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PUTTING IT ALL TOGETHER: LAW SCHOOLS' ROLE IN IMPROVING APPELLATE PRACTICE

*Stella J. Phillips**

I. INTRODUCTION

After clerking at the Arkansas Court of Appeals for more than a year now, I can say with confidence that law schools are teaching Arkansas lawyers the substantive law they need to write good appellate briefs. Often, however, these lawyers make good substantive arguments that fail only because of misunderstandings about, or neglect of, appellate court practices. Judges are often forced, by rule or convention, to decide against a litigant simply because of their lawyer's errors. The Academy of Appellate Lawyers has recognized this problem in other states as well, reporting that

too many appellate briefs reflect ignorance of critical elements of the appellate process. . . . Lawyers who do not understand these concepts . . . present cases with too many issues, the wrong issues, or no legitimate issues at all. These briefs . . . show little or no understanding of how appellate judges analyze cases and make decisions.¹

Why do so many lawyers with worthy arguments lack the vital knowledge about appellate practice that will allow judges to rule in their favor, and what are we to do about this problem? Should we offer more appellate-practice CLEs or create different bar admissions standards for appellate lawyers?² Perhaps. But another solution might be to carefully integrate more teaching of basic appellate practices into substantive law school classes. After all, legal writing professors often incorporate substantive law in their curricula to teach brief-writing and appellate advocacy. Why, then, could not professors in

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1. *Statement on the Functions and Future of Appellate Lawyers*, 8 J. APP. PRAC. & PROCESS 1, 11 (2006) [hereinafter JAPP].

2. JAPP *supra* note 1, at 12–15 (suggesting improvements for future appellate practice).

doctrinal courses weave strands of appellate practice into their curricula?

Some may question the need for this integration when entire law school classes are already devoted to procedure—both civil and criminal—and many legal writing classes address appellate practice. These questions are justified in the interest of efficient uses of time and resources. But perhaps integrating more appellate practice instruction into substantive classes will allow students to keep the relationship between the two concepts fresher in their minds. Substance and appellate procedure, which affect one another and are part of one body of law, would then be less separated conceptually in students' minds. Maybe then appellate briefs would reflect the substantive learning of lawyers.

But why, some would ask, spend time on appellate practice at all? Don't only a handful of lawyers actually practice appellate law as a specialty? Not really. All trial lawyers should try their cases with an eye toward a potential appeal. After all, half of the litigants who go to trial will lose. If the trial lawyer fails to lay a good foundation for a potential appeal, the client will lose in the appellate court too. Furthermore, "[a]n ethical, well-informed appellate lawyer is the first line of defense against irrationality, waste, and pettiness in the appellate process."³

II. FOUR CRITICAL MISTAKES IN CURRENT APPELLATE PRACTICE

In my time at the Arkansas Court of Appeals, I have observed lawyers making a few critical mistakes in their appellate practice. These mistakes probably occur in other state courts as well. The broader suggestions of this article, therefore, may also work beyond Arkansas despite interstate differences in appellate standards and procedures. Sections A, B, C, and D of this article will examine in detail these four critical failings in current practice and make suggestions for addressing them in substantive law courses.

First, many appellants' lawyers do not seem to understand that only some orders may be appealed. If the lower court's order is not final, or among the types of non-final orders that can be appealed, then the appellate court will dismiss the appeal for lack of jurisdiction, regardless of its merits. Second, appellants often lose their appeals because the issues about which they argue (even when they argue persuasively) have not been preserved in the lower court for appellate

3. JAPP *supra* note 1, at 4.

review. Third, many appellants are unsuccessful because they frame their arguments without reference to the appropriate standard of review. This standard is the lens through which the appellate judges evaluate the lower court's order and is often outcome-determinative. Finally, the pressure of clients' expectations and filing deadlines often leads lawyers to become careless when preparing their briefs—careless in their adherence to court rules, in writing style and tone, and in the brief's overall presentation.

Each of these mistakes is avoidable. Before filing a notice of appeal to an appellate court, lawyers should ask themselves two questions: Do I have an appealable order? If so, has the issue I have identified for appeal been preserved for review? If the answers are yes, lawyers should further ask themselves: What is the appellate court's standard of review, and have I framed my argument in those terms? And if so, have I followed the appellate rules and composed a good, careful brief? Only after asking and answering affirmatively all these questions should the lawyer file the brief.

These problems in appellate brief writing can, and should, be addressed in substantive law school classes. Some of the mistakes, such as arguing from an inappropriate standard of review, must be addressed differently depending on the particular substance of the class. Others, such as failing to preserve issues for appeal or careless brief-writing, can be addressed similarly in almost every class. Below are more thorough discussions of these problems and some suggestions for correcting them in substantive law school courses. Creative and dynamic law school professors can use these suggestions as starting points to expand their teaching techniques to include aspects of appellate practice.

A. Do I Have an Appealable Order?

1. *Understanding the Appealability Rule*

An appellate lawyer's first task is to identify the correct order from which to appeal. Finding an appealable order is crucial because the appellate court must consider the issue of appealability *sua sponte* to determine whether it has jurisdiction even if the parties themselves do not raise the issue.⁴ Some interlocutory orders are appealable. For example, if the court enters an order that, in effect, determines the action and prevents a judgment from which an appeal may be taken,

4. *Roberts v. Roberts*, 70 Ark. App. 94, 95, 14 S.W.3d 529, 530 (2000).

the party against whom the order was entered may immediately appeal.⁵ Similarly, orders that grant or refuse new trials, strike answers or pleadings, disqualify attorneys from participation in the case, grant or deny class certifications, and grant, continue, modify, refuse, or dissolve an injunction are immediately appealable.⁶ Appellants' lawyers must be able to quickly recognize those orders and act before the time to appeal has expired.

Usually, however, a losing party may appeal only from a final order or judgment.⁷ That order must dispose of all of the parties and claims in the case before the lower court—otherwise it is not appealable.⁸ For example, in *Roberts*, a divorce case, the court dismissed the appeal because the parties had agreed, before the appeal, that further decisions were required before the court could distribute their marital property; thus, the divorce decree was not final.⁹ Moreover, the appellant must specifically identify that order and the appealing parties in the notice of appeal,¹⁰ otherwise the case will be dismissed.¹¹ Adhering to the appealable-order rule avoids piecemeal litigation and promotes efficiency,¹² helping the courts save time and resources.

