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# What Appellate Advocates Seek from Appellate Judges and What Appellate Judges Seek from Appellate Advocates, Panel Two

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

PANEL TWO
HONORABLE ROBERT R. BALDOCK*
HONORABLE CARLOS F. LUCERO**
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MS. MANDELL-KING: Good morning. We are here to talk about what advocates seek from appellate judges and what appellate judges seek from the advocates who appear before them. What works and what doesn't? We talked about this topic among the three of us—Judge Lucero on my left and Judge Baldock on my right. Basically, advocates want to win in the Tenth Circuit. They want to know what's going to work—what the judges want from them, how to persuade. Judges want preparation, accuracy, and consideration. We think the best way to get into this topic is to make this a question and answer session.

The judges said no introduction was necessary, but I thought that I would just tell you a bit about each of the judges on the panel.

Judge Baldock graduated from college in New Mexico and then went to the University of Arizona in Tucson for law school before entering private practice. He was appointed as a judge for the United States District Court in the District of New Mexico in 1983. Then, in 1985, President Ronald Reagan appointed Judge Baldock to the Tenth Circuit Court of Appeals.

On my left is Carlos Lucero. Judge Lucero came to the circuit in a different way. One way to tell about the path Judge Lucero took is that in 1960, when he was nineteen or twenty, he was president of Citizens for John Kennedy. After graduating from George Washington Law School, he clerked for Judge Doyle, who at the time was a district court judge, but later served on the Tenth Circuit.

After his clerkship, Judge Lucero entered private practice and was an adjunct professor at Adams State College.[1] In looking at his bio, I was interested to see that in 1968 he was a founding member of Colorado Rural Legal Services, and in 1977 he was president of the Colorado Bar Association. In 1984 and 1990 he ran as a Democrat for a U.S. Senate seat in Colorado. Then, in 1995, President Bill Clinton appointed Judge Lucero to our Tenth Circuit.

In appellate practice, the two main areas are brief writing and oral arguments. We'll try to cover each of those. So first, let's talk about briefs. I'll ask a question of the judges. How do you define what a terrific brief is, and what would your pet peeves be in the briefs that you see?

JUDGE BALDOCK: It's a very important question that Vicki put to us—what is a perfect brief? I know that Judge Lucero and I are going to disagree in some instances. But a terrific brief that I enjoy is one that is very precise and gets to the

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1. Alamosa, Colorado.

point of the issues that have been raised, so that I know exactly what it is that you claim as an appellant. The brief needs to identify what the alleged reversible error is, taking into consideration the standards of review that we have to apply, because that standard in many instances determines the outcome. We can't substitute our judgment for the trial judge's, even if something that happened at the trial was very important to the outcome.

For an appellee, a good brief is one that goes directly to the heart of the matter. It is not one of those briefs that just says, "Well, we won in the trial court; therefore, we should win in the appellate court." Those briefs are absolutely no help. These issues sometimes are very close.

A terrific brief is one that is straight to the point. It tells us what happened, why there was error, and what law supports the claim that the judgment below is reversible. The appellee, of course, does just the opposite, explaining why the judgment below should be upheld. So that's a terrific brief, and it doesn't take 150 pages to do that. You can do it easily with less than fifty pages.

MANDELL-KING: Thank you. Judge Lucero, do you have comments?

JUDGE LUCERO: Yes. To me a terrific brief is one that concisely, precisely, and meticulously states the issues for our consideration, and why they compel reversal of what the trial court did below. I am in total agreement with Judge Baldock on his definition of a strong brief. I think it would be helpful to answer the second part of your question—what are your pet peeves about briefs—because I think by explaining what not to do, we can sometimes define what is best. Here are my pet peeves.

Number one is briefs that do not have a compelling reason *as a matter of law* for reversal. That is to say, the brief just says, "I lost below, and please reverse." Well, losing below presents no basis for appealing a case, let alone for persuading an appellate court to reverse.

My second pet peeve is an unfocused statement of the issues that presents no compelling error that we should address or no novel and creative issue that is being advanced for the creation of law that should grab our attention.

Another pet peeve is a brief that does not contain a summary of the argument or that contains a summary of the argument that is of little, if any, help. A summary of the argument should be able to tell an appellate court precisely and concisely what error the trial court made below that requires us to take the extraordinary step and consume and utilize the judicial resources necessary to retry that case. I think litigants who don't put in a summary of the argument have done themselves a grave disservice, and those who don't use the summary properly are close behind.

