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COMPETENT APPELLATE ADVOCACY AND CONTINUING LEGAL EDUCATION: FITTING THE MEANS TO THE END

D. Franklin Arey, III*

Competence is demanded of every attorney. The very first rule of the Model Rules of Professional Conduct makes this command: "A lawyer shall provide competent representation to a client."¹ If the primary function of an attorney is to competently and vigorously represent the interests of his client, then competence should be a primary concern.²

To maintain and enhance this competence, an attorney should engage in continuing study and education.³ Continuing legal education (CLE) programs are often justified as a method for promoting competence.⁴ Even though the ability of CLE programs to maintain and enhance competence remains subject to debate, as of 1995 more than two-thirds of the states required some form of CLE for their attorneys.⁵

What does this all mean in the appellate practice context? Is appellate advocacy a distinct form of litigation, such that it merits special CLE programs? If so, what "competence" in

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1. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1 (1995).

2. Ruggero J. Aldisert, *The Appellate Bar: Professional Responsibility and Professional Competence—A View From the Jaundiced Eye of One Appellate Judge*, 11 CAP. U. L. REV. 445, 446 (1982) [hereinafter Aldisert, *Professional Competence*].

3. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1 cmt. (1995).

4. Rocio T. Aliaga, Comment and Current Development, *Framing the Debate on Mandatory Continuing Legal Education (MCLE): The District of Columbia Bar's Consideration of MCLE*, 8 GEO. J. LEGAL ETHICS 1145, 1153 (1995); see Lisa A. Grigg, Note and Comment, *The Mandatory Continuing Legal Education (MCLE) Debate: Is It Improving Lawyer Competence or Just Busy Work?*, 12 BYU J. PUB. L. 417, 427 (1998).

5. Aliaga, *supra* note 4, at 1145 n.1, 1156-63.

appellate advocacy should we attempt to promote? And what CLE programs will promote competency in appellate practice?

This essay is my attempt to address these questions. My goals are to contribute to an understanding of what constitutes competent appellate advocacy and to describe some CLE programs that promote that competence. On the advocacy side, I readily confess to needing to practice what I preach. Nonetheless, after having an opportunity to evaluate appellate advocacy from both sides of the bench, I am convinced that a continuing emphasis on the basics is necessary to maintain the bar's competence in appellate advocacy. I am not alone in this belief.⁶ This essay highlights some examples of CLE programs that emphasize these basics in a variety of formats.

One cautionary note: I know that I am preaching to the choir, in a sense. Many of the points made are accepted among appellate advocates. But my purpose is not merely to repeat what experienced appellate litigators already know. Rather, I propose to identify the knowledge and skills that ought to be taught through CLE programs to others who are not as experienced in appellate litigation, so that we can promote competent appellate advocacy among the bar as a whole. I don't want to preach to the choir; I want the choir to consider what and how we ought to be preaching to others.

I. IS APPELLATE ADVOCACY RECOGNIZED AS A SPECIALTY?

It would seem appropriate to structure CLE programs to promote competence in appellate advocacy, if this form of advocacy is recognized as a specialty. On this point there does not seem to be much debate: Appellate advocacy is recognized as a distinct form of litigation. It is worthwhile to briefly explore why this is so, especially from the judiciary's point of view.

Appellate judges are emphatic in their belief that appellate litigation is a specialized field. For example, Senior Judge Ruggero Aldisert of the Third Circuit Court of Appeals insists

6. See Aldisert, *Professional Competence*, *supra* note 2, at 446-47, 455-56; Committee on Appellate Skills Training, American Bar Ass'n, *Appellate Litigation Skills Training: The Role of the Law Schools*, 54 U. CIN. L. REV. 129, 133 (1985) [hereinafter Committee, *Appellate Litigation Skills*]; Laurence H. Silberman, *Plain Talk on Appellate Advocacy*, LITIGATION, Spring 1994, at 3, 60.

that “[a]ppellate advocacy is specialized work. It draws upon talents and skills which are far different from those utilized in other facets of practicing law.”⁷ Judge Aldisert notes that appellate lawyers deal primarily with the law and only with professional judges, whereas trial lawyers primarily address facts with an audience of lay jurors. In his view, a trial lawyer can resort to emotional appeals, take days or even weeks to present a case, and rely largely on oral communications skills to examine witnesses and argue his case. In contrast, the appellate lawyer must present a reasoned argument, is limited in page numbers and oral argument time, and communicates primarily through a written brief.⁸

