument to get that resolved? Why does the process have to be so formalistic?

At one time, the New Mexico Court of Appeals considered experimenting with having roundtable discussions. Under this format, the parties would write briefs. Rather than an oral argument, however, all counsel and the appellate judges would come into the courtroom and sit down together. The judges would ask questions, the parties would have a chance to respond, and counsel could pull out the books so that everybody could look at the same paragraph together.

I think the New Mexico Court of Appeals had mixed reactions to this idea, and, as a result, they didn't go forward with it. I was one of the lawyers who actually liked the proposal. It made sense as a form of decision making, and I did not think

the opinions it would produce would be any better or worse than having a formal oral argument.

In closing, I think appellate advocates can do everything, and should do everything, that Judge Murphy mentioned, but in return I think the advocates would like to see more communication from the court. We need more feedback and some sense of what we can do to participate more in the process, rather than writing the briefs from afar and then waiting for word to come down from on high. Practitioners have no idea what the Tenth Circuit judges do after they hear arguments.

EBEL: When I first became a judge, I was very intimidated about how I would make decisions. I walked into my chambers the first day—Judge Doyle was my predecessor—and I was curious how he decided cases. I noticed over his transom there was a penny. I figured he used that as his decisional technique.

Audience, tell us what else you would like to see from judges.

MURPHY: I would like to hear reactions to Andy Schultz' suggestion of an informal séance [the roundtable discussion].

JILL WICHLENS:[9] I have been practicing for ten years now. I have noticed that I have evolved in the way I prepare for oral argument. I used to think judges wanted to hear this grand fifteen-minute speech from me. Now, I put a concept on a piece of paper and then I wait for your questions. I'm evolving almost to the point where I feel like standing up and saying, "I'm Jill Wichlens, I represent the appellant. What would you like to know?" What I'm interested in is, do you want lawyers to follow this approach more?

EBEL: Usually our questions are designed to tell you what we are troubled about. Sometimes lawyers think we interrupt too much. But the fact is that we are trying to do you, as well as ourselves, a favor by saying, "You may think you know what is important in this case. It may be, but we think it is something else. Since we are the judges you probably ought to accept our view of it, erroneous as it may be, and we need your response to our view."

WICHLENS: Is it appropriate for an advocate to ask you a question?

EBEL: Yes, it would be. I think we need to be more interactive. I get the feeling, like Andy said, that we're like dinosaurs. One of these days we are going to be extinct. We are playing with the rules we played with 200 years ago, and it seems inefficient and time-consuming. We need to make some changes.

AUDIENCE MEMBER: What is the internal process? I have been in this business since 1971 and have been to state and federal appeals courts, and I still don't fully understand the process.

JAMES BAILEY:[10] We can't be effective because we don't know what judges do. We don't know how they do it. We don't understand if the judges divvied up questions. If the judges all sat around and said, "You get this one, you get this one, you get this one," or if there were individual questions. I take questions from the court as indicating things that are troubling them. But, I am not ever sure how they get there.

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9. Assistant Federal Public Defender, Denver, Colorado.
10. Attorney at Law, Canges, Iwashko, & Bethke, P.C., Denver, Colorado.

EBEL: Before oral argument each judge on the Tenth Circuit will have read the briefs. We have had law clerks study the cases, and we have read many of the key cases. We accept the factual recitation and have not yet tested it against the record. The judges do not talk to each other before the oral argument. So I don't have any idea what any of my colleagues are going to think. We don't divvy up questions at all.

During the oral argument we ask questions for a couple of reasons. First, a judge asks a question if they are really concerned about it. Second, sometimes we ask a question because we want you, as the advocate, to try to persuade one of our colleagues. I may suspect that a colleague is not going to agree with me, and I want you to give your best shot at what I am hoping will be persuasive to another judge.

After oral argument we immediately sit down as a group without anybody except the judges and we vote. This is a preliminary vote on the decision. One judge in the majority is assigned to write the opinion and circulate it to panel members and ultimately to the entire court before it is issued. Every judge has looked at that opinion before it is issued. That is why petitions for rehearings are not very successful. If the opinion is a problem, before it ever sees the light of day some other judge not even on the panel will say that they disagree with it.

The reason the process takes so long is that we have to read about 1,000 pages a day of legal briefing. We write the equivalent of two law review articles a week in terms of our opinions. We decide 500 cases a year. That is two cases a day. If we take a vacation for a day, then there are four cases the next day that we have to decide. And so we prioritize, and things do become slow. I think that we have got to do something to solve that problem. Either we have to start writing less or more briefly. We have to do something because it is a great disservice. In any event, that is a brief summary of the process.

EBEL: That is about our level of participation. We have not talked with each other. We prepare independently so we'll have different points of view. We have not coordinated our questions or our approach.

SUSAN McMICHAEL:[11] I am familiar with a practice of the Tenth Circuit where you actually write the decision prior to oral arguments. If you still do this, has there been any discussion about circulating, perhaps to the parties, the focus of the oral argument.

EBEL: That is a very interesting question. We have never widely drafted opinions before oral argument. There are a couple of judges on our court that have tended to do that when they think the opinion is fairly easy. I have strongly resisted this because I think that it smacks of pre-judgment and makes oral argument less effective. I have not seen a pre-written opinion in several years.

MURPHY: My view is that it's fine if one person wants to do that. I do not do that. The fact that another judge already wrote an opinion is not necessarily persuasive to me. If that's the way they want to run their office then I don't think I should be telling them how to run their office.

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11. Assistant General Counsel, State of New Mexico Environmental Department, Santa Fe, New Mexico.