The last of my pet peeves is briefs that use too much of their valuable space stating unnecessary facts and thereby consume too much of the judge's time, to the point that he or she loses interest. These briefs fail to isolate the really relevant facts on appeal—the facts that are truly critical to addressing the contended error. Some attorneys really blow it by failing to include citations to the record on those critical facts. That is the worst brief.

MANDELL-KING: Well, both of you have said a lot and I, as an advocate, have a lot of questions about what you mean. First, I want to talk about this notion of being concise. We know that you all have so many briefs to read, and we know we should be getting to the point. We know that we should eliminate unnecessary

wording in our briefs. But concise is really hard to define. If we are doing an appeal, say from a criminal trial that lasted four weeks, it's going to take ten to fifteen pages to write just a concise statement of the facts.

BALDOCK: If you know those things, then why don't we see more concise briefs? That's the problem we have. I think those people who are frequently working at the appellate level understand these things and we don't usually see the type of briefs with the pet peeves we're talking about. Where we see these mistakes are from trial lawyers who only do an appellate brief once in a great while.

The Tenth Circuit has provided a guideline book on how to approach briefs. But it's amazing; time after time after time we get briefs that totally ignore those guidelines. We see briefs that appear to totally ignore the Tenth Circuit rules on how to prepare the brief. I think a lot of this is due to the fact that attorneys who don't have a very large appellate practice get a little bit negligent in really trying to conform to the rules. The time constraint is important too. But you've got one shot at the appellate court, and you really need to put your best foot forward. We see your brief first. That's why it's so important that you follow the court guidelines. We're aware of your time constraints. But you still have to follow the rules.

MANDELL-KING: Say we have a case where the only issue is a question of law about the statute under which the defendant is convicted. How much of the facts do you want us to put in about the offense? Is my office right in thinking you want to know a little bit about what the defendant did, so we don't seem to be hiding the fact that he's not a stellar citizen, but we don't really have to give you much about the facts of the offense at all if our issue is purely that the statute is unconstitutional? Are we right to do it that way?

BALDOCK: I think so.

LUCERO: I think so, too. My message would be simple. Tell us the facts, but write us a short story, not a novel. Remember any appellate judge early on is going to turn to the trial court's findings of fact, conclusions of law, and judgment. After all, that is what's being appealed. So, to the extent that those documents contain a recitation of the facts, that should be a clue to you to keep your statement short, because it keeps us from having to read them twice. That is, of course, unless you disagree with the trial court's characterization of the facts, in which case you should tell us where you disagree and cite to the record so that we can see for ourselves.

BALDOCK: That's why it's important at the very outset that you explain the standard of review. We are limited and guided by that standard. You should tell us right up front. We also recognize that sometimes there are arguments between counsel about the appropriate standard. That's fine. We have to determine that; that's one of the issues of law. But it's extremely helpful if you tell us the standard, for example, if it is de novo because you're attacking the constitutionality of this statute.

MANDELL-KING: What part of the brief do you think is most important and which brief do you read first? Do you read the reply brief first because that's where the issues are joined?

BALDOCK: Well, again, I know each judge does things differently. I start with what the trial court did below. It doesn't matter whether it's a criminal or civil case. I want to know what the trial judge was looking at, and what he or she did. Normally, if it's a jury trial, I read the appellant's brief first, since the burden is on

the appellant to convince me to overturn the conviction. Then, after making my notes and looking at that, I go to the appellee's brief, and then I go to the reply, if there is one.

So I review the trial court, the appellant's argument, the appellee's argument, and then the reply. Doing it in this order helps formulate the issues in my mind. At the end, hopefully I have a clear understanding of what the issue is.

And I do my homework. My law clerks don't do a synopsis for me and come tell me what the case is about. The lawyers are trying to convince me—I'm the judge—why I should do something or the other. So I do my own bench memos. The law clerks and I fight a lot about some of these things. Now, I may rely later on a clerk's judgment if the clerk sees the issue differently. But it's your argument to me, and my understanding of your argument, that's important.

MANDELL-KING: Let's say there are three issues. When you read the briefs do you read the first issue through all three briefs and the second through all three briefs?