Other appellate judges echo these comments. The late Supreme Court Associate Justice Robert H. Jackson observed that “some lawyers, effective in trial work, are not temperamentally adapted to less dramatic appellate work.”⁹ Judge Laurence H. Silberman of the District of Columbia Circuit agrees: “[T]he skills needed for effective appellate advocacy are not always found—indeed, perhaps, are rarely found—in good trial lawyers.”¹⁰ He believes that “[p]ersuading juries takes different forensic and analytical skills than persuading appellate judges.”¹¹

Appellate judges recognize that improved appellate advocacy increases the chance for better decisions. Judge Aldisert emphasizes the importance of improving the competence of the appellate bar because appellate decisions have the force of law, and the quality of those decisions can be affected by the quality of appellate advocacy.¹² Senior Judge Myron H. Bright of the Eighth Circuit Court of Appeals notes that better briefs not only improve a client’s prospects, but also

7. RUGGERO J. ALDISERT, *WINNING ON APPEAL: BETTER BRIEFS AND ORAL ARGUMENT* § 1.1, at 3 (Nat’l Inst. for Trial Advoc. rev. ed. 1996) [hereinafter ALDISERT, *WINNING ON APPEAL*].

8. *Id.* § 1.1, at 4-6.

9. Robert H. Jackson, *Advocacy Before the United States Supreme Court*, 37 CORNELL L.Q. 1, 3 (1951).

10. Silberman, *supra* note 6, at 3.

11. *Id.*

12. Aldisert, *Professional Competence*, *supra* note 2, at 454-55.

improve the work of the court.¹³ Judge Silberman shares these views:

Skilled advocacy improves the quality of our decisions. The best judges, in my view, truly believe that there is a right answer to any case. As imperfect beings, judges may not always find that right answer. But the search is what makes the task worthwhile. Otherwise, we are little more than old politicians in black robes. The better the lawyers, on both sides of a case, the more likely it is that a judge will arrive at, or at least come close to, the right answer.¹⁴

Other judges have also acknowledged this correlation between the quality of appellate advocacy and the quality of the court's own work.¹⁵

Many members of the appellate bar also maintain that appellate practice is a specialty.¹⁶ For example, Dennis Owens argues that an appellate specialist should be retained to handle an appeal.

The chief reason is simple: An appellate attorney can do a better job because he is a specialist. Such a lawyer knows the appellate court's rules, customs, and judges. More important, appellate lawyers know how to write a brief and make an oral argument, and do both efficiently and quickly. . . .

. . . It takes concentration and training to master a specialized part of the law, and appellate practice is just that.¹⁷

This assertion could be dismissed as self-serving, but for the fact that a number of appellate judges steadfastly hold the same

13. Myron H. Bright, *Appellate Briefwriting: Some "Golden" Rules*, 17 CREIGHTON L. REV. 1069, 1069 (1984).

14. Silberman, *supra* note 6, at 60.

15. See, e.g., John C. Godbold, *Twenty Pages and Twenty Minutes—Effective Advocacy on Appeal*, 30 SW. L.J. 801, 807-08 (1976) (the author is Senior Judge on the United States Court of Appeals for the Eleventh Circuit); Paul R. Michel, *Effective Appellate Advocacy*, LITIGATION, Summer 1998, at 19 (Judge Michel sits on the United States Court of Appeals for the Federal Circuit).

16. See Dennis Owens, *New Counsel on Appeal?*, LITIGATION, Spring 1989, at 1; see also Kevin Dubose, *Standards of Appellate Conduct: Insight into Their Creation and Purpose*, 62 TEX. B.J. 558 (1999). Mr. DuBose further describes the new Texas code of appellate ethics in this issue of the *Journal*. See Kevin Dubose, *Standards for Appellate Conduct Adopted in Texas*, 2 J. APP. PRAC. & PROCESS 191 (2000).

17. Owens, *supra* note 16, at 1.

view. As the ABA Committee on Appellate Skills Training noted, "Appellate litigation should be recognized . . . as a discrete and important area of litigation requiring knowledge and skills different than trial litigation."¹⁸

Recognition of appellate advocacy as a specialty manifests itself on a number of fronts. Five states presently certify specialists in appellate practice.¹⁹ The Texas Supreme Court and Court of Criminal Appeals recently adopted a set of Standards of Appellate Conduct.²⁰ As noted later in this essay, many CLE programs are geared just to appellate litigation. Indeed, the journal you are reading focuses on appellate practice and procedure.

