Appellate Advocacy:

SPANNING THE GENERATIONS IN SEARCH OF AN ANSWER TO THE QUESTION ALL APPELLATE LAWYERS STRIVE TO RESOLVE: HOW CAN WE MAXIMIZE OUR CHANCES TO WIN ON APPEAL?

by Kirk S. Blecha & Kenneth W. Hartman

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Today you do not have to search far to find lawyers giving other lawyers advice on how to prevail when they have a case on appeal. From books - even Justice Scalia has written one - to blogs, to websites, to journals like these, you find wide ranging advice on how to be successful on appeal. There is so much information - some if it confusing and contradictory - that a Eager Young Lawyer ("*EYL*") asked a Seasoned Cynical Lawyer ("*SCL*") the one question that led to this article: what do lawyers need to do to win on appeal? That question led to the following discussion.

EYL: We are both familiar with much of the advice out there on how to be successful on appeal, but what do you believe is the one thing that is the biggest predictor of whether you will be able to win or lose an appeal?

SCL: That is a softball question, the kind some judges like to send your way during oral argument. Let me knock it out of the park: win at trial. It is almost always easier to win an appeal when you are sitting in the appellee's chair than it is when you are in the appellant's chair.

EYL: Easier said then done.

SCL: That may be true, but never forget that winning at trial does matter, and the statistics bear that out. For instance, nearly 75 percent of all appeals decided on the merits in United States Courts of Appeals result in the district court's judgment being affirmed. Think about that, it is like the home court advantage in college basketball - if you play at home, you are much more likely to win. That is why none of the "Major" conference schools will play the Creighton Bluejays in Omaha

because they do not want to lose. But I digress. Do you have another question?

EYL: Yes, I do. The nature of a trial is that one side wins and one side loses; my question is, what should you do during trial that will help on appeal?

SCL: Well, sometimes you will hear the following advice - make a record. But it is more than that - you have to make the proper record and then make sure that the proper record makes it to the appellate court. What you must always keep in mind is that appellate judges want to know exactly where in the record they can find what you are relying on to support your position. In like vein, when you discuss "facts," you must be able to cite to those facts in your appellate brief, and you had better be ready during oral argument to direct the court to those parts of the record that are critical to your position.

EYL: I see. I think I even remember an opinion from Judge Riley shortly after he took the bench in which he expressed the court's frustration with parties who do not cite to the specific part of the record that contains the facts upon which the parties rely to make their arguments.

SCL: That is so true. And you must understand that the record consists of the papers and exhibits filed in the trial court, along with the transcripts of the trial court proceedings. If the court reporter does not hear what is said or if a motion is not filed with the court, then it is not part of the record. You must make sure that the entire proceeding is heard and transcribed by the court reporter and that all written documents are filed with the court. If important facts do not get into the court record, they are worthless, no matter how persuasive the information might have been. Also, remember that making the record extends to making an offer of proof. Take your time at trial to make sure that everything is in the record. And, in the Nebraska Supreme Court, these documents only make it into the appellate record if you properly include them in your Bill of Exceptions - don't forget what I said about the proper record making it before the court.

EYL: But, what do you do if the judge who is presiding over your trial does not have a court reporter, but instead digitally records the proceedings?

SCL: In that case, the trial lawyer has to be particularly careful in creating a record. You must make sure that your record is clear with regard to who is making the objection and provide the basis for the objection. With digital recording, it can be particularly difficult to preserve an accurate record during sidebars. When the issue is important, ask the judge to dismiss the jury and make the record appropriately; or, alternatively, ask to make the record during the next break.

EYL: So, the prudent lawyer always makes a record that can be utilized on appeal. But that record will only do you good if you actually get it before the appellate court, right?

SCL: That is right and that leads me to another important point: know the rules of the court to which you are appealing. As Judge Hippe points out in his article "The New Face of Nebraska Court Rules", Nebraska's Court Rules have recently been "codified". Nebraska lawyers should know of these changes and properly use and cite to the rules. It doesn't look professional to have the Clerk of Court bounce your brief because it doesn't comply with the court rules.

EYL: Now, we have our record before the court, but two critical stages still remain - the briefing and the oral argument. Of the two, which do feel takes greater importance in the appellate process?

SCL: What you hear from so many lawyers today, particularly young lawyers like you, is that the brief is the most important part of the appellate process. While I would never say that the brief is unimportant, I would warn you not to ignore the power of oral argument. So much of what we do in trial practice these days does not involve oral advocacy. We all know that it is the rare case where the judges in the federal courts of this state will grant oral argument on motions; and you can often prevail on summary judgment without appearing in person and making any type of oral argument. Those experiences seduce young lawyers into believing that oral argument is not of much value on appeal. Don't ever fall into that trap. Oral argument is vitally important.