BALDOCK: I read each whole brief, because so many times the arguments are integrated. You can't separate them because some of the facts will pour over into the other issues. That way I get a clear picture. Then in my analysis I will separate and outline each issue. As I'm trying to formulate my bench memo I do an outline of each issue. But first I have to know how all the facts come into play.

MANDELL-KING: Thanks. Judge Lucero, how do you do it?

LUCERO: I'm a creature of habit in reading briefs, and I pretty well follow the same model each time. I pick up the appellant's brief, and I read the statement of the issues and the summary of the argument. I do this because I want to know what the case is about and what the dispute is. The statement and the summary tell me that very quickly. As I said before, if somebody doesn't include a statement of the issues, they've blown it in a big way because now they're putting a judge in a bad frame of mind by making him try to figure out what the appeal is about.

Having read those two parts of the appellant's brief, I then turn to the appendix and read the trial court's order and judgment. Now, knowing what the issues are, I can focus on what the trial court did, to see whether the judgment of the trial court was right or wrong. This is sort of a preview of coming attractions. Then I turn back to the arguments in the appellant's brief, and, to the extent that I've been persuaded, I carefully consider every aspect of the appellant's brief. If I have not been persuaded by the appellant's argument, I still read the appellee's brief, but with less concern. Finally, I turn to the reply brief, and I come to my preliminary opinion.

Now, where Judge Baldock and I differ is I do use bench memos from my clerks. I will not read the bench memo before reading the briefs, but having read the briefs and come to my preliminary conclusions on the case, I then turn to the bench memos. It is remarkable, quite remarkable, how often you agree pretty well with the bench memo. At that point I come to closure in my mind. Now, if the clerk's recommendation and mine don't square, that is a red flag, and you've got a hot issue here. Then I'll direct more research, and I'll pull cases. The law clerk always attaches key cases to the bench memo, and I'll read those as well. Now the case is ready for oral argument.

BALDOCK: I have to agree with Carlos. When the briefs are really far apart, or I see citations to cases that are going off in different directions, then I may call the

law clerk in and say, "Look, there's something strange here." The lawyers should pretty much be looking at the same line of cases and arguing different analysis. So when lawyers are arguing entirely different cases, then I know that something is wrong with one side or the other. Then I may call the law clerk to do some more extensive research.

## QUESTIONS AND COMMENTS, SESSION ONE

JUDGE WADE BRORBY:[2] I have two questions concerning briefs to the panelists. One, what do you think of the brief that has seventeen issues? Second, what do you do when a brief meets a word limitation, but not the page count. For example, our page limitation is thirty, and the word limit is less than 14,000 words. But sometimes we get briefs that have 13,987 words but go on for sixty-four pages.

LUCERO: Attorneys should avoid briefs that are too long at all costs. I *detest* briefs that are sixty-four pages where every word counting rule has been bent. Avoid repetition in briefs. Avoid long string cites. And, for oral argument, I would say this: take a look at the work of typical circuit judges across America. Typically, we'll hear twenty-four cases in one week of oral argument—six cases a day for four days. If the appellant's brief is fifty pages, the response is always fifty pages, and the reply is twenty-five. That's 125 pages of reading on that case. Multiply that by six and that equals 750 pages. Multiply that by four and you are now approaching 3000 pages of reading.

BALDOCK: *War and Peace.*

LUCERO: Yes. Don't forget we read the trial court's statement of facts, conclusions of law, and judgment or whatever document is being appealed. That's typically thirty pages, again times four, times six. Add the key cases that our law clerks have been kind enough to dog tag, noting the key sections of the case. The reading a circuit judge does is horrific, so lawyers who use more pages than necessary to tell us about something are annoying the judge and putting him in a bad state of mind. Obviously, that is not going to affect the outcome of the case, but that's certainly not going to help your advocacy.

BALDOCK: You can't put that together with questions about fifteen to sixteen issues. Lawyers only have fifteen minutes to put their best foot forward, and they can't argue eleven different issues in front of us. I don't mean that you have to address every issue you raise during oral argument. I don't personally assume that lawyers have abandoned the issues they don't mention in oral argument. Your brief is the controlling thing. Your oral argument is your chance to be persuasive and convince us that your position is right.