No one should automatically discount any attorney's ability to handle an appeal just because he does not routinely engage in appellate work. All experts had to start somewhere. Judge Silberman notes that "sheer intelligence will take an attorney a long way" towards mastering appellate advocacy.²¹ On the other hand, appellate advocacy involves far more skills than the ability to conduct legal research²² or other skills taught in the typical law school appellate advocacy or moot court program.²³ While a general practitioner can perform competently with proper study and application, appellate practice should still be treated as a specialty. It is not work to be undertaken lightly.

Recognizing appellate advocacy as a specialty justifies CLE programs to promote competence in the field. At least two important goals would be served. If improving the quality of appellate advocacy can help to improve appellate decision-making and opinions, as Judge Aldisert and others suggest, then by all means we should strive to promote competence in this

18. Committee, *Appellate Litigation Skills*, *supra* note 6, at 153. Although the Committee addressed its comments to legal educators, these comments are certainly applicable in this context as well.

19. Melissa M. Serfass, *Standards for Certification of Appellate Specialists*, 1 J. APP. PRAC. & PROCESS 381, 381 (1999).

20. Dubose, *supra* note 16, at 560.

21. Silberman, *supra* note 6, at 3.

22. See ROBERT J. MARTINEAU, MODERN APPELLATE PRACTICE: FEDERAL AND STATE CIVIL APPEALS § 11.13, at 171 (1983).

23. Committee, *Appellate Litigation Skills*, *supra* note 6, at 141-47. See William H. Kenety, *Observations on Teaching Appellate Advocacy*, 45 J. LEGAL EDUC. 582 (1995); Frank Tuerkheimer, *A More Realistic Approach to Teaching Appellate Advocacy*, 45 J. LEGAL EDUC. 113 (1995).

specialty. Further, competent appellate advocacy serves the interests of our clients. To the extent CLE programs can promote such competence, they are a tool that should be utilized.

II. WHAT CONSTITUTES COMPETENT APPELLATE ADVOCACY?

It is not enough to simply call for CLE programs that enhance appellate practice competence. There should be some standard or goal that we hope to promote. What do we mean by "competence" in appellate practice? We should identify the specific traits, abilities, and practices that constitute competent appellate advocacy. This is the ambitious task of this section of the essay.

Rule 1.1 gives some assistance in defining competence: "Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."²⁴ The comment to the rule reiterates the importance of adequate knowledge, skills, thoroughness, and preparation; these requirements vary with the complexity of the matter at stake, the lawyer's experience, the preparation and study he can devote to the matter, and the possibility of association with or referral to a more competent lawyer in the field in question.²⁵ The comment also notes the possibility that a novice in a field can become competent to undertake a matter: "A lawyer can provide adequate representation in a wholly novel field through necessary study."²⁶

The Committee on Appellate Skills Training turned to another American Bar Association report for a definition of competence.²⁷ The Committee's summary of this other report is worth quoting:

As the Cramton Committee has suggested, the development of a competent lawyer involves three components:

24. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1 (1995).

25. *See id.* cmt.

26. *Id.*

27. Committee, *Appellate Litigation Skills*, *supra* note 6, at 131 n.1, 134-35, 136 (citing REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON LAWYER COMPETENCY: THE ROLE OF THE LAW SCHOOLS, 1979 A.B.A. SEC. LEGAL EDUC. & ADMISSIONS TO BAR). The Committee referred to this other report as the Cramton Committee Report. *See id.* at 134-35, 136.

knowledge about law and institutions, fundamental skills, and the ability and motivation to apply both knowledge and skills to the task. The required knowledge is further defined in that committee's report as knowledge about relevant law—legal concepts, doctrine, and rules—and about legal institutions—their procedures, powers, and limits. Fundamental skills involve written and oral communication in a variety of specialized settings.²⁸

This summary is similar in focus to rule 1.1 and its comment. There is a common emphasis on knowledge and skills that is worth developing further.

Before turning to specifics, note Judge Ruggero Aldisert's test for competent appellate advocacy: "A lawyer in a federal appellate court should know as much about the procedural and substantive precepts governing his case as a circuit judge's junior law clerk would know upon reading the lower tribunal's opinion and a basic treatise on the subject."²⁹ Judge Aldisert regretfully adds that many lawyers fail this test;³⁰ one suspects this is not a commentary on the superior quality of junior law clerks.

