

Five Fifth Circuit Judges Offer Pointers on Appellate Advocacy

By Chad Ruback – (September 15, 2014) – Clarity. Brevity. Honesty.

Remember those are the three words when taking cases to the U.S. Court of Appeals for the Fifth Circuit, according to the judges on the other side of the bench.

On September 9, five judges from the Fifth Circuit gathered at the Belo Mansion in Dallas for a program hosted by the Dallas Bar Association's Business Litigation Section. In recent memory, this is the largest number of Fifth Circuit judges gathered together to share such tips outside of New Orleans, the city in which the court is based.

Judge Catharina Haynes, the only Fifth Circuit judge who maintains a chambers in the Dallas-Fort Worth area, noted that this was the most Fifth Circuit judges to gather in the area since the time of her 2008 investiture.

Judge Haynes, who served as the seminar's moderator, also remarked that the five participating judges are among the six most junior judges on the court and, as such, are expected to remain on the court for many more years. Consequently, as Judge Haynes indicated, these judges' preferences may be of particular interest to attorneys who practice before the court.

The judges were introduced by Thompson & Knight litigation partner Craig Haynes, who is chairman of the Business Litigation Section and is married to Judge Haynes.

In addition to Judge Haynes, the participating judges were Gregg Costa of Houston, Jennifer Elrod of Houston, James Graves of Jackson, Mississippi, and Stephen Higginson of New Orleans. The judges were readily agreeable with one another's suggestions, and no suggestion was met with any dissent.

Judge Graves light-heartedly continued to steer the other judges back to discussing his three pillars of appellate advocacy—clarity, brevity, and honesty. He also repeatedly reminded attendees



Judge Catharina Haynes

that appellate advocacy should be characterized by civility rather than rudeness or impoliteness.

Although not expressly stated by any of the judges, most of the tips they offered seemed to emphasize that there are no shortcuts to effective appellate advocacy.

Rather, drafting an effective appellate brief and preparing for an effective appellate oral argument are both quite time-consuming. The judges have extremely heavy workloads and are not pleased when an attorney doesn't dedicate enough time to the case, as this shifts to the judges some work, which should have been done by the attorney.

Although many of the judges' tips are mainstays at appellate continuing legal education seminars, the following three tips were not:

1. Draft your brief as if your audience was composed of well-educated laymen rather than lawyers. Doing so will make the brief much clearer.
2. If the disposition of one of your issues is governed by a particular fact or by a controlling opinion, you should try to include that fact or opinion in the issue presented section of your brief.
3. At oral argument, be prepared for a judge to ask: (a) what is the most critical fact in your case; (b) what is the most important opinion you rely upon; and (c) what is the rule of law you would like the court to adopt. >

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Although not new to regular attendees of appellate seminars, here are some other worthwhile tips offered by the judges:

1. It is extremely easy to waive error in federal court, much more so than in state court. So having a lawyer focused on error preservation in the trial court is invaluable.
2. When deciding which arguments to make on appeal, be certain not to make any weak arguments. If there is a weakness in your case, acknowledge it and explain why you should nevertheless win. Lack of candor is the single worst mistake that you can make in appellate advocacy. If you fail to acknowledge important facts or legal authority, the judges will certainly talk to their colleagues about you . . . and may even admonish you publicly when they issue their opinion.
3. Appellate judges are all generalists. Even those who had a specialty before taking the bench have since become generalists. Consequently, don't assume that the judges are familiar with a particular area of law. If your case involves an area of law that a generalist wouldn't know, include some background about the relevant law in your brief. Consider citing to well-known treatises for this background.
4. If you can't avoid using technical jargon or acronyms in your brief, be sure to define them.
5. If you indicate in your brief that something is in the record, be sure that it really is. Electronic records make it quite easy for judges to confirm the accuracy of your references to the record.
6. If you truly want oral argument, be sure that your brief explains in detail why oral argument is needed for your case. Boilerplate language is not helpful here.
7. Complete your appellate brief at least seven days before its filing deadline. Set your brief down for a couple of days and then re-read it. You will likely find areas for improvement that you would not have found if you hadn't taken a break from working on your brief. Also, ask someone unfamiliar with your case to read your brief and provide input as to what could be clarified.
8. In appellate briefing and at oral argument, don't say "I think," "I believe," or "it seems to me." The judges don't want your opinion. They want you to tell them what the law requires.
9. Unnecessarily criticizing the trial court judge is offensive to the appellate judges.
10. At oral argument, begin by letting the judges know what issues you intend to address and in what order. Then, when you are about to begin actually addressing one of those issues, let the judges know which issue are about to begin addressing.
11. At oral argument, (a) don't speak too quickly; (b) don't speak too quietly; (c) don't gesticulate too much; (d) don't be theatrical; and (e) don't be self-righteous or indignant.
12. At oral argument, don't ask questions of the judges. It is their job to ask you questions, not vice versa.
13. You can never be too prepared for oral argument. Know the record.
14. If asked to concede an obvious matter at oral argument, do so.
15. At oral argument, don't say "with all due respect." Judges perceive that as telling them you think that they are idiots.
16. At oral argument, be sure to directly address any question posed to you.
17. If, after filing your brief or making your oral argument, you realize that you have made a mistake (in citing to the record or the law), you should file a letter correcting your mistake. This will go a long way toward restoring your credibility with the judges.

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