William Mitchell Law Review

Volume 35 | Issue 4 Article 8

2009

Suggestions from the Bench: Things Judges Wish That Appellate Lawyers Would Do Differently

Bruce D. Willis

SUGGESTIONS FROM THE BENCH: THINGS JUDGES WISH THAT APPELLATE LAWYERS WOULD DO DIFFERENTLY

Retired Judge Bruce D. Willis†

I. INTRODUCTION

Most lawyers who appear in the Minnesota Court of Appeals are well prepared and do a professional job of representing their clients' interests, both in writing and at oral argument. But an informal survey of the court's judges suggests that the court sees, with some regularity, things that some lawyers do that judges find to be unhelpful.

The following comments are not in any way intended as a primer for appellate argumentation. There are many excellent resources available with that purpose.[1] Rather, these suggestions reflect specific issues that the judges have identified and are made to serve as reminders for seasoned appellate counsel and as guides for others who appear in the court.

† LL.B. 1965 Harvard Law School, B.A. 1962 Yale. Judge Willis practiced with Popham, Haik, Schnobrich, Kaufman & Doty, Ltd. in Minneapolis from 1965 to 1995 and then served as a judge on the Minnesota Court of Appeals from 1995 to 2008.

1. One of the most recent additions to the literature is a very accessible, well-written, and relatively short book by Antonin Scalia and Bryan A. Garner, entitled MAKING YOUR CASE: THE ART OF PERSUADING JUDGES (Thomson West 2008).

II. GENERAL

As a prefatory comment, from the court's perspective, an appellate lawyer's overarching concern should be to make things as easy as possible for the judges, and anything that does not serve that end should be avoided.

Turning to the judges' specific suggestions: some apply both to briefs and to oral arguments. For example, do not overstate your case, and be scrupulously accurate in all representations that you make to the court. Not only is candor toward the court a professional responsibility, but there is likely nothing more damaging to your case than giving the judges the impression that you are attempting to mislead them.

Do not attempt to defend the indefensible. Every case has weaknesses. Concede what should be conceded. You will win points with the court, and necessary concessions are not inconsistent with your professional obligation to provide zealous representation.

Identify your best issues and focus your argument on those issues. All too often, lawyers throw every possible issue into an appellate argument, apparently in the hope that at least one will attract the attention of the court. But judges recognize weak arguments, which make for ponderous reading and a waste of time at oral argument.

It is always better to make a thorough argument on one or two issues than to make cursory arguments on five or six, or more.

Remember that the court of appeals, as an error-correcting court, has no authority to overrule supreme court precedent. Do not waste time arguing why existing law is bad policy. Your relief, if any, is in the supreme court or, perhaps, with the legislature.

Never personalize an argument. Judges especially dislike arguments that attack opposing counsel, the parties, or the district court.

III. BRIEFS

Remember that your first impression on the court is made in writing. Quality writing matters. Brevity and clarity are great virtues. Inaccessible writing does not delight the reader. Learning to write well is a lifelong project, but if you read well-written work, then writing well becomes second nature. There are many helpful usage and style books available. Familiarize yourself with some of

them, and use them. Good writing makes a reader feel smart; bad writing does not.

Bear in mind that "brief" is an adjective, as well as a noun.[2] Do not conclude that because a fifty-page brief is allowed, your brief must be fifty pages. If you can address the issues in twenty pages, stop there. Recognize that in preparation for a calendar, judges usually must read more than twenty briefs, as well as appendices, bench memoranda prepared by law clerks, and portions of the record of each case. You do not want to add to the judges' reading burden unnecessarily.

Proofread, proofread, proofread. Bad grammar, misspelling, and typographical errors detract greatly from your brief. They are distractions for judges, and they affect your credibility. Also, remember that you cannot rely entirely on a computerized spell checker.[3]

Do not forget to address the standard of review, which can be outcome-determinative. If the briefing shows disagreement regarding the applicable standards, be prepared to deal with the issue at oral argument.

Avoid including unnecessary details in your statement of facts, such as specific dates and times, unless they are critical to the case. Otherwise, a careful and focused reader—and appellate judges try to be careful and focused—is likely to pay close attention to those details, expecting that they will later be important to resolution of the issues in the case. If they prove not to be important to the resolution of the issues in the case, there is a risk that the reader will resent the wasted time and attention.