Generally, it is relatively easy to find the order from which a party must appeal. But some cases require more careful attention to the exact terms of the lower court's judgment. Civil appeals must arise from a lower court order that settles all the parties' issues and "put[s] the trial court's directive into execution, ending the litigation, or a separable branch of it."¹³ Thus, the order must dismiss all of the parties from the court, discharge them from the action, or conclude their rights to the subject matter in controversy.¹⁴ If it does not do so, then the case may be dismissed on finality grounds. Such was the case in

5. ARK. R. APP. P. — CIV. 2(a).

6. *Id.*

7. One "exception" to the finality rule involves cases in which the circuit court may, in its discretion, issue a certificate under Arkansas Rule of Civil Procedure 54(b) explaining to the appellate court why an immediate appeal of a final judgment affecting only some of the claims or parties is warranted. See John J. Watkins, "The Mysteries of Rule 54(b)," at ARK. L. NOTES 117 (1996).

8. *Roberts*, 70 Ark. App. at 95-96, 14 S.W.3d at 530-31.

9. *Id.* at 96, 14 S.W.3d at 531.

10. Ark. R. App. P. — Civ. 3(e); Ark. R. App. P. — Crim. 2(a)(4).

11. *Farmers & Merchants Bank of Rogers v. Deason*, 300 Ark. 30, 31, 775 S.W.2d 909, 910 (1989) (stating, in dicta, that the attempted notice of appeal was ineffective because it failed to mention the order appealed from and omitted a party's name).

12. *Id.*

13. *Roberts*, 70 Ark. App. at 95.

14. *Id.*

Downing v. Lawrence Hall Nursing Center,¹⁵ where the administrator of an estate had filed a wrongful-death action against a nursing home, hospital, and several other unidentified “John Doe” defendants.¹⁶ The circuit court dismissed the action against the nursing home and hospital on the ground that Downing did not have standing to bring the action; the court did not, however, address the John Does in its dismissal order.¹⁷ Thus, the Arkansas Supreme Court lacked jurisdiction to hear the case on its merits for lack of an appealable order.¹⁸

Similarly, from a practical standpoint, if a court’s decision does not conclude the merits of the case, then the appeal is premature and will be dismissed for lack of jurisdiction.¹⁹ In *Doe v. Union Pacific Railroad*, for example, the court dismissed the appeal because the lower court’s ruling did not end the litigation.²⁰ The appellant argued that the court’s order on her Motion for Leave to File Under Seal—to preserve her anonymity—was final because disclosure of her identity would divest her of a substantial right and the Arkansas Supreme Court would then be unable to place her in her former condition.²¹ The supreme court disagreed, ruling that nothing indicated that the appellant could not or would not prosecute her case without anonymity.²² She only showed was that it would be emotionally difficult for her to pursue her lawsuit in her own name.²³ Because there was no evidence that burdensome and meaningless litigation would result without an immediate appeal, the appeal was premature, and the court dismissed it without prejudice.²⁴

Criminal cases generally follow the same rule. A defendant may appeal from a conviction within thirty days of the entry of the judgment and commitment order or from an order denying certain post-trial motions.²⁵ Guilty pleas and pleas of no contest usually may not be appealed.²⁶ The exceptions to that general rule, however, should make criminal appellate lawyers cautious as they decide whether to enter a

15. 368 Ark. 51, 243 S.W.3d 263 (2006).

16. *Id.* at 52, 243, S.W.3d at 264.

17. *Id.*

18. *Id.* at 53–54, 243 S.W.3d at 265–66.

19. *Doe v. Union Pac. R.R. Co.*, 323 Ark. 237, 240, 914 S.W.2d 312, 314 (1996).

20. *Id.* at 242, 914 S.W.2d at 315.

21. *Id.* at 239, 914 S.W.2d at 312.

22. *Id.*

23. *Id.*

24. *Id.* at 242, 914 S.W.2d at 315.

25. Ark. R. App. P. — Crim. 1 and 4(a).

26. ARK. R. APP. P. — CRIM. 1(a); ARK. R. CRIM. P. 24.3(b), 26.1.

guilty plea and whether to subsequently appeal.²⁷ Criminal appellate lawyers should also remember to appeal from an order of conviction, not just an adverse ruling on a motion that does not result in conviction.²⁸ Pre-trial evidentiary rulings, for example, are not appealable, as was illustrated in *Butler v. State*,²⁹ where the defendant tried to appeal the circuit court's order that he submit to blood and saliva tests.³⁰ The court dismissed his appeal because that pre-trial ruling was not appealable.³¹

Finally, lawyers must be sure that the lower court's order contains all the information that is required to make it appealable. In a suit to quiet title to property, for example, the order must include a specific description of the land; otherwise, it is not appealable.³² Similarly, the court will dismiss an appeal about a claim to an easement if the circuit court's order purportedly quieting title did not specifically describe the easement's boundaries.³³ Furthermore, in adverse possession cases, the order must dispose of all of the possible claimants, not just some of them.³⁴ In *Koonce v. Mitchell*,³⁵ the Arkansas Supreme Court reversed and dismissed a lower-court judgment because it found that neither it nor the lower court had jurisdiction of a quiet-title action because the record owners were not given notice or made parties to the action below.³⁶ If the order does not contain the elements required to appeal, the potential appellant must take some intermediate action to obtain an appealable order before filing the notice of appeal.

27. *E.g.*, ARK. R. CRIM. P. 24.3(b) (permitting withdrawal of a guilty plea if defendant reserved the right to challenge, on appeal from a conviction, an adverse ruling on a pretrial motion to suppress certain evidence); *Green v. State*, 362 Ark. 459, 209 S.W.3d 339 (2005) (reaching, on appeal, an issue that was neither a part of the accepted guilty plea nor part of sentencing terms that were an integral part of accepting the guilty plea); *Bradford v. State*, 351 Ark. 394, 94 S.W.3d 904 (2003) (holding that the defendant, who entered a guilty plea, could appeal an allegedly illegal sentence imposed at a separate sentencing proceeding); *Hill v. State*, 318 Ark. 408, 887 S.W.2d 275 (1994) (reviewing non-jurisdictional issues arising in the penalty phase of a bifurcated trial where the defendant entered a guilty plea).

28. *Butler v. State*, 311 Ark. 334, 338, 842 S.W.2d 435, 438-39 (1992).

29. *Id.* at 338, 842 S.W.2d at 439.

30. *Id.* at 336, 842 S.W.2d at 437.

31. *Id.* at 338, 842 S.W.2d at 439.