Overall, I tend to agree with Carlos. You really are shooting yourself in the foot by not streamlining your briefs.

MANDELL-KING: I'd like to respond as well to Judge Brorby's question. I have been writing briefs for a long time, and I attend a lot of writing seminars. We do know your situation, and we know there's no point in annoying the judges we're trying to persuade. We try to be concise, and we try to write clearly and accurately. We try to write a statement of facts that's not a summary of the whole record. We

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

try to write a statement of the facts that's articulate and accurate and that is not boring—one that is a little punchy, that tells you a story, that may tell you a story that's different than what the prosecutor told in the trial court, because we don't want to tell that story again. We also want to be accurate in how we frame the issues. I have been taught to be selective with the issues, and I have tried to be selective with issues in my own practice. I usually raise three issues, maybe up to five, depending on the case. I try to show that I have enough confidence in my analysis that I don't have to raise a lot of other issues.

The problem is, it turns out my crystal ball just doesn't work right all the time, and I don't always know what the United States Supreme Court is going to do in a couple of years. I've seen that this year in *Morrison*,[3] *Apprendi*,[4] *Dickerson*,[5] and with *Lopez*[6] from a few years ago. So I have been struggling with this. I don't want to waive an issue, obviously in a death penalty case, or in these cases where because of the drug laws we have clients serving sixty-seven years, which is essentially a life sentence, without parole. So we can't waive an issue.

So I just ask you all to understand that's what we struggle with—not waiving issues and trying to give you all the facts you need so that we haven't inadvertently omitted something you need to know, all the while trying to be concise. And, while needless repetition is no good, repetition for emphasis, or repetition when you repeat the facts in the argument portion as you weave the facts and the law, can be persuasive.

LUCERO: In criminal cases I think the statement of issues has to be extensive for the reasons you state, but I also think most practitioners have a sense of what issues may ultimately evolve, so they can predict which issues need to be preserved. The more experience you have, the greater your sense of this is. In civil cases, an excessive statement of issues is a sign to me of two things. One, you're dealing with an inexperienced lawyer. Two, you're dealing with an unfocused advocate who doesn't really have a clear sense of what went wrong and what is the reversible error. There are so many "Hail Mary" issues. This hoping and praying—"I lost and I've got to get something up there to get this case reversed"—doesn't get you very far.

DEAN LUTHEY:[7] When you are reviewing a record, how do you go about determining abuse of discretion in a civil case? I know it's very case-oriented, but

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3. United States v. Morrison, 529 U.S. 528 (2000) (holding that neither the Commerce Clause nor Section Five of the Fourth Amendment gave Congress authority to enact the civil remedy provision of the Violence Against Women Act).

4. Apprendi v. New Jersey, 530 U.S. 466 (2000) (invalidating state hate crime statute that gave judges authority to increase criminal sentences as violative of due process and holding that any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt).

5. Dickerson v. United States, 530 U.S. 428 (2000) (holding that Congress could not overrule the protections provided by *Miranda v. Arizona*, 384 U.S. 436 (1966), by reinstating a voluntariness standard for the admissibility of confessions).

6. United States v. Lopez, 514 U.S. 549 (1995) (invalidating the Gun-Free School Zones Act, which made it a federal offense for any individual knowingly to possess a firearm at a place that individual knows or has reasonable cause to believe is a school zone because the act exceeded Congress's commerce clause authority).

7. Graydon Dean Luthey Jr., Attorney at Law, Hall, Estill, Hardwick, Gable, Golden & Nelson, Tulsa, Oklahoma.

if you look at the decisions, it's hard sometimes to get particular guidance on what is or is not an abuse of discretion.

BALDOCK: This goes to why it's important to state the standard of review up front, even in a civil case. I know I've seen a couple of cases in the Tenth Circuit where, instead of staying with the very specific language on the appropriate standard, we either want to show off our vocabulary or we want to use a different word for whatever reason. That's what gets us into trouble. I've seen it personally in several of our cases where there's a simple standard of review, and I look at the test that they've set out, and the court has used a different word that makes it a different meaning. So I do appreciate your question there. We should be very reluctant to change the meanings or use our own words. I don't know if that's any help.

LUTHEY: That is.