Minimize the use of substantive footnotes and long block quotes.

A brief should reflect a preference for the active voice. That is the way that the brains of most English speakers have been wired since infancy to receive information.

Avoid legal jargon,[4] resist any temptation to turn nouns into verbs,[5] and avoid trendy phrases.[6]

2. WEBSTER'S INTERNATIONAL DICTIONARY 227 (3d ed. 1993).

3. *E.g.*, "following a jury trail" and "the index contains an extensive copulation of authorities."

4. *E.g.*, "heretofore" and "above mentioned."

5. *E.g.*, "interfaced with co-workers," "gifted the beneficiary," and "tasked the committee."

6. *E.g.*, "at the end of the day" and "back in the day."

IV. APPENDICES

An appendix should contain only those items that are essential to the brief. Remember that the court has available to it the entire record of your case.[7]

Do not include in an appendix duplicates of the same document, illegible copies, or irrelevant documents. But if a particular document, such as a contract, is central to the appeal, make certain that there is a legible copy in the appendix.

Do not forget that Minnesota Rule of Civil Appellate Procedure 130.01 requires an appendix to be separately and consecutively numbered. It is frustrating to try to negotiate through an unpaginated appendix or an appendix that consists of "exhibits" with new pagination for each exhibit.

Make certain to include an index for the appendix, preferably at the beginning of the appendix, rather than at the beginning of the brief. If, for some extraordinary reason, it is necessary to have an appendix of more than one volume, include the complete index at the beginning of each volume.

Most judges appreciate having the order appealed from at the front of the appendix. It is time-consuming to have to sift through a large appendix trying to discover which of many orders is at issue in the appeal.

V. ORAL ARGUMENT

It is important to familiarize yourself with the court and its procedures before arriving for oral argument. You are notified in advance of the judges who will be on your panel. Because many judges prefer to be addressed by name, you should know, at a minimum, how to pronounce the names of the members of the panel.[8] If you choose not to address a judge by name, "your honor" is an acceptable substitute. "Judge" is less acceptable, and an attorney who addresses a member of a panel as "sir" or "ma'am" will not be mistaken for an experienced appellate advocate.

The court of appeals consists of "judges" not "justices."

Only counsel may sit at counsel table for an appellate argument. Clients, if they are present, must sit in the audience.

It is not necessary in the court of appeals to reserve time for

7. MINN. R. CIV. APP. P. 110.01 (2008).
8. *E.g.*, Judge Klaphake's surname is not pronounced "Clap-haik."

rebuttal. The appellant automatically has five minutes of rebuttal time. But you should not be afraid to waive rebuttal if the respondent has not raised issues that must be rebutted. Waiver of rebuttal is not necessarily a sign of weakness; it may be a sign of strength.

Generally, you should avoid a recitation of the facts at oral argument. You may rest assured that the judges have read the briefs, including the statements of fact. Additionally, laying out the facts uses precious amounts of the limited time you have available. Weave the facts, as necessary, into your discussion of the applicable law.

There are, however, cases in which you are able to say what you want to say in less than fifteen minutes. In such a case, ask if the court has any additional questions. If there are none, sit down. Do not feel a responsibility to fill all of the time available.

Never interrupt or attempt to speak over a judge.

Do not appear to be irritated by the fact that a judge asked a question.[9] Try to remember that questions are your friends. Questions tell you what the judges are thinking. Many experienced lawyers are rightly more concerned if there are few questions than if there are many.

Do not respond to a question with "that's a good question." That response is usually a recognizable device to buy time to think of an answer, and all judges think that their questions are good.

Do not be afraid to admit that you do not know the answer to a question. The judges will recognize that anyway. Do not offer to answer a question later in writing. If the judges want supplemental briefing, they will tell you so.

Familiarize yourself with the generally accepted pronunciation of words and terms that you can expect to use in your argument.[10] Again, this is a matter of credibility.

VI. CONCLUSION

Recognizing that perfection is rarely achieved, even by judges, the above suggestions are offered with the hope that they will help make it easier for the practicing bar to make things easier for the judges.

9. *E.g.*, "As I was saying before I was interrupted . . . ."
10. *E.g.*, the Parentage Act is not pronounced as "the Par-RENT-ij Act."