32. *Petrus v. Nature Conservancy*, 330 Ark. 722, 727, 957 S.W.2d 688, 690 (1997).

33. *Id.*

34. *Koonce v. Mitchell*, 341 Ark. 716, 718, 19 S.W.3d 603, 605 (2000).

35. 341 Ark. 716, 19 S.W.3d 603 (2000).

36. *Id.* at 716, 719, 19 S.W.3d at 603, 606.

2. *Suggestions for Substantive Courses Regarding Appealability*

There are many ways to address the issue of appealability in substantive law school courses. It is important, for example, for professors to point out the many kinds of final orders that may be entered in various cases. By making students aware of the variety of appealable orders, professors will better prepare future lawyers to spot those orders in their practice. An explanation of the appealable-order rule is particularly important for first-year students because first-year classes tend to be more abstract and academic than other classes that highlight litigation between parties. Therefore, it is important that students learn early in their law-school careers what a final appealable order from a real case will look like.

Family law classes present a good opportunity to teach students about the appealable order rule. Circuit court judges enter a handful of common orders in domestic relations cases—divorce decrees, custody orders, grants of guardianship, alimony and child-support awards, terminations of parental rights, and dependency-neglect adjudications—only some of which are appealable. Knowing which of these orders are appealable is especially important under the recently revised Arkansas Supreme Court Rule 6-9, which allows an appeal from adjudication orders, review orders, some permanency planning orders,³⁷ terminations of parental rights, and denials of the right to appointed counsel.³⁸ The new rule is referenced in Arkansas Rule of Appellate Procedure—Civil 2, which lists the orders from which a litigant may appeal. Under subsection (c)(3), in juvenile cases where an out-of-home placement has been ordered, some orders are appealable.³⁹ Family law practitioners, especially those involved in juvenile cases, should become familiar with this new class of appealable interlocutory orders in dependency-neglect cases.

Family law classes also highlight the requests spouses commonly make when seeking a divorce—child support, alimony, property division—and issues that may arise during the proceedings that could prevent an appealable order.⁴⁰ The final decree must dispose of all the

37. Permanency planning orders are appealable if the court enters a final judgment as to one or more issues or parties based on its express determination, supported by factual findings, that there is no just reason to delay the appeal. ARK. SUP. CT. R. 6-9.

38. ARK. SUP. CT. R. 6-9.

39. Ark. R. App. P. — Civ. 2(c)(3).

40. *See Allen v. Allen*, 99 Ark. App. 292, 259 S.W.3d 480 (2007) (stating, in dicta, that the divorce decree appealed from was not final because it did not specifically

parties' claims and address each of the parties' requests, leaving no obligations pending until other hearings take place.⁴¹ For example, in *Allen v. Allen*,⁴² a recent divorce case, the court of appeals reversed and remanded a divorce decree stating, in dicta, that it was not final.⁴³ Because the decree did not specifically state the amount that the appellant had to pay the appellee, it gave rise to further litigation and the appellate court could not rule on that issue.⁴⁴ Reminding students of this requirement could help prevent dismissals in important family law cases on appeal.

Professors in substantive law courses could also identify the common procedural postures for cases in their particular legal area. Students, especially first-year students, are often ignorant of the variety of procedural postures that may arise in actual cases. Rulings on summary-judgment motions or post-trial motions may lead to orders that seem somewhat different than a judgment on the merits of a civil or criminal case. Civil procedure classes are ideal for pointing out these types of orders. Professors in those classes could show students copies of final orders in various types of cases and point out any appealable interlocutory orders that were entered throughout the case. Criminal law professors may also remind students that they must appeal from an order of conviction, not just an adverse ruling on a pre-trial motion.⁴⁵ Finally, it would be helpful for professors in most substantive courses to point out what information certain orders must contain to be appealable. In property classes, for example, the professor should point out what a final order in a quiet title or adverse possession suit must include to be appealed.⁴⁶ Also, in adverse possession cases, professors should remind students that the order must dispose of all possible claimants, not just some of them.⁴⁷

state the amount appellant had to pay appellee, thereby giving rise to further litigation).

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *See* *Butler v. State*, 311 Ark. 334, 338, 842 S.W.2d 435, 438-39 (1992) (dismissing appeal of pretrial order for murder defendants to submit to blood and saliva tests).

46. *See* *Petrus v. Nature Conservancy*, 330 Ark. 722, 957 S.W.2d 688 (1997) (dismissing claim to easement because the circuit court's order purportedly quieting title did not specifically describe the easement's boundaries).

47. *See* *Koonce v. Mitchell*, 341 Ark. 716, 718, 19 S.W.3d 603, 605 (2000) (reversing and dismissing a lower court judgment because neither that court nor the supreme court had jurisdiction of a quiet-title action in which the record owners were not given notice or made parties to the action).

By teaching students about the pitfalls they will encounter as they try to appeal, professors will help the courts—and future lawyers—save time and resources as they serve litigants. Once students understand the appealability rule, they will be better prepared as lawyers to consider the next issue in a potential appeal—preservation.

B. Has the Issue on Appeal Been Preserved for Review?

1. *Understanding Preservation*

Lawyers often make the mistake of appealing an issue that is not preserved for review. If an appellant makes a persuasive argument that the lower court has erred in its judgment, then an appellate court may reverse that ruling. Appellate courts, however, are not simply “do over” opportunities for losing parties. They are more like “safety-nets” for litigants—catching only reversible lower court errors. Because of that limited role, appellate courts will not rule on issues that the trial court never had an opportunity to address. Thus, before they file their notices of appeal, appellate lawyers must determine what issues the court will rule upon and what parts of the record it will use to make those decisions.

Unlike in some other states and in federal courts, Arkansas courts generally do not reverse on an unpreserved issue even if there is plain error in the record.⁴⁸ Therefore, even extremely important issues, like constitutional rights, must first be raised at the lower court level to be considered on appeal.⁴⁹ The few exceptions to this rule focus primarily on issues affecting the appellate court’s subject-matter jurisdiction and therefore, may be raised at any time during the case, including on appeal, even if not raised below.⁵⁰ If, for example, the circuit court enters a sentence that was illegal on its face, the appellate court may modify that sentence even if the defendant raises the issue for the first time on appeal.⁵¹

To properly preserve an argument for appeal, litigants must clearly and specifically set forth the grounds of their objections or motions

48. *Pharo v. State*, 30 Ark. App. 94, 100–01, 784 S.W.2d 64, 68 (1990).