LUCERO: Abuse of discretion is not an unbridled term. It is always used in a legal context. It is always bounded by a statement of law on one side of an issue or another. Rarely do we have to decide an abuse of discretion issue in a vacuum. Typically, you had previous decisions in the area that will show one extreme, where the court did reverse, and a series of other cases where it didn't reverse. So we are aided by those statements of law in making that judgment. Ultimately it is probably the closest you come to pure justice in a sense that it is ultimately our "sniff" test, if you will, that tells us whether discretion was abused. But I remind litigants that if we're going to err in that area, typically we err in the direction of affirming what the trial court did under that standard.

MANDELL-KING: I've been reminded that time is running out. Perhaps we could quickly address a couple of aspects of oral argument.

LUCERO: When I came on the court five years ago after being a trial lawyer and sat on the first panel, the very first thing I heard in oral argument was, "Your Honor, I would like to use eight minutes of my time to make the opening statement, and I would like to reserve seven minutes for rebuttal." I had the pleasure of sitting with Judge Baldock at that time, and I remember it still. He said, "Well counsel, your time is your own, and we don't play a role in that. You divide your fifteen minutes of opening argument any way you want." Since that day and that comment, I've heard the same question by lawyers and the same comment by every presiding judge, maybe 600 times.

Look at the rules of oral practice in the circuit. They are clear. If you have a question about them, chat with the clerk, don't waste your time talking about that with the panel because you're just wasting thirty seconds of oral argument.

BALDOCK: When the judges say, "Good morning counsel," the clerks know your time has started. As Judge Lucero has said, by the time it takes you to tell us all of that about splitting your time, you have used thirty seconds of your vital time, so you have wasted time. And there are other judges that when that clock strikes zero they say, "Counsel, we understand your argument, your time is up."

LUCERO: As you're going, "Uh, uh...."

Let me tell you how Shirley Hufstedler did a case before Judge [Deannell Reece] Tacha, Judge [Paul] Kelly, and me, although not all of you are going to be lucky

enough to have implications of *Roe v. Wade*[8] before you. She stood up. She walked up to the podium. She was poised. She knew what she was there for. And she said, "Good morning. Twenty years ago the United States Supreme Court handed down its decision in *Roe v. Wade*. Since that day, the circuit courts of the country have uniformly held....Today we are here because the District Court departed from the clearly enunciated rule of cases. The issue for you is whether you should affirm that decision or not. We ask you to reverse it because...."

She didn't stand up and say, "Good morning. It's nice to be in the Tenth Circuit. I'd like to have eight minutes of my time reserved for this and seven minutes reserved for that...." Day after day, week after week, year after year, appellate practitioners go into that same litany needlessly.

Stop. Learn to do it right. You're wasting your time.

I hope that little tidbit helps you if nothing else in coming this morning does.

MANDELL-KING: I assume we do have to say our names for the record?

LUCERO. Yes, you do say your name for the record.

BALDOCK: I don't require that because I have your names, I've looked at the briefs, and I know who you are. I usually will tell you, "Good morning. We'll hear you counsel." And away we go.

When we're in courtroom number two, which is the historic courtroom, I cannot tell you how many times a lawyer wants to stand up and tell us, "Judges, over your head is written the statement...." Well, I'm looking in the other direction, at you, and you've got fifteen minutes. We want to hear you.

Because with some of the judges, when your fifteen minutes are up, you're out of time. They'll say, "Thank you counsel, you're time is up. We think we understand your argument. Sit down." Other judges will ask you to continue a few minutes on a specific point. That's why I tell some of you who don't appear before us very often to ask somebody who's been there about the time question, particularly after you know who you drew as a panel. I would say right now the majority of our court cuts you off when you're out of time. I mean that's just it.

LUTHEY: Shifting from the review for error to the lawmaking function of the circuit, what is persuasive to the circuit on questions of first impression? Are there any general guidelines as to what is persuasive to the members of the court?

LUCERO: Look, advocates should remember that when we are in the law-making, law-creating area, they need to preserve the issue with us, but that is really the role of the United States Supreme Court. We address those issues, but ultimately they're meant for a larger audience. What is persuasive, to me, is a historical recitation of the evolution of the law that would give us some guidance if we're going to take a step into the domain where no man has gone before. Give us a compass.

MANDELL-KING: I would think policy would be important in a case raising a question of first impression.

