

APPELLATE PRACTICE TIPS

Lessons From 15 Years On The Appellate Bench

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- I. Introductory Comments
- II. Some Fundamentals
 - A. Character, trustworthiness, reliability – written and oral
 - B. Hard work – diligence, preparedness, attention to detail. Thinking through difficult positions.
 - C. Developing good habits, developing your potential, developing your advocacy skills
 - D. Common sense. Don't lose it.
- III. My Favorite East Valley Opinion
 - A. Bailey v. Myers, 206 Ariz. 224, 76 P.3d 898 (App. 2003) – informally “Bailey’s Brake Service v. City of Mesa”
 - B. Eminent domain opinion: bulldozers stopped, the taking stopped – never tested in front of our Supreme Court
 - C. Article 2, Section 17 of the Arizona Constitution, provides:

Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches, on or across the lands of others for mining, agricultural, domestic, or sanitary purposes.

No private property shall be taken or damaged for public or private use without just compensation having first been made ... which compensation shall be ascertained by a jury, unless a jury be waived *Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public.* (Emphasis added.)

D. Some lessons:

1. Importance of State Constitutions – especially in protecting our liberties
2. Distinguishing prior cases that appear adverse
3. The benefit of three judges – all contributed

IV. Appeals

A. Please read and follow the applicable Rules: Arizona Rules of Civil Appellate Procedure (ARCAP). Also, please check out our Court Policies on our website: <http://www.azcourts.gov/coa1/Policies>.

B. The Problem of Premature Notices of Appeal (NOAs)

1. Do you have a final, appealable judgment? The court of appeals has dismissed a number of appeals in recent years, for lack of appellate jurisdiction, because of NOAs filed

before the final judgment or order that wraps up the case. The court would rather decide your clients' cases on the merits. NOAs should be timely filed *after a final judgment*.

2. What happens when a NOA is filed before a final judgment is entered? For background on this subject, see *Bollermann v. Nowlis*, 234 Ariz. 340, 322 P.3d 157 (2014), *Craig v. Craig*, 227 Ariz. 105, 253 P.3d 624 (2011), *Smith v. Ariz. Citizens Clean Elections Comm'n*, 212 Ariz. 407, 132 P.3d 1187 (2006), *Barassi v. Matison*, 130 Ariz. 418, 636 P.2d 1200 (1981), *Ghadimi v. Soraya*, 230 Ariz. 621, 285 P.3d 969 (App. 2012), *Fields v. Oates*, 230 Ariz. 411, 286 P.3d 160 (App. 2012), *Baker v. Bradley*, 231 Ariz. 475, 296 P.3d 1011 (App. 2013), *Natale v. Natale*, 234 Ariz. 507, 323 P.3d 1158 (App. 2014), and *Camasura v. Camasura*, 238 Ariz. 179, 358 P.3d 600 (App. 2015).
3. Please read and carefully follow ARCAP 9 and ARCP 54 and 58. These rules were amended in 2014 and 2015 in an attempt to save some premature NOAs and allow them to trigger our appellate jurisdiction.
 - a. Note: federal court rules and statutes are different, and the federal courts have not had this problem to the extent we have. The recent amendments bring our state court rules into closer alignment with the federal court rules. Differences remain, however.
 - b. Even the recent amendments, based to

a certain extent on the analogous federal rules, have not solved all premature NOA problems. See *Camasura, supra* (interpreting ARCAP 9(c) based on federal court interpretations of similar language in the federal rules, and dismissing appeal for lack of jurisdiction).

4. Rule 54 — required language in most judgments now. In an ordinary judgment that wraps up the entire case, the judgment should have Rule 54(c) language certifying the case is final.
 - a. If the case involves multiple claims or parties, Rule 54(b) may be used to certify a ruling intended to be appealable even though there are remaining parties or claims in superior court. But the mere inclusion of Rule 54(b) language in a judgment “does not make it final and appealable; the certification also must be substantively warranted.” *SW. Gas Corp. v. Irwin ex rel. County of Cochise*, 229 Ariz. 198, 202, ¶ 12, 273 P.3d 650, 654 (App. 2012). See also *Lloyd v. State Farm Mut. Auto. Ins. Co.*, 189 Ariz. 369, 943 P.2d 729 (App. 1996).
 - b. Must every appealable judgment have either Rule 54(c) or 54(b) language? The answer is “No.” There are certain rulings that are appealable by statute, which do not need Rule 54 certification.