With these general considerations of the meaning of competence in mind, what specific knowledge and skills characterize competent appellate advocacy? I propose examination of three categories of tasks, abilities, or practices the appellate litigator typically encounters: (1) preliminary concerns; (2) brief writing; and (3) oral argument. My goal is not to suggest the right answer or method of approaching tasks in these categories, although that might occur incidentally; rather, I want to identify knowledge and skills that could be the subject of CLE programs designed to enhance competent appellate advocacy.

A. Preliminary Concerns

How attorneys address certain preliminary concerns can affect the credibility that courts assign to their work. Many of the decisions made before the attorney's pen hits the paper

28. *Id.* at 136.

29. Aldisert, *Professional Competence*, *supra* note 2, at 455.

30. *Id.*

govern what occurs in brief writing or at oral argument, or whether an appeal is even taken at all. At the very least, attorneys should be aware of these concerns and give them due consideration.

The first concern, of course, is deciding whether to appeal. Blindly pursuing an appeal can be detrimental to more than the outcome of the case: “[A] case which should not be appealed but is appealed nevertheless immediately deflates the credibility factor for the lawyer. The legal acumen and professional judgment of the lawyer is automatically suspect.”³¹ Instead, before making a decision, competent appellate advocates will consider factors such as the possibility of success, the length of time needed to complete an appeal, and the financial costs involved.³²

In considering whether to appeal, attorneys must understand appellate courts as an institution. If their jurisdictions contain an intermediate appellate court and a supreme court, for example, they must determine which of those courts can address the issues raised and relief sought. This determination requires not only an understanding of applicable court rules, but also an understanding of the concepts of “error correction” and “law development” as appellate court functions, the relationship between intermediate appellate and supreme courts, and any distinctions between them.³³

If an appeal is to be taken, the record must be reviewed for error. “The skill that is perhaps the most important and unique to the appellate litigator is that of developing and working with the record on appeal.”³⁴ The record must demonstrate that the issues were properly preserved.³⁵ Further, not all errors matter: The appellate courts only care about reversible error, not harmless error.³⁶

31. William F. Causey, *The Credibility Factor in Appellate Brief Writing*, 99 F.R.D. 235, 236 (1984).

32. See ALDISERT, *WINNING ON APPEAL*, *supra* note 7, §§ 1.2, 1.3; Godbold, *supra* note 15, at 803-05.

33. See MARTINEAU, *supra* note 22, §§ 1.8, 1.9, 1.11.

34. See Committee, *Appellate Litigation Skills*, *supra* note 6, at 139.

35. Leonard I. Garth, *How to Appeal to an Appellate Judge*, LITIGATION, Fall 1994, at 20, 21 (Senior Judge Garth sits on the United States Court of Appeals for the Third Circuit).

36. See Christian A. Fisanick, *Travelogue of Appellate Practice*, LITIGATION, Summer

Appellate advocates must next exercise discretion and objective detachment in deciding which of these issues will be raised on appeal. One consistent admonition decries the “kitchen sink” approach of raising every conceivable issue on appeal.³⁷ “A storm of arguments—good, bad, and indifferent—can convince the judges that there is no merit to the case, even if buried in the deluge is a winning nugget.”³⁸ A competent appellate advocate will evaluate the issues accordingly, “select[ing] with dispassionate and detached mind the issues that common sense and experience tell him are likely to be dispositive. He must reject other issues or give them short treatment.”³⁹

Competence requires appellate litigators to consider other hurdles before they begin writing. Does the case present an appealable order?⁴⁰ Will jurisdiction otherwise be proper in the appellate court?⁴¹ Can the attorney navigate the “statutes, rules of procedure, and judicial doctrines that govern what and when a litigator must do to represent a client effectively in the appellate process”?⁴² Moreover, can the attorney devote the time and resources necessary to bring this appeal, or would it be better to refer it to another lawyer?

Many of these preliminary concerns require skills that can only be refined through experience. Nonetheless, awareness of

1997, at 49, 64; Michel, *supra* note 15, at 19.

