Appealing Appeals: Persuasive Appellate Case-Building and Best Practices

BY THE HONORABLE LIDIA S. STIGLICH AND KATHRYN COMBS, ESQ.

In October 2013, I—then a district judge in the Second Judicial District Court—co-authored a piece for this publication entitled, "Writing to Judges … Persuasively."[1] In the intervening years, I have been honored to sit on the Nevada Supreme Court. While my perspective has changed, many of the observations in that article still hold true. **Here, I want to expand upon and reiterate those past sentiments with respect to both writing persuasively and building a persuasive appellate case.**

Make Your Record (Object—Even When It's Uncomfortable)

As a former trial lawyer and trial court judge, I understand the strain and time pressure involved in practicing in our district courts. During jury trial, advocates feel a dozen eyes on their every move. Judges seem impatient, trials take longer than expected, and calendars shift. Facing the stress of trial, lawyers may not be thinking about the possibility of an eventual appeal. Lawyers may feel uncomfortable asking for time to make a thorough NRCP 50(a) motion for judgment as a matter of law, or uncomfortable objecting in the middle of closing argument or in a way that interrupts a sympathetic witness. However, as understandable as those pressures may be, sitting on an appellate court has only solidified to me the importance of preserving the appellate record. At the Supreme Court, we feel the reality of the failure to make a record in a way that can be intensely frustrating. We often encounter litigants who may have been entitled to relief if their trial counsel had simply uttered two magic words: "I object."

Avoid Trial Counsel "Self-Representing" as Appellate Counsel

A misstep I have seen at the Supreme Court is when lawyers handle the appeals of their own trial cases. I do understand the pragmatism of this approach, but I am of the opinion that it should be avoided, if possible. When a trial lawyer conducts their own appeal, two issues can arise: first, myopia. Can anyone truly turn an unflinching and unbiased eye to their own work? Could you effectively make an argument against non-preservation or ineffective counsel when it was you, yourself, making those supposed errors? Second, a combination trial-appellate lawyer for the same case can unwittingly introduce evidence or add context that is outside the record. These attorneys are so immersed in the case that their memories—rather than the record—are at the forefront of their minds. We have had lawyers cite to hallway conversations, the way "we usually do things," and even discussions with judges that are

not reflected in the record. It is generally easier for a separate appellate lawyer to have fidelity to the record, because their only exposure to the case *is* the record.

Build an Accessible Appendix

First, if it is at all within your power, make the PDF files in your appendix searchable. If you do, all law clerks in the state will rise up and call you blessed, and the taxpayers of Nevada will thank you for their saved time. Second, err on the side of over-inclusion. Don't cite to a district court order that was argued at a hearing and then fail to include a transcript of the hearing in the record. Third, when you reference audio or video evidence as part of your appeal, make every effort to have the actual exhibits transmitted to the court. If applicable, specifically direct the court by use of the timestamps to where you want to direct our attention. Often, trial transcripts will reference *that* a trial exhibit video was played, not *what* the video showed. Your exhibits went to the jury room—please give them to the appellate court so we don't need to rely on your representations about their contents. Make it easy for the court to access the information that we need to understand your arguments.

Plan—Then Write—Your Brief

In my past article for this publication, I encouraged writers to prioritize brevity. That advice holds true today. Your brief is much more persuasive if you get to your points and state them as clearly as possible. The Nevada Supreme Court is one of the busiest appellate courts in the country, and a concise, clear brief can make a significant difference. In my 2013 article, I also spoke of the value of organizing, planning, and outlining extensively before writing. The difference between a well-planned brief and a circuitous (even if beautifully written, or witty, or incisive) brief is obvious to all readers at appellate courts, and the latter does little to advance your argument.

Something that should, perhaps, go without saying is the importance of supporting every single statement you make. The best briefs *never* reference a fact or legal concept without a citation to the record or relevant authority. Sentences without a reference to a case or the record stick out as if highlighted and raise concern with experienced readers.

To misquote Emily Dickinson: "Tell all the truth [and never] tell it slant." The last thing you want is a law clerk or judge incredibly disgruntled because your brief selectively quotes the record in misleading ways, misstates a past holding of our court, or cites a foreign authority without acknowledging that it is a minority view.

At the appellate level, each party has an opportunity to respond to the other's briefing (either in an Answering or Reply Brief). In your answer or reply, avoid extreme characterizations of the other party's briefing. If you call the opposing party's argument "ridiculous" or their recitation of facts "incomprehensible," make sure there's no possible way it can be seen as anything else. Your brief should lead its readers to have no concerns about your credibility, even if they disagree with your argument.

Oral Arguments—You Have Our Full Attention

In our court, many cases are resolved simply on the briefing. When they are not, we have oral argument because we think that there are issues that could be better understood through rhetorical discussion. Don't spend that time on your slam-dunk arguments or summarizing the underlying facts. If you aren't being asked questions, dive into the important issues you can flesh out further from your brief and assume we are familiar with the general facts and posture of the case. When you *are* asked questions, please be respectfully responsive to them, even if you disagree with the premise. Conceding what should be conceded can go a long way. If a hypothetical question is asked, do not fight the hypothetical that the justice or judge has set up! Answer the question under the hypothetical facts and *then* distinguish your own facts. Why would the hypothetical come out differently in your case? If you are asked something you don't know that is knowable (for example, whether one motion was filed before or after a certain hearing), offer to supplement or provide the information to the justices after the argument. Last, be mindful of your body language and expression—impatience, disgust, or performative disbelief are off-putting and not the best attitudes to manifest while trying to be persuasive.

Move for Reconsideration or Rehearing with Care

NRAP 40 permits petitioning the court for rehearing when the petitioner believes the court has "overlooked or misapprehended" the law or the facts. NRAP 40A permits petitioning the court for en banc rehearing in order to ensure the most important issues are heard by the full court, and to ensure uniformity between panels. This court has these options because we want to do right by litigants. If a mistake has been made, a lack of uniformity has been created, or this court misjudged the importance of an issue in assigning the case to a panel, we want to know! That said, do not waste your client's money, falsely raise their hopes, or damage your credibility through a frivolous motion for rehearing or reconsideration.

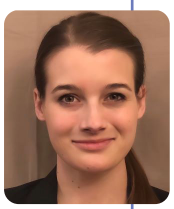
If you do file one of these motions, do not simply re-argue your appeal. We have your briefing. We know you think the case came out wrong—it was decided against you! If your motion is a restatement of your brief, that is an ineffective use of everyone's time. Instead, ground your argument for or against rehearing or reconsideration firmly in the standards in NRAP 40 and 40A.

I have, throughout my practice in Nevada, been impressed by the quality of advocacy in our state at both trial and appellate levels. The above advice is only a portion of what could be said about effective appellate work, but I hope it is useful to help you maintain your credibility, plan your writing and arguments carefully, and avoid some common pitfalls I have seen in the appellate courts.

ENDNOTES:

1. Hon. Lidia Stiglich & Zelalem Bogale, Esq., Writing to Judges ... Persuasively, *Nevada Lawyer*, October 2013, at 16.

The Honorable **LIDIA S. STIGLICH** currently serves as a Justice in the Nevada Supreme Court. Before joining the Supreme Court, Justice Stiglich served as a district judge in Nevada's Second Judicial District Court.



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