49. *Green v. State*, 330 Ark. 458, 468, 956 S.W.2d 849, 854 (1997) (affirming a murder conviction and attempted-murder conviction over the defendant’s arguments about jury instructions and self-defense because those arguments were not raised in the trial court).

50. *Mayer v. State*, 351 Ark. 26, 29, 89 S.W.3d 926, 928 (2002).

51. *Id.* at 29–30, 89 S.W.3d at 928–29.

in the lower court.⁵² On appeal, the appellant cannot change the nature or scope of that argument.⁵³ For example, assume that the defendant's lawyer objects to testimony as hearsay. The plaintiff's lawyer then might argue that the testimony is an "admission" under Arkansas Rule of Evidence 801(c)(2). Suppose the circuit court excludes the testimony. The plaintiff's lawyer must advise the court, on the record, of what the testimony would have been if allowed⁵⁴ and file an appeal after the judgment. But if the plaintiff's lawyer argues on appeal that the testimony should have been admitted under the Rule 803(2) "excited utterance" exception to the hearsay rule, then the appellate court will not rule on the issue. Why? Because, even though the trial lawyer argued and received a ruling on hearsay grounds, the argument and ruling below had a different basis (admission exemption) than the one on appeal (excited utterance exception). Because the lower court never decided whether the statement fell under the excited utterance exception, the appellate court will not second-guess its decision.

It is also crucial that the objection or motion be made at the time the alleged error occurs in the lower court.⁵⁵ This contemporaneous-objection rule ensures prompt attention to an error, rather than allowing it to be compounded by later events. Moreover, litigants have the burden of obtaining a clear ruling from the lower court on their motion or objection to preserve that issue for appeal.⁵⁶ "[Q]uestions left unresolved are waived and may not be relied upon on appeal" even if the party raised the issue below.⁵⁷

The preservation rule serves several useful purposes. If a party objects immediately to a ruling, then the trial court, which is in the best position to avoid and correct error, may hear the arguments and change its decision at that time. Changing the ruling soon after it occurs, rather than waiting for an appeal, saves litigants and the judicial system time and resources. Additionally, it would be unfair to reverse a judgment on appeal based on arguments that the prevailing party never had the chance to meet at trial. Finally, the preservation re-

52. *E.g.*, *Tosh v. State*, 278 Ark. 377, 380–81, 646 S.W.2d 6, 8–9 (1983); *Casteel v. State Farm Mut. Auto. Ins. Co.*, 66 Ark. App. 220, 223–24, 989 S.W.2d 547, 549 (1999).

53. *Fields v. State*, 81 Ark. App. 351, 358, 101 S.W.3d 849, 855 (2003).

54. Advising the court in this way is known as a "proffer." See discussion *infra* Part II.B.2.

55. *Fields*, 81 Ark. App. at 58, 101 S.W.3d at 855.

56. *White v. Davis*, 352 Ark. 183, 186, 99 S.W.3d 409, 412 (2003) (affirming trial court's dismissal because the appellant failed to get a ruling on his objection to the venue of a hearing on the motion for a new trial).

57. *Id.*

quirement also prevents “sandbagging” by lawyers who might take unnecessary risks at trial knowing that, even if they lose, they can use a reversible error to escape an adverse decision. By making it likely that the trial court—rather than the appellate court—will determine the case’s outcome, the preservation rule encourages trial lawyers to prepare and perform more carefully, rather than rely on an appellate opportunity to correct their mistakes.

2. *Suggestions for Substantive Courses Regarding Preservation*

As with the appealable-order rule, there are many ways for law professors to teach their students about preserving lower-court error. They might, for example, point out to students when specific motions and objections must be made in the cases they discuss in class. Evidence classes and procedure classes are ideal for those instructions. When teaching students about how to preserve error, it is helpful to break trials into three periods—pre-trial, trial, and post-trial. Among the objections and motions that must be made before trial are motions to dismiss for insufficient service of process or lack of personal jurisdiction, motions to sever criminal offenses, motions for summary judgment, and motions to suppress evidence in criminal trials.⁵⁸ If these types of objections and motions are not made before the case comes to trial, the issues are waived on appeal.⁵⁹ Another set of motions and objections must be made at trial—on the record when the alleged error occurs—but not after. It includes objections to exhibits, testimony, and the like.⁶⁰ Finally, certain motions can only be made within a certain period of time after the court enters its order. They include motions for a judgment notwithstanding the verdict, motions for a new trial, and motions to vacate or set aside a judgment.⁶¹ By highlighting the times at which various motions and objections must be made, professors truly help their students become better appellate lawyers and prevent many important arguments from being abandoned in the lower court.⁶²

58. *E.g.*, ARK. R. CRIM. P. 22.1 (motion to sever offenses); ARK. R. CIV. P. 12(h) (motions to dismiss); ARK. R. CIV. P. 56 (motion for summary judgment); ARK. R. CRIM. P. 16.2(b) (motion to suppress evidence).

59. *Id.*

60. *Mills v. State*, 321 Ark. 621, 623–24, 906 S.W.2d 674, 675 (1995).

61. *E.g.*, ARK. R. CRIM. P. 33.3(b) (post-trial motions); 37.2(c) (post-conviction petitions for relief); ARK. R. CIV. P. 59(b) (motions for a new trial); ARK. R. CIV. P. 60(a) (motions to vacate judgment).

62. See J.T. Sullivan, *Ethical and Effective Representation in Arkansas Capital Trials*, 60 ARK. L. REV. 1 (2007).

Besides noting *when* particular motions and objections must be made, professors can also help their students identify *what* issues are commonly raised on appeal. Evidentiary rulings are frequently challenged on appeal. Thus, professors in all law school classes, and particularly in evidence class, have an opportunity to remind students about raising a specific, contemporaneous, evidentiary objection and getting a specific ruling on the record.⁶³

Professors should also alert their students to the proffer rule. Denials of motions to admit evidence must be accompanied by a “proffer”—a record showing—of what the evidence would be if it was admitted by the judge.⁶⁴ Violations of the proffer rule doom many appellate cases because if there is no proffer of the evidence, then the appellate court cannot rule on the trial court’s refusal to admit it.⁶⁵ In *Tauber v. State*,⁶⁶ for instance, the court affirmed a DWI conviction without even reviewing the trial court’s refusal to allow a defense witness to testify because the defendant did not proffer that testimony.⁶⁷