EYL: Okay, I am actually with you on that, but let's talk about the brief first; like you might say, let's not put the cart before the horse.

SCL: One "rule" that I don't often see in anyone's "top ten tips" on appellate advocacy is "get a fresh pair of eyes." By that I mean, do not hesitate to ask someone to help you with the appeal or to handle the appeal for you. After a trial, the trial lawyer is often so immersed in the case it is difficult for the lawyer to review the record with an objective eye. Ideally, you want someone, either from inside your law firm, or, if that is not possible, someone you hire for that specific purpose, to talk with you and review the record, all with the goal of having that objective review to help craft arguments that may prevail on appeal. For example, I once tried a two week jury trial in federal court in the Northern District of Iowa. Although I was brilliant during trial, the jury didn't see it our way and returned a substantial verdict against our client. Our client instructed us to appeal. I knew in my heart the trial judge had committed innumerable errors; and, as for the jury, I knew that no reasonable person could ever have returned such a preposterous verdict. In spite of my confidence, I asked one of my partners, Mike Lessmann, to review the record. He did and, much to my chagrin, he told me that all my great arguments were losers. Mike suggested that I basically ignore all the usual appellate arguments - erroneous

jury instructions, improper evidentiary rulings, and so forth - and instead focus on one fundamental issue: the trial court's response to the jury's question during jury deliberations. Although I was dubious, I took his advice and won on appeal. His "fresh eyes" led directly to a successful outcome.

EYL: So what you are telling me is we should step back and think the case through, and also find a person to think the case through with us.

SCL: Exactly, with the knowledge that the other person is going to have a much different perspective than you do.

EYL: So, does this strategy lead to a more focused brief?

SCL: Of course, and that is the goal. Judges do not like briefs that meander hither and yon. Judges like briefs that are focused with laser precision on issues that the judges think will decide the case. For briefs before the Nebraska Supreme Court, for example, this means fewer assignments of error: resist the temptation to assign twenty errors when you know that two or three will do. It also means you should limit your propositions of law that control the case to those that actually do control. When judges see forty propositions of law that supposedly control the outcome of an appeal, they begin to question your entire case. Very few trials have forty substantial and reversible errors. Remember, appellate judges are looking for your help, so help them by writing a focused argument and citing only the propositions of law that control the outcome of the appeal.

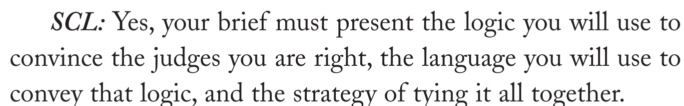
EYL: I have heard that before, but what about all those "kitchen sinkers" out there who feel like they have to throw in every conceivable argument that could possibly be made just in case one of them happens to stick?

SCL: Unless you are doing criminal death penalty appeals, throw out the kitchen sink. You're a lawyer. Use your judgment to decide which arguments to pursue.

EYL: Now, about the brief itself. On this point, I will refer to some of the advice that is out there in cyberspace because I think it summarizes a winning brief so well. The advice comes from Judge Posner, who I am sure most lawyers would recognize as one of the most respected judges in the country. His advice reminds us that the basics matter. He says, "be brief, be clear, be simple, be vivid, be commonsensical, avoid legalisms, and do not be afraid to spoon-feed the judges; they will not bite off your hand."

SCL: I could not agree more.

EYL: To me his advice falls into three areas: structure, language, and strategy.



SCL: Yes, your brief must present the logic you will use to convince the judges you are right, the language you will use to convey that logic, and the strategy of tying it all together.

EYL: So be brief, be clear, be simple. To me this means making sure you have a logical structure to your argument. If nothing else, your brief, should have a simple logical core that takes the reader by the hand and leads to your inescapable conclusion.

SCL: And being vivid and being commonsensical while at the same time avoiding legalisms means you will convey that logic with words that bring your argument to life without distracting the reader with fancy words that will not impress the judges anyway.

EYL: Judge Posner's point about spoon feeding judges brings home a story that Judge Caporale has told me a number of times. I would guess that most lawyers in Nebraska know that before Judge Caporale came to our firm he was a member of the Nebraska Supreme Court. He tells the story of the advocate who stood before the court and started his argument by referring to the very basics of contract law - something like, "Your honors, in order to have an enforceable contract under the laws of this state, you must have an offer . . ." at which point he was interrupted by a member of the court who stated, "I think you can assume that we understand the basics of contract law", to which the advocate responded, "That, your honor, is the mistake I made below."