Brumett v. MGA Home Healthcare, L.L.C., 1 CA-CV 15-0047, ___ Ariz. ___, 2016 WL 4045308 (App. July 28, 2016).

C. A Word about Court of Appeals precedents — one judge's view:

1. Don't assume a COA opinion is settled law, even after the passage of years.
2. Don't assume a Division One panel of judges is bound to follow a prior Division One opinion.
3. If you have a good argument that a prior COA opinion is wrong and should not be followed, make the argument. We may agree, and besides, you may be headed to the Arizona Supreme Court.

D. Appellate Brief Writing

1. Clarity and concision are very important! [Blaise Pascal: "I have only made this letter longer because I have not had the time to make it shorter."]
2. THINK about your case before you begin writing or preparing for oral argument. Think of your best arguments before you write the briefs, and thereby avoid waiver. Thinking it through will help you be organized and concise.

3. The clarity of briefs is usually enhanced by referring to the parties by their names rather than as "Appellant" or "Appellee." There are exceptions. In many civil cases, "Plaintiff" and "Defendant" may be just fine.
4. Importance of standard of review: must we give deference to the ruling, decision, or verdict from superior court?
 - a. *De novo*
 - b. Abuse of discretion
 - c. Clearly erroneous/substantial evidence
5. Consider how you might be creative in presenting the issues to us (while accurately following the record and the law, of course).
6. Framing the "Issues Presented"
7. Remember that most judges actually are human beings. Try to paint a word picture, using accurate facts and appropriate law, to motivate the reader to find in your favor.
8. Your credibility and attention to detail are important: accurate and precise record citations, and honest discussions and citations of cases: Can we trust what you are telling us?
9. Advice from JCG's mentor: write the brief so that the judges could use it to write their decision.

10. Edit and improve!
11. If a document such as a photograph, chart, diagram, survey, plat, report, exhibit, or medical record is important to the issues on appeal, please make sure we have a legible and complete copy of it, preferably in an Appendix. Some copies we get are difficult to read, unsigned, or incomplete. If a good, clear copy is not in the trial court record, consider seeking a stipulation or filing a motion to supplement the appellate record with the better copy.
12. Requesting attorneys' fees and new ARCAP 21(a)(2):

Content of Notice. A claim for fees under this Rule must specifically state the statute, rule, decisional law, contract, or other authority for an award of attorneys' fees. If a party fails to comply with this requirement, the appellate court may decline to award fees on that basis. This Rule only establishes the procedure for claiming attorneys' fees and does not create any substantive right to them.

Therefore, don't cite only Rule 21. Cite the applicable contractual provision or statute, such as A.R.S. § 12-341.01. Make your request for fees in your brief(s). See ARCAP 21(a)(1) ("A party claiming attorneys' fees must do so in an opening or an answering brief on appeal.").

- E. Motion practice at the court of appeals. For helpful information, see “Civil Appellate Motion Practice,” by Barbara Vidal Vaught and Melina Brill, published in the July/August 2016 Arizona Attorney, beginning at page 20.

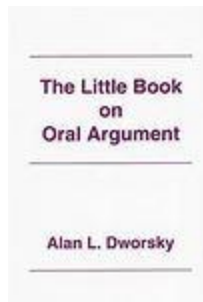
- F. Supplemental Citation of Authorities
 - 1. Update your research regularly
 - 2. Use Rule 17 as often as needed, but only when needed
 - 3. Best to get your final update to us 1 to 2 weeks in advance of argument or conference, if you can

- G. Oral Argument
 - 1. Must be requested — we seldom order *sua sponte*.
 - 2. In your request for oral argument, tell us why argument should be helpful to us.
 - 3. Most of us like oral argument and believe it helps us decide the cases.
 - 4. Our typical internal procedures
 - 5. At argument, don’t read a script; we usually suggest that you be prepared with an opening and a closing, and an outline, and especially be prepared for questions.