The proffer rule also applies to alleged errors in refusing to give jury instructions. The requested jury instructions must be proffered if the court refuses to give them.⁶⁸ Lower-court decisions about jury instructions are often appealed, and whether the refused instruction was proffered can determine the appellate court’s decision. Similar to its decision in *Tauber*,⁶⁹ the Supreme Court of Arkansas in *Watson v. State*⁷⁰ held that the trial court’s failure to give a jury instruction on a lesser-included offense of second-degree battery was not reversible because *Watson* did not make a record proffer of the instruction he was requesting.⁷¹

Criminal law classes also present a good opportunity for teaching about preserving the record. Appellate lawyers for criminal defendants must, therefore, remember the requirements for challenging convictions on the basis of insufficient proof. It is important for criminal law professors to explain that appealing a criminal case is not simply a matter of filing a notice of appeal from a judgment. To chal-

63. *White*, 352 Ark. 183, 99 S.W.3d 409 (2003); ARK. R. EVID. 103(a)(1).

64. ARK. R. EVID. 103(a)(2); *see Tauber v. State*, 324 Ark. 47, 50, 919 S.W.2d 196, 197 (1996).

65. *See Tauber*, 324 Ark. at 49–50, 919 S.W.2d at 197–98.

66. 324 Ark. 47, 919 S.W.2d 196 (1996).

67. *Id.* at 49–50, 919 S.W.2d at 197–98.

68. *See Watson v. State*, 329 Ark. 511, 512, 951 S.W.2d 304, 305 (1997).

69. 324 Ark. 47, 919 S.W.2d 196 (1996).

70. 329 Ark. 511, 951 S.W.2d 304 (1997).

71. *Id.* at 512, 951 S.W.2d at 305.

lenge the sufficiency of the State's evidence on appeal, the defendant in a jury trial must have moved for a directed verdict, first at the close of the State's case, and again at the close of all evidence.⁷² Furthermore, in his motions, the defendant must have specified what aspects of the State's evidence were deficient.⁷³ In *Newman v. State*,⁷⁴ the court affirmed a capital-murder conviction because Newman's motion for a directed verdict merely stated that the "testimony did not 'reflect' all of the elements of capital murder."⁷⁵ Similarly, in *Eastin v. State*,⁷⁶ the court affirmed drug convictions when the defendant's directed-verdict motion stated only that the State lacked sufficient proof for a prima facie case.⁷⁷ This is not enough. The point of this requirement, which appellate courts strictly construe, is to allow the State to reopen its case and present the missing proof.⁷⁸

Litigants deserve fair trials, and they hope for a fair appeal if they challenge a lower court's ruling. Making students aware of common appellate arguments while reminding them of the preservation rule will focus their minds on the important relationship between the two stages of the case—lower court and appellate court. Remembering that relationship is crucial; lawyers who fail to do so may do their clients a disservice by foreclosing a reversal on waived points. If, however, the appellate points are preserved, the appellants have overcome the first hurdle to a reversal on the merits. The next step is to consider the appellate court's standard of review.

C. Have I Framed My Argument in Terms of the Applicable Standard of Review?

1. *Understanding the Standard of Review*

One of the most overlooked, but important, aspects of appellate practice involves the standard of review. Most lawyers know that in criminal cases, the state must prove each element of the charged offense beyond a reasonable doubt. And most of them know that a civil plaintiff has a lower burden of proof. However, those standards apply

72. Ark. R. Crim. P. 33.1(a).

73. ARK. R. CRIM. P. 33.1(c); see *Newman v. State*, 353 Ark. 258, 281, 106 S.W.3d 438, 453 (2006).

74. 353 Ark. 258, 106 S.W.3d 438 (2006).

75. *Id.* at 281, 106 S.W.3d at 453.

76. 370 Ark. 10, 257 S.W.3d 58 (2007).

77. *Id.* at 15, 257 S.W.3d at 62–63.

78. See *id.*

to lower court proceedings, not appeals. Lawyers sometimes fail to realize that appellate courts rule not only on the merits of a case but also on the lower court's rulings about those merits. Appellate judges are not necessarily smarter, more experienced, or better decision-makers than trial judges. Appellate judges do not simply re-decide the case on appeal. Instead, an appellate court's job is remedial—it corrects preserved and reversible errors that occurred in the lower court. Thus, lawyers should know how much deference an appellate court will give to a lower court's decision if it is appealed. This degree of deference—the standard of review—is often dispositive in appeals, and thus, it warrants a lawyer's careful attention.

In some cases, appellate courts give considerable deference to the lower court. When the issue is a matter of fact, for example, the trial court or the jury is in the best position to evaluate the evidence and witnesses. Thus, the appellate court will give great weight to those fact-finder's decisions.⁷⁹ In other cases, however, appellate courts scrutinize the lower court's decision much more closely. When the issue on appeal is solely a matter of law, the appellate court will give little or no deference to the lower court, which is in no better position than an appellate court to make decisions about the law.⁸⁰ If brief-writers can determine which standard of review applies to their case, then they can better tailor their briefs to fit the evaluative level of the appellate court. If, however, appellants proceed under the wrong standard of review, then they may present facts and arguments in a way that, even if persuasive to the court, will not win a reversal.

Determining which standard applies is important because appellants must succinctly state in their brief the standard of review for each issue in their appeal.⁸¹ Sometimes the applicable standard of review is obvious; in other cases, it is less clear. And, sometimes, the issue on appeal is a complex question for which it is possible to argue two standards of review. Furthermore, there are special standards for reviewing the decisions of certain state agencies and for special types of orders. In general, however, four main standards—*de novo*, clearly erroneous, abuse of discretion, and substantial evidence—predominate in Arkansas law.

79. *Dinkins v. Ark. Dep't of Human Services*, 344 Ark. 207, 213, 40 S.W.3d 286, 291 (2001) (reversing and remanding trial court's termination of parental rights).

80. *Guerrero v. OK Foods, Inc.*, 94 Ark. App. 333, 335, 230 S.W.3d 296, 297 (2006) (holding that the intentional-tort exception to exclusive-remedy workers compensation doctrine did not apply to certain employers).