SCL: That is a great story. In other words, you want to in inform the court, in your brief and at argument, how you ended up before the court and why the issue is important.

EYL: And that leads us to oral argument. What have you found is the best way to prepare for oral argument?

SCL: Preparation is the key to a successful oral argument. Remember, your time before the appellate court will be limited. In the Nebraska Supreme Court, this means that most civil cases will have only ten minutes of argument per side. You have to be prepared to deal with any conceivable question that could be asked during those ten minutes.

EYL: I have helped prepare others for oral argument and have read a lot about how to successfully prepare for one, but all this has confirmed for me is that oral argument is, like most things in the law, more art than science. What I mean by this is that practitioners seem to prepare and argue in unique ways. Is there really any general rule that can help those who are about to argue their first appeal?

SCL: There are a few "rules" that I would say apply across the board to all those who are going to make an argument to an appellate court or any court for that matter. First and foremost, you must always be honest with the court. Complete candor in response to questions is a must; appellate judges have an amazing ability to ferret out lies. Your credibility and reputation are all you have as a lawyer, so do not tarnish them by not answering a judge's question with complete candor. Second, you must

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always be respectful to the court and to your opponent. This means more than mouthing the words, "Mr. Chief Justice" and "may it please the court" or making sure you get the names of the judges right as you argue.

EYL: Yeah, I have given up counting the number of times Judge Stephan has been referred to as Judge Stevens. And worse yet, the number of times attorneys addressed the Nebraska Supreme Court as gentlemen or guys, when Judge Miller-Lerman has been on the court for almost a decade. Judge Caporale once told me that an advocate appearing before the court once used the phrase "you guys", to which Judge Caporale responded, "Well, at least one of us 'guys' has a question . . .". The Lincoln Journal Star reported that the advocate got skewered, but did not even realize it.

SCL: Right, that is more than a little mistake. But, respect also means that you answer the questions that are asked of you when they are asked. Never say, "Well, Judge, I was going to get to that later". If the judge thought that the question was important enough to ask, the answer is likely an important part of that judge's analysis of the case. So answer the question promptly and do not defer to a later time in your argument. Also, being respectful is about not making excuses when answering questions.

EYL: You mean answering a question posed by a judge with "I do not know, I did not try the matter below?"

SCL: You are so quick on the uptake for a youngster. When you say that, you are only telling the judge something he or she already knows from the record. By saying I did not try it, you merely frustrate the judge who is looking for a real answer to a pressing question that he or she has. I once started an argument in the Nebraska Court of Appeals by commenting, "I did not try this case and I did not write the brief." One of the judges immediately stated, "We don't care, but you better know the record." After that somewhat terrible start, I had the presence of mind to reply, "I do know the record and the record shows why we should prevail." I saved my bacon!

EYL: Any other universal rules?

SCL: There are two more that I should mention: believe in your position with every fiber of your being and dress professionally. The latter is closely related to being respectful. You must dress professionally so that you convey to the judges that you are serious and that you take appearing in their court seriously. What you want the judges talking about during their consultation is your argument, not what you were wearing.

EYL: But the lights are pretty dim in the Supreme Court's courtroom. The judges probably could not tell if you were wearing a purple suit or a blue one.

SCL: Well you might risk that, but I would not.

EYL: And your other point?

SCL: You must believe in your position with every fiber of your being. You must convey to the judges that you believe your position is the only reasonable, rational answer to the questions before them. If you slip and the judges sense that you do not believe entirely in the arguments you made, the judges may start thinking, "Well, if he does not believe it, why should I?"

EYL: So, be honest, be respectful, believe completely in your position, and dress professionally are the four universals that apply regardless of the style of presentation or how the lawyer chooses to prepare. But what about the presentation itself? For instance, before John Roberts took the bench as the Chief Justice of the United States Supreme Court, he wrote an article suggesting that a lawyer should have at least three separate moot court sessions prior to the actual appellate argument. Is that realistic?

SCL: For a case pending before the United States Supreme Court, yes. For others, it really depends on the nature of the case and the issues at stake. But remember, as we talked about earlier, oral argument is an art, not a science. There are many ways that lawyers prepare for oral argument; a moot court session is only one way.

EYL: So no universal rules for preparation?

SCL: Sorry, kid, but no. Some lawyers rehearse their oral argument so that when their adrenaline kicks in they are able to

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