BALDOCK: When it comes to considering policy, we'll only call on those lawyers who have argued in front of us enough that we know that they read records correctly and have a sense of policy issues. Those lawyers every now and then get

8. Roe v. Wade, 410 U.S. 113 (1973).

the privilege of having the judges open up to them up and say, "Counsel, we need some help and we need to discuss...." At that point it's not an argument, it's a discussion of policy—what's going on in the real world. We're not there.

## QUESTIONS AND COMMENTS, SESSION TWO

JILL WICHLENS:[9] I have a question for Judge Baldock and Judge Lucero. In the criminal context, often I'm trying to convince you an error was not harmless, and I'd like to be able to say, "Well the government's evidence was really thin, take my word for it, so this error was prejudicial." But I can't say that, that wouldn't be credible. So I'm always torn about how many facts I should give you to let you assess whether an error was harmless or prejudicial, and I wonder if either of you have any specific thoughts on that?

LUCERO: Well, I think the criminal lawyer differs a little in the sense that criminal advocates are going to have to raise more issues in order to preserve them for procedural reasons. But you can tell us what the key facts are and which ones you're just preserving.

BALDOCK: I view it a little bit differently, because so many times lawyers fail to cite to the record and tell us where we can find the facts. You're trying to convince us that the admission of evidence was reversible error, but you don't say, "You're going to see this and how it affects my client on these pages of the transcript." I've got to go read the whole transcript, all of the questions and answers, to figure it out. To me, it's common sense as a lawyer. I want you to take the judge by the hand and lead him through the door to the exact page that shows reversible error.

WICHLENS: I take it then that if it takes several pages to go through the facts that are key to the case, that's okay?

BALDOCK: Sure, you've got to do that. That's your duty, to take us by the hand and say, "Judge, this is what I'm talking about."

LUCERO: The message to each and every one of you is that you need to cite to the record, please.

AUDIENCE MEMBER: I was wondering whether all this computer system technology is improving the quality of work that you see as federal jurists. When I graduated from law school in 1983, we were all typing on IBM Selectrics. I have often wondered whether judges think that we're doing a better job because of the technology we have access to. Clearly we should be.

BALDOCK: Computers have clearly changed the judge's job. There would be absolutely no way that I could do the amount of work required of me if it weren't for the advent of the computer and computer research capability. We would die. That's the only impression I have so far.

The computer is the single most important thing that has allowed you to generate more appeals and us to generate more opinions, whether they are published opinions or orders of judgment. In the criminal context, there is the electronic filing of orders. You get them and they're gone. It's tremendous.

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9. Assistant Federal Public Defender, Denver, Colorado.

The computer also allows me to determine if lawyers are misciting or misquoting cases, because I've got them right in front of me. Only when a squirrel runs into the transformer in Roswell, New Mexico, do I have to go back to the law books. That happened one day when I was working with my law clerks. They are really proficient at the computer, and when the electricity went out they all thought we were going for a hike. I said, "No, we're going to do it the old fashioned way."

AUDIENCE MEMBER: But do you feel subjectively as though the quality of the briefs that you've been reading since 1983 has improved because lawyers have more computer assistance technology.

BALDOCK: No.

AUDIENCE MEMBER: Interesting.

BALDOCK: Now those who have an appellate practice, who appear before us a lot, their briefs are usually very well done. But with the lawyer who only comes once in a great while, often the product is not good and it's no help. That really irritates me when I haven't been helped at all by a brief and it has wasted my time.

LUCERO: Let me say one thing on this question. There are a couple of things the advent of computer use has done. First, I think it has helped a lot technically. I think you find fewer technical errors in briefs. It has also brought the advent of the word count. We have a limit of fifty pages, and people use smaller type to get around it. For some reason, people think the more you talk, the more you persuade. That isn't true; that absolutely isn't true. The more precisely, concisely, and persuasively you write, the more you persuade.

The *Dred Scott*[10] opinion is some 240 pages long. *Brown v. Board of Education*[11] was eleven pages long. One couldn't be upheld by a civil war, and the other persuaded by the sheer force of its power. Now tell me, do you think *Brown* would have been a better opinion if it were 240 pages long? No. Would *Dred Scott* be a better decision if it were eleven pages long? Maybe so, but maybe they would have had to come out and say that they were holding that an African American is not a citizen of the United States. Maybe if they had to read it in bold type they would have realized it would never stand. In any event, in terms of use of the computer, no, I don't think it necessarily improves quality.