81. Ark. Sup. Ct. R. 4-2(a)(7).

Questions of law—constitutional or statutory interpretation issues, for example—are reviewed by the appellate court *de novo*.⁸² A *de novo* review allows the appellate court to look at the entire record and essentially re-decide the case.⁸³ It is the least deferential standard of review because the appellate court is not required to give any weight to the lower court's judgment.⁸⁴ The clearly-erroneous standard is much more deferential. In cases where an appellate court looks for clear error—such as appeals of a circuit court's factual findings—it will not reverse the lower court's judgment unless it has a firm and definite belief that the lower court made a mistake.⁸⁵ The abuse-of-discretion standard of review is similarly deferential—to reverse a case because the lower court abused its discretion, the appellate court must find that the lower court acted “improvidently, thoughtlessly, or without due consideration”⁸⁶ or made an error of law.⁸⁷ The substantial-evidence standard is also common in appeals—it is often seen in appeals of criminal convictions. Under that standard, appellate courts determine whether the lower court's judgment is supported by evidence of sufficient force and character to compel a conclusion one way or the other with reasonable certainty, without speculation or conjecture.⁸⁸

Interestingly, in Arkansas courts, the *de novo* standard is sometimes used in combination with the other standards. The formulation might look something like: We review termination-of-parental-rights cases *de novo*, and reverse only if the lower court clearly erred.⁸⁹ In these circumstances, the “*de novo*” seems to define the *scope* of the review, rather than the *standard* of review. It means that the court will review the entire record, rather than just the parts of the record that support the lower court's judgment.⁹⁰ Clear error, however, seems to

82. *Guerrero*, 94 Ark. App. at 335, 230 S.W.3d at 297.

83. *See id.*

84. *Id.*

85. ARK. R. CIV. P. 52; *see*, *Dinkins v. Ark. Dep't of Human Services*, 344 Ark. 207, 213, 40 S.W.3d 286, 291 (2001).

86. *Grant v. State*, 357 Ark. 91, 93, 161 S.W.3d 785, 786 (2004) (affirming murder and battery conviction over hearsay objection to dying-declaration testimony).

87. *See*, *Ford Motor Co. v. Nuckolls*, 320 Ark. 15, 20–21, 894 S.W.2d 897, 900 (1995). (reversing and remanding a grant of a new trial in a products-liability case because the order was based on a legal error about evidence).

88. *Hudson v. State*, 53 Ark. App. 111, 112, 919 S.W.2d 518, 519 (1996) (affirming drug-delivery conviction).

89. *Dinkins*, 344 Ark. at 213, 40 S.W.3d at 291.

90. *Compare Hudson*, 53 Ark. App. 111, 919 S.W.2d 518 and *Dinkins*, 344 Ark. 207, 40 S.W.3d 286.

be the standard of review. The court will only reverse the lower judgment if it is firmly convinced of a mistake.⁹¹ In addition to these four general standards, appellate judges apply special standards to certain kinds of final orders. An order granting summary judgment, for example, is reviewed to see whether the evidence presented by the moving party left any question of material fact unanswered.⁹² The appellate court will view the evidence in the light most favorable to the non-moving party and will resolve all doubts and inferences against the moving party.⁹³

Appeals that come from state administrative agencies may also be subject to special standards of review. For example, an appellate court must affirm a workers' compensation commission decision if "reasonable minds could reach the Commission's conclusion."⁹⁴ It does not matter whether the appellate court would have decided the case differently had the case been before it in the first instance. Unless the court determines that the commission's ruling was unreasonable, then the court must affirm.⁹⁵ Workers' compensation appellants, therefore, cannot just re-present their evidence to the appellate court. Instead, under this highly deferential standard, an appellate brief must focus on the unreasonableness of the commission's decision.⁹⁶ The appellant's goal is to persuade the appellate judges that no reasonable person could have interpreted the evidence in the way that the commission did.⁹⁷

2. *Suggestions for Substantive Courses Regarding Standards of Review*

Professors teaching substantive law school classes have many opportunities to point out the relevant standards of review to their stu-

91. *Dinkins v. Ark. Dep't of Human Services*, 344 Ark. 207, 213, 40 S.W.3d 286, 291 (2001).

92. *Rice v. Tanner*, 363 Ark. 79, 82, 210 S.W.3d 860, 863 (2005) (affirming summary judgment in malpractice case because none of the decedent's heirs-at-law were joined as parties before the statute of limitations ran).

93. *Id.*

94. *Lloyd v. United Parcel Service*, 69 Ark. App. 92, 94, 9 S.W.3d 564, 565 (2000) (reversing and remanding a Workers' Compensation Commission order that an employee is entitled to benefits for carpal tunnel syndrome).

95. *Id.*

96. *See Barnes v. Greenhead Farming*, 101 Ark. App. 129, 130, 270 S.W.3d 873, 874 (2008).

97. The standard is the same in employment benefits cases. *Tate v. Director of Dep't of Workforce Services*, 100 Ark. App. 394, 269 S.W.3d 402 (2007).

dents. A simple explanation—even a mere mention—of the applicable standards will remind law school students about the appellate court’s lens, and make it easier for them to draft a persuasive brief. Depending on the type of class, law professors can be more or less explicit about the standard of review that applies.

In workers’ compensation or employment law classes, for example, professors would be well-advised to teach the standard of review specifically because it will be the same in almost every appeal from the workers’ compensation commission. Thus, students in those classes should learn, and professors should teach, that the appellant’s goal is to persuade the appellate judges that no reasonable person could have interpreted the evidence in the way the commission did.

Family law classes also present a good opportunity for teaching the standards of review commonly applied to domestic cases. These appeals sometimes evoke great sympathy from judges who may feel strongly about issues related to divorce and child custody. No matter how emotionally persuasive an appellant’s brief is, however, appellate judges must affirm some decisions unless they are left with “a definite and firm conviction that a mistake has been made.”⁹⁸ Appellate courts give greater deference to the lower courts in child-custody cases because it is there that the lower court had the opportunity to use all its powers of perception to the fullest extent to evaluate witnesses, their testimony, and the child’s best interest.⁹⁹ Lawyers, therefore, must grasp the importance of not just convincing the appellate judges not just that the lower court’s decision is incorrect, but also *firmly convincing* them that no reasonable lower court judge could have applied the law to the facts in that way.¹⁰⁰

Criminal law classes provide a good opportunity for professors to teach about the substantial evidence standard that is used to review criminal convictions challenged solely on the sufficiency of the evidence. In those cases, the appellate court must affirm the lower court’s decision if the conviction is supported by evidence of sufficient force and character to compel reasonable minds to reach that conclusion and pass beyond suspicion and conjecture.¹⁰¹ When reviewing the conviction, the appellate court looks at the evidence in the light most fa-

98. *Dinkins*, 344 Ark. at 213, 40 S.W.3d at 291.

