

APPELLATE PRACTICE

February 2013

IN THIS ISSUE

As we reflect on the recent 2013 Midyear Meeting, M.C. Sungaila recounts the insightful comments of Judge Roger Gregory on appellate oral argument and record preservation shared a year ago at the 2012 Midyear Meeting.

Oral Advocacy and Record Preservation: A Judge's Perspective. Insights Shared at the IADC 2012 Midyear Meeting by Judge Roger Gregory



ABOUT THE AUTHOR

M.C. Sungaila is Chair of the IADC Amicus Briefs Committee and a Vice-Chair of the IADC Appellate Practice Committee. She is an appellate partner in the Orange County office of Snell & Wilmer. She can be reached at: mcsungaila@swlaw.com.

ABOUT THE COMMITTEE

The Appellate Practice Committee is available to all members who routinely practice in state and federal appellate courts, as well as trial lawyers who handle their own appeals. The Committee publishes quarterly newsletters addressing various appellate related topics and recent trends in appellate practice. The Committee also offers CLE programs focusing on appellate related issues that often arise before, during and after trial. Networking among members is encouraged through Committee meetings and social events.

Learn more about the Committee at www.iadclaw.org. To contribute a newsletter article, contact:



John B. Drummy
Vice Chair of Publications
Kightlinger & Gray, LLP
(317) 968-8142
jdrummy@k-glaw.com

The International Association of Defense Counsel serves a distinguished, invitation-only membership of corporate and insurance defense lawyers. The IADC dedicates itself to enhancing the development of skills, professionalism and camaraderie in the practice of law in order to serve and benefit the civil justice system, the legal profession, society and our members.

At the 2012 Midyear meeting, we were privileged to hear insights on appellate oral argument and record preservation from Judge Roger Gregory of the U.S. Court of Appeals for the Fourth Circuit. We reproduce many of those core insights here (with the note that any errors are our own in transcription, and not those of the exceedingly articulate Judge Gregory.)

ORAL ARGUMENT ON APPEAL: TEN TIPS

Present your theory of the case. The argument is your opportunity to explain to the justices why, as a matter of policy, your client should prevail. It is your opportunity to present your theory of the case; return to that theory and theme throughout your presentation.

Concede what you must, but nothing that is essential to your theory of the case. There is another reason to fully understand and consistently present your theory of the case: by understanding and articulating your theory of the case, you will know what you can and should concede in response to questions from the court, and what you cannot concede without risking the loss of your core arguments.

When answering questions, answer in the micro but think in the macro. In keeping with the point above about knowing your theme: answer the judges' questions about the facts of your case with an awareness of how those answers might impact the broader picture, including the relevant law and the application of that law to your case. Might your answer mean the case would fall under an adverse line of authority, and be factually distinguishable from the favorable authority you are urging the court to adopt?

Shuffle your argument points as necessary. Argument preparation should be thorough,

but not rigid. While counsel should prepare an opening statement and proposed argument points, counsel should not be wedded to an order of presentation. Counsel must be nimble, moving between any prepared points and the court's questions.

Guard your reputation and integrity. Your wins will come, so long as you maintain your integrity. Do not take a "win at any cost" approach. Counsel and client are better served when the lawyer maintains integrity and is forthright with the court.

Never underestimate the role of passion, even in an appellate argument. Advocate for the system of justice, not just your individual client. "If the only one to benefit from your dream is you, and it does not benefit others, then you are dreaming too narrow." Argue for stakes bigger than those facing your client alone.

It's the judges' day, not yours. Answer their questions when they ask them; do not put them off in favor of what YOU think is important. This is the time to increase the judges' understanding of the case and eliminate misunderstandings of the record. Engage the court.

Oral argument has a purpose different from brief writing. The appellate briefs lay out how the court can rule for you; oral argument explains why the court should, as a matter of policy, rule in your client's favor. Remembering this difference will help you appropriately tailor your presentation.

Always remember the first rule of oral argument: do no harm. This can mean different things depending on your client's position on appeal. For an appellee, this can mean making sure you do not awaken sleeping judges, or cause them to support

reversal when they did not previously seem inclined to do so. As an appellant on rebuttal, that can mean limiting your argument to correcting misstatements of the record made by your opponent and focusing on repairing and responding to the other side's argument.

Be respectful of your opponent. The appropriate tone is: opposing counsel is an equally learned counsel with whom you happen to disagree. Do not make it personal.

TRIAL RECORD PRESERVATION TIPS

Do not be overcome by victory at trial and lose sight of the bigger picture. Pay attention to how you win at trial. If you have a choice between two potential strategies – winning by urging an untested and questionable legal standard or by presenting evidence in support of a tried and true legal standard – choose the latter.

The best time to correct and amplify the record is in the trial court. If the trial judge announces an apparently weak ground for a ruling, suggest another stronger ground, and that the necessary findings be made in support of that alternative ground. Establish prejudice in the record at the time an adverse ruling is made.

Do not sandbag the trial judge and hold your best arguments for appeal. Appellate courts like to see arguments raised and fully ventilated in, and decided in the first instance by, the trial court. Raise every favorable argument and legal authority you can find in the trial court.

Keep in mind what standard of review applies. Even when arguing in the trial court, keep in mind the eventual standard of review that will apply to any ruling. If the abuse of discretion standard will apply, make sure the trial court provides a full discussion of the reasons for its ruling. If review will be de novo, make sure you present all relevant cases and legal arguments to the trial judge first.

Beware the half-loaf: object to half-remedies. If the trial judge agrees to give you half the remedy you urged, you still must point out why this will not be sufficient or risk waiving an objection to the half-remedy on appeal.

Make the trial judge comfortable about ruling in your favor. Most judges do not like to be reversed. Give the judge a sense of comfort that he or she is doing the right thing under the law by ruling a certain way. Consider educating the judge on key legal areas early on, through bench briefs.



PAST COMMITTEE NEWSLETTERS

Visit the Committee's newsletter archive online at www.iadclaw.org to read other articles published by the Committee. Prior articles include:

NOVEMBER 2011

From Deference to Contempt: The Illusion of Appellate Review of Discovery Abuses
Michael F. Smith and Alison Verret

JUNE 2011

Appellate Oral Argument: A Primer
M.C. Sungaila

MARCH 2010

A Friend in Need is a Friend Indeed: The Increased Prevalence and Influence of Amicus Briefs
M.C. Sungaila

DECEMBER 2009

Avoiding Collateral Damage: Vacating a Judgment as Part of a Settlement
John B. Drummy

NOVEMBER 2009

The *Carlsbad* Exception to an "Unappealing" Rule: The Supreme Court's Ongoing Struggle with Appellate Review of Remand Orders
Jonathan A. Berkelhammer and Cooper Harrell

MARCH 2009

Tips from the Bench
Marsha Piccone

AUGUST 2008

Staying Enforcement of a Money Judgment Pending Appeal: An Overview
David M. Axelrad and Peder K. Batalden

JUNE 2007

Advice from Appellate Judges on Brief Writing – Part IV, Second and Sixth Circuit Update
Elizabeth Ullmer Mendel, Warren Harris and Bob Faller

APRIL 2007

Advice from Appellate Judges on Brief Writing, Part III and First Circuit Case Update
Warren W. Harris and David A. Wollin

MARCH 2007

Advice from Appellate Judges on Brief Writing, Part II
Warren Harris and Bob Faller