JUDGE JAMES LOGAN:[12] I was on the court for twenty-one years and would like to dispel a notion about that. In those twenty-one years I never saw an opinion that anyone else ever wrote before the oral argument was complete. There was a period of time when one or two judges on the court allowed oral argument. We weren't as strict about denying oral argument as today. Sometimes a judge would read the briefs and think that he could dispose of the case in about two pages. He would bring the opinion to oral argument. After the discussion by the judges and the vote, the judge would whip out a two-pager and say, "You all voted exactly this way, I would like you take a look at a few pages." I never saw a judge show any such document to any other judge on the court before oral argument, and I never saw such an opinion that was more than three pages long.

MURPHY: I think that is a good point. I agree that they wait until after the vote because I think the judge that has written it is anxious not to pre-judge.

PAUL FRYE:[13] I wanted to respond to the invitation to critique Andy's suggestion [regarding holding roundtable discussions]. I like formality. I think it's a protection. The only thing I would like from the court of appeals is more time at oral argument. I think that fifteen minutes is not enough. Many of the cases that merit oral argument are complicated. The fifteen minutes that we typically get is not enough to deal with the issues that might be concerning the court.

MURPHY: In the last year or so I have been serving on the Clerk's Panel, and I get into a very similar issue regarding motions for over-length briefs. I was surprised at the frequency with which these motions are filed and the frequency with which they are filed in inappropriate cases. And as a consequence, my colleagues and I, Judge Porfilio and Judge Briscoe when she serves on that panel, began to get a little stingy. We have observed that the briefs are getting longer, and there is no correspondence between their length and their helpfulness.

I juxtapose that with the concept of oral arguments. It is difficult to custom make your whole calendar. It could well be that your case would be better if you took ten of the fifteen minutes away from the case that is going to follow it, but it is difficult to construct your calendar that way, particularly when you have a group court. We would have to get consensus before we ever heard the case, and it is difficult enough to get consensus on an opinion.

JUDGE MARY BRISCOE:[14] Oftentimes I wish that counsel would ask for additional time in a complex case. I would urge you to look at your case, and if you need more than fifteen minutes, simply file a motion. They are usually granted.

ROBERT RAMANA: I am a law clerk for Judge Henry. I wanted to mention something that has been touched on and that is changing the system in which you have three judges preparing independently for oral argument. There is a tradition of not discussing the case until you get to oral argument at conference. I am personally ambivalent about that because, on the one hand, I like the fact that you have independent law clerks formulating assessments of the case. The theory behind this is that you could, perhaps, get a better decision with three independent reviews of

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14. Circuit Judge, United States Court of Appeals, Tenth Circuit.

the case. On the other hand, it is remarkably inefficient if your law clerk and Judge Murphy's law clerk are writing thirty to forty-page bench memos and I'm doing the same thing, and we're not talking before oral argument.

Perhaps if we all got together before oral argument, the questions would be better, more focused, or we could give more guidance to the lawyers. But I get the feeling that in the tradition of this culture that is not done. I am just curious if you think that this is a good idea or if, perhaps, it might be changed. It strikes me that if the judges had a pre-oral argument conference they could say, "Now what do we want to focus on, and should we notify the lawyers of particular issues or cases they should argue?"

EBEL: That is a classic tension. I think you raise a very good point. At the Supreme Court now they share certiorari petitions. One pool does it for all the Justices. That seems to work out just fine. That is a very important decision. I think one of the problems is that we are preparing up until the moment we walk on the bench. If we didn't have such a crushing caseload and could prepare in advance, then it would be easier for us to sit down and collaborate.

However, one of the good things about this formality is spontaneity. I think that spontaneity contributes something to the process. If you sat down and pre-conferenced, you would not get the same spontaneous give and take between the judges. I think it is important to be right out there in the presence of the advocates so that they can interrupt and lean one way or the other.

JUDGE KAPELKE: We would have the same problem in terms of coming to any consensus on what issues you want to hear about in advance because we typically do not discuss the cases before oral argument. We do circulate a memo that is written generally in the form of an opinion. There are problems concerning that, but my experience is that we have enough independent counsel on the court that it does not have that great of an effect. When we have written one of those memos, it does not necessarily mean that anyone is going to go along with it.

I am fascinated with what Andy Schultz described as the New Mexico séance. I do not really have a good picture of how that would work. I just wondered if you could take a minute to flesh that out a little bit more.

SCHULTZ: The idea came from Judge Lynn Pickard when she was about to become the chief judge on the court of appeals. As I understand it, counsel would receive notice of oral argument. Counsel would be told that the oral argument would last thirty minutes, but that each side would not be allowed to present a formal oral argument. Instead, counsel would receive a letter from the court indicating the issues that they wanted counsel to present. When you arrived in the courtroom there would be three tables pushed together. It would look more like you were walking into a seminar in an upper level law school class than a formal appellate oral argument. The judges would begin by indicating what the issue was that they wanted counsel to start with and then give each side an opportunity to argue it. Rather than devolving into a shouting match, it would be an interactive presentation, with the judge asking questions and counsel being able to respond. There could be instances where the judges would pull out the book saying, "I don't see that in this opinion, show me what you're talking about or how you get that from this language." This process would give the parties a chance to talk.

I think the reason it was not implemented was because it was different. I think lawyers were uncomfortable with it; they were scared. They didn't like being in law school in the first place, and they didn't want to do it again now that they are out of school. But a number of us wanted it to be pursued, at least as an option for attorneys who wanted to do it. We thought there were a great number of cases, particularly very complex procedural cases, where the court does not get a good handle on the record. In those cases, it may take much more than fifteen minutes just to walk through and give you a flavor of what the case truly is about, either procedurally or factually, before you even get to the legal question.

EBEL: We will close. I am sorry we did not have more time. These were some very thoughtful comments and questions. There are certain things that those of us on the Tenth Circuit will be thinking about. Thank you very much.