99. *Word v. Remick*, 75 Ark. App. 390, 394, 58 S.W.3d 422, 424–25 (2001) (affirming child-custody modification).

100. *E.g.*, *Prows v. Ark. Dep’t of Health & Human Services*, 101 Ark. App. 205, ___ S.W.3d ___ (2008); *Downum v. Downum*, 101 Ark. App. 243, ___ S.W.3d ___ (2008).

101. *King v. State*, 100 Ark. App. 208, 209, 266 S.W.3d 205, 208 (2007).

avorable to the State¹⁰²—it does not even consider evidence that weighs against the defendant's guilt. The fact that there is some reasonable doubt about the conviction will not win a reversal because the State, as the appellee, does not have to re-prove the defendant's guilt. The State need only show that there is substantial evidence of that guilt.¹⁰³ Criminal appellants have a steep hill to climb, and professors should teach their students that simply revealing the weaknesses of the State's proof will not automatically win a reversal. Instead, the appellant's lawyer in these cases has the heavy burden of showing that there was little or no evidence to support the conviction.¹⁰⁴

Criminal law, criminal procedure, and evidence classes are good places to teach the standard of review for evidentiary rulings. If, for example, a criminal appeal depends on an evidentiary ruling, then the appellant must tailor its argument for that issue to a different standard of review. Decisions about evidence are left to the trial court's discretion, and appellate courts will not reverse that decision unless it represents an abuse of discretion.¹⁰⁵ Though unusual, reversals for an abuse of discretion do occur if the appellate lawyer can compose a brief that convinces the appellate court that the lower court's decision is groundless or contains an error of law.¹⁰⁶

In multi-issue appeals, each issue potentially has a different applicable standard of review. Thus, each case may present a thicket of issues and related standards through which appellate lawyers must maneuver as they frame their arguments. The point here is not to provide an exhaustive list of all the standards of review in Arkansas or explain in-depth any one of them—other resources are available for that.¹⁰⁷ The point is that these standards exist and that they are too important to ignore when writing an appellate brief. Understanding the relevant standards of review will help students remember the appellate court's lens and make it easier for them to draft a persuasive, *careful* brief when they become lawyers.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Phavixay v. State*, 373 Ark. 168, ___ S.W.3d ___ (2008), *reh'g denied* *Phavixay v. State*, No. CR07-585, 2008 WL 2206206 (Ark. May 29, 2008); *Lee v. State*, 102 Ark. App. 23, ___ S.W.3d ___ (2008).

106. *Phavixay*, 373 Ark. 168, ___ S.W.3d ___.

107. *See* ARKANSAS BAR ASSOCIATION, *HANDLING APPEALS IN ARKANSAS* (2007).

D. Have I Followed the Appellate Rules and Composed a Good, Careful Brief?

1. *Understanding the Importance of Care*

Appellate briefs must be careful—that is, they must be full of care. Lawyers labor under extreme time pressure—filing deadlines and hearing dates always seem to be looming. Appellate judges, clerks, and other court employees, however, are as time-limited as attorneys, and their patience is often worn thin by reading careless briefs and petitions. When faced with the prospect of wading through a brief that is disrespectful, full of typos, inaccurate, nonconforming, or messy, the reader may look to the other party's brief for a clearer presentation of the case. Moreover, they might be tempted to regard the sloppiness of the brief as an indication of the credibility and caliber of the argument within it. Thus, a lawyer's sacrifice of care to get an appellate brief timely filed pays no real reward. Additionally, appellants, who usually begin the appeal as the underdog because of the standard of review, put themselves at an even greater disadvantage by filing careless briefs. There are, however, some lessons that students can learn to help them prepare appellate briefs that will be truly appealing.

First, appellants must know and adhere to court rules about the content, composition, and filing of appellate briefs. When certain court rules or orders particularly apply to a subject matter, lawyers must be aware of them. The Arkansas Rules of Civil and Criminal Procedure are obviously relevant and important. Equally important, however, are the Arkansas Rules of Appellate Procedure—Civil and Criminal, the Supreme Court Rules, and the administrative orders that affect appellate briefs. Lawyers dealing with evidentiary issues should look not only to the Federal Rules of Evidence, but also the Arkansas Rules of Evidence.

Disregarding the requirements of those rules can be fatal to an appellate argument, and a flagrant disregard could even lead to sanctions.¹⁰⁸ For example, in *Baker v. Baker*,¹⁰⁹ the court of appeals dismissed an appeal because the appellant did not follow Arkansas Rule of Appellate Procedure—Civil 6(b).¹¹⁰ The appellee in that case had

108. *King v. State*, 312 Ark. 89, 91, 847 S.W.2d 37, 38–39 (1993) (cautioning appellant for flagrantly deficient abstract).

109. 43 Ark. App. 56, 858 S.W.2d 157 (1993).

110. *Id.* at 57, 858 S.W.2d at 157–58 (dismissing appeal where the appellant failed to order additional parts of the record designated by the appellee pursuant to ARK. R.

designated additional parts of the record to be brought up on appeal.¹¹¹ When the appellant failed to order those additional parts, the appellate court dismissed.¹¹² In *Lackey v. Mays*,¹¹³ the court of appeals ordered a re-briefing where the appellant made numerous errors in the abstract and addendum and was improperly argumentative in parts of the brief, such as the informational statement, that needed to be objective.¹¹⁴

Besides the technical requirements for briefs, appellants must pay attention to the completeness of their arguments. Generally, an appellate court is only bound to review matters that are briefed and argued by the appellant.¹¹⁵ Some appellants lose because they fail to address all of the grounds of the lower court's decision. When the trial court expressly bases its decision on multiple independent grounds and the appellant challenges only one of those grounds, the appellate court may affirm the lower court's decision without addressing any of the appellant's grounds for appeal.¹¹⁶ That was the case in *Pugh v. State*,¹¹⁷ in which the court refused to reverse an evidentiary ruling on relevancy grounds because the circuit court excluded the evidence on hearsay grounds as well.¹¹⁸ Additionally, litigants may lose their appeals because they fail to show the prejudice resulting from the error they allege.¹¹⁹ Unless the appellant can show the appellate court how it was damaged by the lower court's ruling, the court will have no reason to remedy the alleged error.¹²⁰

Another appellate-practice error is the disrespectful tone taken by some brief writers. An inappropriate tone usually results from ignorance about the appellate court's limited role. Appellants must be sensitive to this role, keeping in mind the court's hesitancy to overstep its constitutional and institutional boundaries. Appellate judges, for

APP. P. — CIV. 6(b)); *Calaway v. Dickson*, 360 Ark. 463, 201 S.W.3d 931 (2005) (ordering rebriefing for failure to abstract a hearing in accordance with ARK. SUP. CT. R. 4-2).

