EFFECTIVE ADVOCACY
The Do's and Don'ts of Raising, Preserving, and Arguing Issues for Appeal

Justice Jim Nelson
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TRIAL

1. Appellate advocacy begins with trial counsel, when you first meet your client.
    a. Begin to build credibility for your client, for you, and for your case.
    b. Document and start building a record with a view toward preserving theories and issues.
    c. Think in terms of, "Is this a viable issue or theory to litigate and, if I lose, will it be viable on appeal?"
    d. Be timely with motions:
        i. If you need a continuance, move for one and demonstrate good and specific cause.
        ii. Put your motions in writing whenever feasible and be sure to obtain a ruling on them.
        iii. Don't waive your client's right to a speedy trial, right to be present at critical stages, or any other rights. She cannot be forced to waive one right in order to exercise another.
    e. Do your legal research:
        i. Tried and true issues and theories
            1. Point briefs to the court—cite cases, statutes
            2. Hold the State to its statutory obligations and time requirements.
            3. Hold the State to its burdens of going forward, proof, and persuasion.
        ii. Don't be afraid to think outside the box
            1. If your research supports a new theory, argue for it.
            2. Don't be afraid to point out where our cases are wrong or inconsistent.

3. Look at dissents and concurrences—just because it wouldn't fly in one case doesn't mean it won't in another where it has been raised and argued in the trial court.

4. Examples: Public Duty Doctrine; Rule 404(b)/transaction rule; Confrontation Clause

f. If you want to raise a constitutional issue, make sure it is raised in writing, briefed, and argued.

   i. The Supreme Court will want to avoid these if possible.

   ii. Make sure it is a good issue, not some throwaway—you simply invite the Court to make bad law.

g. Don't forget:

   i. Speedy trial concerns—demand promptly and repeatedly.

   ii. Critical stage concerns—make sure you and your client are joined at the hip when it comes to any in-court or in-chambers appearances. Your client is constitutionally entitled to be at all of these.

2. Object, Object, Object

   a. Objections must be specific—cite the rule, the statute, the case.

   b. Failure to object will lead to a decision that the issue or theory is waived.

   c. General and non-specific objections will not suffice.

   d. Don't assume that plain-error review will be available to correct your mistakes.

      i. It puts the ADO in a bad position.

      ii. It makes trial counsel look bad.

      iii. It provides grounds for an IAC claim on PCR.

   e. Object when the error is made—the contemporaneous-objection rule. Failing to do so may waive your claimed error.

   f. Make an offer of proof.

   g. Use motions in limine.

   h. Object during opening and closing arguments if there is improper argument.

i. Offer jury instructions that support your client's case and theory of defense.

    i. Failure to do so will waive the claim of instructional error.

    ii. Make sure the denied instruction is in the record.

    iii. Object to the State's or the court's instructions if they are incorrect.

    iv. Don't forget to request, if appropriate:

        1. Accomplice instruction

        2. Lesser included offense instruction

        3. Rule 404(b)/Rule 105 instruction

3. As you litigate, think like an appellate attorney.

    a. Even though ADO will likely handle the appeal, you are all on the same team.

    b. Keep in mind that you all are trying to get the best result for the client.

    c. Keep in mind that unless you lay the foundation and record for the appeal, then you've simply handed off a losing case to the ADO.

    d. And don't think that falling on your sword in an IAC claim is going to get your client anywhere—it won't.

APPEAL

1. Rule No. 1: Read, understand, and follow the Montana Rules of Appellate Procedure.

    a. Having to re-file a brief because it is deficient in some respect makes you look unprofessional and incompetent.

    b. Don't waste the Court's time drafting orders and returning briefs.

2. Almost all cases are decided on the basis of the briefs and at the panel level.

    a. It is imperative that your brief be able to convince the five Justices to whom the case is first assigned.

b. Credibility is everything—yours, your client's, your case. Without it you'll lose.

3. Briefs:

   a. Shorter is better.

   b. Make your table of contents accurate and useful to the reader—show the main headings and subheadings with accurate page numbers.

   c. Table of Authorities—make sure it is accurate as to citations and page numbers. Don't use *passim* if a case is cited extensively. Instead, give the range of pages in which the citations appear.

   d. Statement of the Issues

      i. Select your three best issues.

      ii. Argue your best issue first, and then your second best, etc.

      iii. Don't include throwaway issues—they hurt your credibility.

      iv. Frame your issues in terms of: the trial court erred in doing this or that, in not doing this or that, in allowing this or that, or in not allowing this or that. If the trial court didn't make a substantial error of law, then you don't really have much of an appeal.

   e. Statement of the case

      i. Keep it short and only recite the procedural points that are relevant.

      ii. Every motion and order and ruling probably is not relevant—and each unnecessary reference cuts down on your word count for argument purposes.

   f. Statement of the Facts

      i. Tell your story.