37. ALDISERT, WINNING ON APPEAL, *supra* note 7, § 8.4; Bright, *supra* note 13, at 1071; Causey, *supra* note 31, at 237-38; Gary L. Sasso, *Appellate Oral Argument*, LITIGATION, Summer 1994, at 27. Andrew L. Frey and Roy T. Englert, Jr., offer a defense to judicial complaints of this nature:

When appellate judges lament—as they frequently do—the unnecessary length of some of the briefs they see, they may not appreciate fully that a lawyer cannot, as a judge can, simply settle on a single true path to the desired result.

Andrew L. Frey & Roy T. Englert, Jr., *How to Write a Good Appellate Brief*, LITIGATION, Winter 1994, at 6, 8.

38. Silberman, *supra* note 6, at 4.

39. Godbold, *supra* note 15, at 809.

40. Bright, *supra* note 13, at 1069-70; Godbold, *supra* note 15, at 805.

41. Aldisert, *Professional Competence*, *supra* note 2, at 465-67.

42. Committee, *Appellate Litigation Skills*, *supra* note 6, at 138. Rules can govern matters such as the notice of appeal, brief requirements, interlocutory and cross appeals, extraordinary relief such as mandamus, motions, and rehearing. *Id.* Relevant doctrines that may not be reduced to rules include issue preservation, standards of review, plain and harmless error, and parties on appeal. *Id.* At the very least, an attorney must be able to identify those occasions when these rules and doctrines come into play.

these concerns, coupled with the study and consideration necessary to address them, can go a long way to enhancing appellate advocacy competence.

B. Brief Writing

Competent appellate advocates approach brief writing conscious of the importance that briefs have in the context of the appellate court's work. Appellate judges have a tremendous caseload that does not permit misuse of their time.⁴³ In addition, briefs have for some time supplanted oral argument as the primary means of communicating with these courts.

[T]he roles of the brief and oral argument have been reversed. The brief is the central feature of modern appellate practice. This dramatic change, although discussed in a number of recent articles by judges on busy appellate courts, has not been recognized by many attorneys. . . . The appellate attorney must understand that *the brief affords the principal and perhaps the only opportunity he will have to present arguments on behalf of his client to the appellate court.*⁴⁴

In this environment, competent appellate advocates understand that effective brief writing is required.

The attorney must accomplish two tasks through the brief: (1) inform the appellate court about the case; and (2) persuade it that the attorney's position is correct.⁴⁵ The court's need to be informed cannot be neglected. "Generally, the brief that best helps the court understand the case is the brief that best serves the client's cause."⁴⁶ Senior Judge Garth explained: "Your job is to educate and teach us. If you cannot do either, you are not prepared to discharge your appellate function."⁴⁷

43. ALDISERT, WINNING ON APPEAL, *supra* note 7, § 2.5; Garth, *supra* note 35, at 20; Michel, *supra* note 15, at 19.

44. MARTINEAU, *supra* note 22, at § 11.2 (footnote omitted); *see also* Joel F. Dubina, *Effective Appellate Advocacy*, LITIGATION, Winter 1994, at 3 (Judge Dubina is a member of the United States Court of Appeals for the Eleventh Circuit).

45. Godbold, *supra* note 15, at 802.

46. Bright, *supra* note 13, at 1074.

47. Garth, *supra* note 35, at 67.

The second task, persuasion, is crucial: “If a brief does not persuade, it fails.”⁴⁸ Effective persuasion, in turn, requires the appellate advocate to maintain his credibility with the court.⁴⁹ Careful selection of the issues presented, thorough research, accurate statement of the facts and law, avoidance of hyperbole and partisanship, and good writing are just some of the many tools a competent appellate advocate will utilize to demonstrate his credibility, for the purpose of persuading the court.⁵⁰

With a proper understanding of the appellate court’s working environment, the role of the brief, and the two tasks to be undertaken, an appellate advocate should be prepared to address the case at hand. This essay would wander far off track if space were devoted to skills such as proper use of the record, legal research, and effective writing. It requires no citation, however, to emphasize the importance of doing these things well. Many of the authorities cited in this essay contain good advice on writing to inform and persuade appellate courts, and I highly recommend them.⁵¹

My limited experience as an appellate judge underscores the need to constantly remind the bar of these basics. The best briefs I read were clearly thought through before their authors made any attempt at writing. Good writers not only stated the standard of review, they applied it in their argument as well. Given the workload of the Arkansas Court of Appeals, I always appreciated a brief writer who remained focused, clear, and concise, without obvious partisanship. Unfortunately, a number of attorneys neglected these basics. Many squandered their credibility through partisanship, inaccurate citations, incomprehensible writing, and lack of focus throughout the argument.