111. *Baker*, at 56–57, 858 S.W.2d at 157.

112. *Id.* at 57, 858 S.W.2d at 157.

113. 100 Ark. App. 386, 269 S.W.3d 397 (2007).

114. *Id.* at 386, 269 S.W.3d at 398.

115. Ark. R. App. P. — Crim. 14.

116. *See Pugh v. State*, 351 Ark. 5, 11, 89 S.W.3d 909, 912 (2002).

117. 351 Ark. 5, 89 S.W.3d 909 (2002).

118. *Id.* at 11, 89 S.W.3d at 912.

119. *Webb v. Thomas*, 310 Ark. 553, 559, 837 S.W.2d 875, 878 (1992) (declining to address the trial court's refusal to admit video-taped transcript when the appellant's brief did not suggest any prejudice from the alleged error).

120. *Id.*

example, are almost always cautious in overruling precedent.¹²¹ In *Chamberlin v. State Farm Mutual Auto Insurance*,¹²² the supreme court explained the court's hesitancy to overrule precedent, saying:

The policy of *stare decisis* is designed to lend predictability and stability to the law. It is well-settled that “[p]recedent governs until it gives a result so patently wrong, so manifestly unjust, that a break becomes unavoidable.” Our test is whether adherence to the rule would result in “great injury or injustice.”¹²³

Particular judges may feel bound by personal or institutional loyalty to past decisions or the judges who decided those cases. Brief-writers must recognize that reality, as well as the “colleague factor,” and remember that judges are being reviewed by their peers as well as the parties. Appellants should also note that the court of appeals is bound to follow United States and Arkansas Supreme Court precedent.¹²⁴ Thus if an appellant wants a supreme court case overturned, only that court—not the court of appeals—may do so.

Furthermore, judges are often hesitant to “make law” and thus be labeled judicial activists. Often they will be more inclined to alert the general assembly to a statutory problem rather than interpret an existing law to mean something that, by its terms, it does not.¹²⁵ A good example of this reluctance is found in *Sowers v. St. Joseph's Mercy Health Center*,¹²⁶ where the court rejected the contention that charitable immunity violated the Arkansas Constitution, and for the second time called on the General Assembly to consider whether charitable immunity should be abolished.¹²⁷ Appellants should respect the democratic aspects of the judicial system and not ask an appellate court to “rewrite” statutes.

Finally, it goes without saying that appellate briefs should be free of typographical errors, misstatements, and inaccuracies (especially in citations to authority and pertinent facts). Punctiliousness is not re-

121. See *Chamberlin v. State Farm Mut. Auto. Ins.*, 343 Ark. 392, 397–98, 36 S.W.3d 281, 284 (2001) (citations omitted).

122. 343 Ark. 392, 36 S.W.3d 281 (2001).

123. *Id.* at 397–98, 36 S.W.3d at 284.

124. *Brewer v. State*, 68 Ark. App. 216, 221, 6 S.W.3d 124, 127 (1999) (declining to adopt the Arizona requirement for medical expert testimony about the defendant's emotional propensity to act in a pedophile case).

125. *Sowers v. St. Joseph's Mercy Health Center*, 368 Ark. 466, 477, 247 S.W.3d 514, 522 (2007); *Guerrero v. OK Foods Inc.*, 94 Ark. App. at 333, 336, 230 S.W.3d 296, 298 (2006).

126. 368 Ark. 466, 247 S.W.3d 514 (2007).

127. *Id.* at 477, 247 S.W.3d at 522.

quired, but is admired, as is neatness and an agreeable aesthetic appearance.¹²⁸

2. *Suggestions for Substantive Courses Regarding Composition*

Professors have opportunities to teach about the importance of carefulness in every law school class. Remember: law school is a professional school. Students should learn to regard their course work as the first work product of their legal careers. Professors should stress the importance of a professional appearance in course work and on exams—correct spelling, grammar, and citations. When certain court rules or orders particularly apply to a subject matter, professors could simply make students aware of them. For example, evidence professors should direct students not only to the Federal Rules of Evidence, but also the Arkansas Rules of Evidence. In Civil Procedure classes, students should be aware of the applicable Rules of the Arkansas Supreme Court and Court of Appeals as well as the Rules of Civil Procedure. And, to foster effective brief-writing, professors might point out to students how judicial opinions often reflect the appellate briefs. Criminal law students, for example, might benefit from considering how the court's depiction of the defendant in its final opinion reflected the defendant's presentation in the briefs. These suggestions may seem too burdensome or time-consuming for law professors and students alike. But the fact that so many lawyers have disregarded care, precision, and accuracy in their briefs indicates a need for greater emphasis on these practices when possible in law school.

III. CONCLUSION

Teaching more appellate practice in substantive law-school classes is a practical solution to a serious problem. Law school professors and students of the law—those in law school and those who continue to study as academics and practitioners—have the duty and privilege of improving the body of law with their attention to appellate practice. Moreover, following the rules and paying attention to details are parts of an attorney's ethical obligation to competence.¹²⁹ Lawyers are integral parts of the court system. They are the allies of the courts "in promoting fair and efficient appellate justices, as guardians of the integrity of the appellate process, . . . and as members of a primarily

128. Coleen M. Barger, *How to Write a Losing Brief*, 30 THE ARKANSAS LAWYER 10 (Spring 1996); Alex Kozinski, *The Wrong Stuff*, 1992 BYU L. REV. 325 (1992).

129. ARK. R. OF PROF'L CONDUCT 1.1.

self-regulated profession capable of advancing and adopting reforms that improve the administration of justice.”¹³⁰ As the late Judge Richard S. Arnold said, our courts should be “places where anybody can come in and say, ‘I am a human being. I am here. . . . I have law. . . . So judge my case’”¹³¹ Good appellate practice helps make our courts these places by allowing appellate judges to decide a case on its merits, rather than its procedural flaws.

130. JAPP *supra* note 1, at 2.

131. Shirley S. Abrahamson, *The Old Order Changes*, 8 J. APP. PRAC. & PROCESS 77, 81 (2006).