6. The importance of questions – our questions relate to facts or issues that we think may be important in resolving the appeal. Good answers to the questions can be very important. If we suggest you address a particular issue, please do so. (An example!)
7. Hypothetical questions – be willing to entertain hypothetical questions that may stretch your position and its logic. Understand that by asking questions about hypothetical situations, we are not trying to stump you. Rather, we are probably trying to properly frame the contours of the issue before us. Your willingness and ability to help us by answering our questions can enhance your persuasiveness.
8. Remember, argument to an appellate court is not a closing argument to a jury. But, again, most judges are human and some even have feelings. Some emotion and enthusiasm is appropriate.
9. Know the record, know the pertinent cases, and accurately describe the facts and the law. This is very important. Demonstrate that we can trust you.
10. Honest advocacy — sometimes “I don’t know” is the best answer. Maintain your trust quotient.
11. Begin well in advance of the day of argument to think about what questions you may be

asked.

12. Be prepared to concede certain points, if necessary and appropriate to do so.
13. We occasionally send the attorneys an order alerting them to specific issues we want to address at argument.
14. A helpful resource for busy attorneys who are not appellate specialists:



V. Special Actions

- A. Seek review of non-final, non-appealable orders and rulings
- B. Our exercise of special action jurisdiction is highly discretionary
- C. What justifies moving this matter to the front of the line?
- D. We decline jurisdiction in roughly 80-90% of petitions filed, especially if you can raise the issue on appeal
- E. We rarely entertain special actions seeking review

of evidentiary or discovery rulings (unless privilege is at issue)

- F. We rarely accept jurisdiction from the denial of motions for summary judgment
- G. We are more likely to accept jurisdiction when the issue presented is a pure issue of law, not factually intensive, of statewide importance, and likely to recur. If you have a situation in which irreparable injury is likely to occur, that will also increase your likelihood that we will exercise special action jurisdiction.

VI. Motions for Reconsideration

- A. Don't file if you are merely re-arguing your position
- B. Use when we make significant errors in facts or law (we hope this seldom happens, of course, but as noted above most judges are human)
- C. Most motions for reconsideration are denied

VII. Published Opinions versus Memorandum Decisions

- A. Motions to publish will be treated as motions for reconsideration, as set forth in our Court Policies

Criteria for opinions are set forth in Rule 111, Rules of the Supreme Court. New subsection (c) allows citation of our Memorandum Decisions for persuasive value, but not as precedent: "for persuasive value, but only if it was issued on or after January 1, 2015; no opinion adequately

addresses the issue before the court; and the citation is not to a depublished opinion or a depublished portion of an opinion.”

- B. Would you like us to publish more Opinions? Have you begun citing our Memorandum Decisions?

VIII. Petitions for Review

IX. Increasing Your Likelihood of Success on Appeal, Including the Importance of Making a Good Record in Superior Court

- A. Be the Appellee on appeal; win at the trial court!
- B. But if your client is the Appellant, it will be very helpful if a good record has been made in the trial court.
 1. A solid appeal must be built at the trial court.
 2. Making specific and correct objections to the other side’s evidence
 3. Offers of Proof or detailed avowals when your evidence is rejected
 4. Importance of a clear record – use of depositions and exhibits
 5. Sidebar conversations
 6. Jury Instruction issues, objections, and record

7. Making necessary motions for judgment as a matter of law – preserving your issues
 8. Electronic courtroom issues
 - a) Exhibits projected on screens or monitors – will it be clear on appeal what portion was addressed during the testimony?
 - b) Video-taped depositions – will a transcript, DVD, or audio recording be part of the record? And will the record reveal precisely what portions were presented to the jury and what portions weren't?
 9. Exhibits not admitted – do you need some of them to be part of the record on appeal (to support your argument that they should have been admitted and would have made a difference)?
 10. Two excellent articles are "Preserving the Appellate Record: Five Common Traps to Avoid," by Thom Hudson, in the March 2004 Arizona Attorney Magazine, and "Four Easy Ways to Lose Your Ninth Circuit Appeal During Trial," also by Thom Hudson, in the December 2011 Arizona Attorney Magazine.
- C. Remember: it is incumbent on the Appellant to make sure the appellate record is complete for the purposes of the appeal. Be careful to arrange for all the transcripts you will need. When challenging the sufficiency of the evidence, a

complete record (including transcripts) is necessary to avoid the presumption that missing portions of the record on appeal support the trial court's rulings.

X. Professional Growth

- A. Importance of mentors (Get one; be one; or both!)
- B. Integrity
- C. Civility