Effective brief writing is a necessary skill for competent appellate practice. Knowing the importance of the brief in the context of appellate litigation should motivate a competent appellate advocate to exercise and hone this skill. Focusing on the tasks of informing and persuading, while exercising good

48. ALDISERT, WINNING ON APPEAL, *supra* note 7, § 2.1.

49. *Id.* § 2.4; MARTINEAU, *supra* note 22, § 11.18; Causey, *supra* note 31, at 235.

50. MARTINEAU, *supra* note 22, § 11.18; Causey, *supra* note 31, *passim*.

51. See, e.g., ALDISERT, WINNING ON APPEAL, *supra* note 7; MARTINEAU, *supra* note 22; Causey, *supra* note 31; Frey & Englert, *supra* note 37; Godbold, *supra* note 15.

research and writing skills, will, in my opinion, enhance the competence of the appellate advocate immeasurably.

C. Oral Argument

To acknowledge that briefs are the primary means of communicating with appellate courts does not imply that oral argument is irrelevant. Much more often than not, I found oral argument to be helpful, *as long as all involved were prepared*. I always found it useful to test my understanding of a case and my tentative decision through an exchange with prepared attorneys. Appellate judges agree that oral argument can be helpful, albeit for various reasons and in varying degrees.⁵² Oral argument skills are therefore important to competent appellate advocacy.

One aspect of this skill, of course, is effective use of public speaking principles.⁵³ As with writing skills, I do not intend to list these exhaustively; my point is that these principles should be studied and taught as part of any effort to promote competent appellate advocacy. Having watched an experienced trial attorney pace behind the podium while arguing to the United States Court of Appeals for the Eighth Circuit, I am convinced that emphasizing these basics should help lessen distraction from the exchange of ideas at oral argument. Advice on effective use of public speaking principles in the context of appellate oral argument is readily available.⁵⁴

An important aid to effective oral argument is understanding its place in the context of the appellate court's decision making process. Because most courts will have read the briefs by the time of oral argument, they are prepared to go immediately into conference to decide the case after argument concludes.⁵⁵ Thus, an attorney's only direct, personal contact with the court occurs at oral argument, immediately before it discusses and decides the case. A competent appellate advocate will therefore regard oral argument as a conversation with the

52. See Dubina, *supra* note 44, at 4; Michel, *supra* note 15, at 21; Silberman, *supra* note 6, at 4.

53. Committee, *Appellate Litigation Skills*, *supra* note 6, at 140.

54. See, e.g., ALDISERT, WINNING ON APPEAL, *supra* note 7, §§ 16.1–16.6; Michel, *supra* note 15; Sasso, *supra* note 37.

55. ALDISERT, WINNING ON APPEAL, *supra* note 7, §§ 3.1, 15.1.

court in what is, in effect, a beginning of its conference. “Lawyers should consider oral argument as the beginning of the conference dialogue. It is a window into what the panel thinks.”⁵⁶

This understanding should help an appellate advocate to understand the importance of questions at oral argument. This is the court’s chance to ask any questions it may have after reading the briefs; this is when the court wants to get to the heart of the matter.⁵⁷ Wise advocates welcome the chance to personally answer the court’s questions about the case, rather than allow them to be raised, and left unanswered, in the judges’ case conference. “What makes for the best oral arguments? Not ‘argument’ at all, but answers to questions that resolve in your client’s favor the doubts of the panel members.”⁵⁸ I think good appellate litigators understand this, doing all that they can to encourage and answer questions from the bench.

Competent appellate advocacy requires extensive preparation for oral argument. Appellate judges repeatedly bemoan the lack of, and emphasize the importance of, preparation.⁵⁹ Further, because appellate advocates never know whether they will be besieged with questions or left to deliver a monologue, competent advocates will prepare for both possibilities.⁶⁰ This preparation should include a thorough review of the record, anticipation of the court’s questions, and development of a focused argument. Really good advice concerning preparation for oral argument and responding to questions from the bench is available and should be consulted.⁶¹

My experience with oral argument as an appellate judge is much more limited than my experience reading briefs (which further underscores the importance of the latter). Many arguments were very good, including some in which counsel made skillful use of exhibits. I do recall being puzzled by one