AUDIENCE MEMBER: About misquoting or misciting cases, Judge Baldock, I would be terrified, knowing that you have the computer power that you have. Are you finding at least that that offense is less common because lawyers know they're going to get caught?

BALDOCK: No, because they hide it in string cites. They make the mistake of thinking we don't read those cases, and normally the first case is right on point, but two or three of those string cites don't even come close. That's why I tell my clerks we're not using string cites when I write.

PAUL FRYE:[12] I have two questions. First, has the Tenth Circuit considered allowing attorneys to file briefs on CD ROM with hypertext links so that if you cite a case, you can key in on that and the case appears on your computer screen?

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10. Dred Scott v. Sandford, 60 U.S. 393 (1856).

11. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

12. Attorney at Law, Rothstein, Donatelli, Hughes, Dahlstrom, Schoenburg & Enfield L.L.P., Albuquerque, New Mexico.

LUCERO: It's under discussion and I think it would be a great idea. Also it would be great to have the record on computer disk.

BALDOCK: I think there are potential security problems with disks. That came up with jury instructions. The judges want to ask for diskettes so they can work off the material the lawyers give them. The circuit administrators said no, because they didn't want disks that they couldn't control.

I think some of the resistance has to do with age, and that's why the rule says when you're sixty-five years old and you have so many years, you can step down. Honestly, when I work off the computer monitor, within about two or three hours, I'm almost blind. So maybe I'm too old and I ought to start moving aside, but I want it on hard paper where I can make notes in the margin.

LUCERO: I think we want them in both forms.

BALDOCK: That's fine with me. Those that are young and can read off a screen, we'll let them have at it. I want to read the hard paper.

FRYE: My second question is, how effective do you find oral advocacy by people who show a lot of emotion or bombast or outrage?

LUCERO: Because we're in the city of the late Oliver Seth,[13] may he rest in peace, I'll tell you the story I was told when I came on the bench about a lawyer who stood up and made what would be a wonderful closing argument to the jury, except he was at the Tenth Circuit in front of Judge Seth. Judge Seth patiently listened to all this, and at the end he said, "Now, counsel, did you make this argument to the jury?"

And the lawyer said, "Yes, I did, your Honor."

And Judge Seth said, "Well, did you win or lose?"

The lawyer said, "We lost, your Honor."

Judge Seth replied, "Then what are you making that argument to us for?"

MANDELL-KING: I have a couple of comments from the advocate's perspective on the word- and page-limit issue. Oftentimes, if we're complying with the word count and we try to choose a typeface that's readable, the clerk's office would reject our briefs based on the page count.

BALDOCK: At the last conference one of the judges made the motion that we have the clerk's office count the words to make sure the computer's right. What does that tell you about what that judge was thinking?

MANDELL-KING: I don't want you to be angry if I'm filing a brief that is complying with the rules, but is more than fifty pages.

LUCERO: Don't worry about what makes us angry; the question is what's going to persuade us in your favor.

SANDRA SALTRESE-MILLER: Sandra Saltrese of Boulder, Colorado. This question is for Judge Lucero. How do you view amicus briefs? I do immigration rights cases.

LUCERO: I really like amicus briefs because it's a way for the broader public to say, "This case is out of the ordinary, and these are the policy issues that are impacting the case." When I was on the clerk's committee, I just routinely voted to grant the motions to file amicus briefs.

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13. Chief Judge, United States Court of Appeals, Tenth Circuit.

BALDOCK: I think they're helpful, I really do. And I agree the key is policy. Sometimes on the bench we're no longer able to really know what's going on in the real world because we're not in trial courts where we see what's going on every day.

LUCERO: I thought you were going to ask us, Vicki, about time spent on questions, which is probably on everybody else's mind. I hear it all the time: "Look, I came up here; I had fifteen minutes to tell you something, and you guys started asking questions, and you never stopped. You took all my time."

I'll tell you why you shouldn't worry about it. The judges have read your briefs, and they've read what the trial court did. They understand the case, and you should consider questions as totally friendly. Do the best job you can in answering them, but don't worry about anything you didn't have a chance to mention.