         1. The Court knows nothing about your case, so you have to tell your story to the Justices.

         2. Start at the beginning and go chronologically to the end. Don't start in the middle and go both ways simultaneously.

         3. Use short simple sentences.

         4. Use short paragraphs.

5. Use good grammar and punctuation, and be sure to check your spelling.
6. Make accurate references to the record on appeal for each fact. Include:
    a. Transcript page or pages
    b. Document
    c. Order
    d. Jury instruction refused or given
    e. Argument made
    f. Objection made
    g. If the Court wants to verify what you are stating, give them the precise place to find the fact you are articulating.
7. Include only those facts relevant to your appeal—every fact is not usually relevant. Again, the irrelevant facts cut down your word count for argument.
8. Acknowledge mistakes and errors made.
9. Don't construct your fact section around: Witness 1 said this; Witness 2 said this; Witness 3 said this; etc. It is very ineffective.
10. Avoid confusion.
11. If the reader has to read your opponent's brief to find out what the case is about—which occasionally happens—you are half way to losing.

g. Summary of the Argument
    i. Make it a discrete section.
    ii. Keep it short.
    iii. Cite the main statutes, cases, and rules you are relying on.
    iv. When I finish reading the summary, I should know basically what your arguments are and what your authority is.

h. Argument
    i. State your issues—the most important first.
    ii. State the standard of review.

iii. Make your argument.

1. Be professional.
2. No ad hominem attacks on the court or counsel.
3. Back up each argument with accurate citations to authority—statute, rule, case, constitution, the record.
4. Don't cite to memo or non-cite opinions—affects credibility.
5. Use short sentences and paragraphs.
6. Use subheadings.
7. Include accurate quotes of statutes and rules, rulings made, instructions given or refused, etc. Avoid long block quotes.
8. Do develop and present your arguments in your appellate brief. Don't try to incorporate by reference into your brief authorities, citations to deposition and trial testimony, or arguments contained in your filings before the trial court as a way to circumvent the Court's page limitations on briefing.
9. The goal is to lead the reader through your argument in a linear fashion from premise, to proof, to inevitable conclusion.
10. State your conclusion as to that issue in a short, summary paragraph.
11. Go to your second most important issue, etc.

i. Conclusion

i. Write a short conclusion that sums up your brief.

ii. Tell the Court what relief you want.

1. Reversal and remand for new trial
2. Reversal

j. Reply brief

i. Don't rehash your arguments.

ii. Do attack your opponent's arguments and authorities.

iii. Show how your opponent mischaracterizes authorities and the record.

iv. Do damage to your opponent's credibility.

v. Turn your opponent's arguments against him or her.

vi. Don't raise new issues.

k. Appendix

i. Must include the relevant judgment or order appealed from.

ii. Basic rules:

1. Don't include documents that the reader will not need to refer to when reading your brief.

2. Do include documents that the reader will need to refer to when reading your brief. If I'm reading your brief at home or in the car (which I frequently do), will I have everything I need in your brief and appendix to understand your case?

a. Jury instructions

b. A particular order or ruling by the court

c. Transcript pages supporting a claim of error

d. Findings of fact and conclusions of law from a hearing

e. Text of a statute

3. You probably do not need to include copies of cases—maybe only a page or two

4. Don't include in the appendix information that should be in the brief itself as a way to get around the Court's page limitations on briefing.

l. Overall briefing rules:

i. Be accurate

ii. Be fair

iii. Be professional

iv. Be short

v. Hit hard blows, but not foul ones

vi. Stick to the record on appeal—your chances to be original are few and will not usually be successful.

4. Oral argument

   a. Be prepared for questions and more questions and more questions.

      i. Don't come to the argument expecting to make a speech.

      ii. Don't try to control the structure of the discussion. Let the Justices control what they want to know. That's the whole point of oral argument.

      iii. If a judge throws you a soft ball, run with it. You can gauge where the judges are coming from—sort of—by their questions.

      iv. How you answer questions will determine the success of your appeal.

   b. Don't bother stating the facts—the Court knows them already.

   c. Argue your most important legal issue first.

   d. Let the Justice state the question, and then answer it fairly and directly.

   e. Don't dissemble or evade or answer a different question—you're not running for political office.

   f. Know your opponent's case as well as your own—read each case in your briefs and your opponent's briefs.

   g. The morning before your argument, do a Westlaw or Lexis search to make sure the Court has not handed down a decision on your issues since your briefs were filed. (If it has, then a notice of supplemental authority should be filed before our decision is rendered.)

   h. Don't be patronizing to the Court or individual Justices. Occasionally we ask stupid questions—just deal with it in a professional manner.

   i. Don't be afraid to disagree with a Justice—just be respectful about it.

   j. Don't use more time than is necessary.

   k. Don't split your time with someone else—it rarely works.

   l. Don't use props, charts, or PowerPoint.

   m. Easily said, but don't be nervous. We all put our pants and skirts on the same way—according to gender, of course; we've all been in your shoes.

n. Keep in mind that oral argument is the frosting on your client's cake or the final nail in her coffin. It's important; it changes opinions.

QUESTIONS