56. Silberman, *supra* note 6, at 4.

57. See ALDISERT, WINNING ON APPEAL, *supra* note 7, § 3.2; Godbold, *supra* note 15, at 818-19.

58. Michel, *supra* note 15, at 22.

59. See ALDISERT, WINNING ON APPEAL, *supra* note 7, §§ 3.4.1, 15.2.

60. Committee, *Appellate Litigation Skills*, *supra* note 6, at 140.

61. See Talbot D’Alemberte, *Oral Argument: The Continuing Conversation*, LITIGATION, Winter 1999; Michel, *supra* note 15; Sasso, *supra* note 37.

attorney who seemed put off by questions from the bench; I will probably never forget the advocate who did not seem familiar with a statute that was the basis for an award against his client, which he was appealing. These anecdotes suggest a failure to appreciate the importance of questions from the bench and preparation for argument. These things are understood by experienced appellate advocates, but the examples nonetheless reinforce my contention that these are the basics we need to emphasize to the bar at large, if we wish to enhance competence in appellate advocacy.

Oral argument clearly should not be neglected as a skill. Competence in this area includes the use of public speaking principles and thorough preparation. Further, we should be emphasizing the context of oral argument in the decision-making process and the related subject of questions from the bench. An understanding of these latter two points helps to focus a competent appellate advocate's preparation for oral argument.

III. WHAT CLE PROGRAMS SHOULD WE OFFER TO PROMOTE COMPETENT APPELLATE ADVOCACY?

Appellate advocacy is a specialized area of practice that merits its own CLE programs. We can probably agree on the basic knowledge and skills necessary to maintain competence in this specialty. With some agreement on the ends—enhancing the identified knowledge and skills of a competent appellate advocate—we can examine the means—CLE.

What CLE programs should we offer to promote competent appellate advocacy? By describing a number of CLE programs with which I am familiar, and considering the knowledge and skills identified, I propose to very briefly evaluate the utility of these programs in promoting competent appellate advocacy. I hope to leave you with some ideas for programs that can promote the knowledge and skills discussed above.

Two related matters merit attention. First, there is a growing recognition among CLE planners of what professional educators already know: Adults have different learning styles, which CLE planners should take into account if they want to

prepare more effective programs.⁶² Exploring adult learning styles and examining the variety of programming possibilities available to address these styles are topics well beyond the scope of this work. However, if we want to effectively plan CLE programs to enhance appellate advocacy competence, we must consider this practical advice.

Second, some still debate the effectiveness of CLE: No one has proved that CLE programs improve the competence of their participants.⁶³ Without engaging in that debate, I acknowledge that this essay assumes the effectiveness of CLE programs in improving participant competence.

A. Descriptions of Particular Programs

I've been lucky enough to attend some very good programs. As a presenter, I've also been in a position to inflict my ideas on program participants. Described below, in no particular order, are some of these programs.

1. Eleventh Appellate Practice Institute

This program, cosponsored by the American Bar Association's Appellate Judges Conference and the Tort and Insurance Practice Section, is without a doubt the best I've ever attended. The Eleventh Appellate Practice Institute took place in Washington, D.C. on May 29-31, 1998; the institutes are conducted every other year.⁶⁴ The factor that makes it superior to me is the judicial feedback, both on a brief I had to write and an oral argument I gave, just for the program.

Participants are actively involved in the program. Before the institute begins, each participant writes either an appellant's or an appellee's brief, based on an actual record. At the program, each participant is paired with someone who wrote an opposing brief; these two participants orally argue their sides of the case before a panel of institute faculty. In my case, the panel

62. See AM. L. INST.-A.B.A., TEACHING FOR BETTER LEARNING: ADULT EDUCATION IN CLE 15-16, 24-25 (1999).

63. See Aliaga, *supra* note 4, at 1156-57; Grigg, *supra* note 4, at 427.

64. As of this writing, the Twelfth Appellate Practice Institute is scheduled for June 2000 in New Orleans, Louisiana.

consisted of federal judges from the Fourth and Ninth Circuit Courts of Appeals and a judge from the Massachusetts Supreme Court.

This kind of involvement is made possible, in part, by a low student-faculty ratio. Only 144 attorneys were allowed to register. Twenty-four appellate judges and twelve highly-experienced appellate advocates made up the faculty, for a ratio of four students to one faculty member. All participants were assigned to a small group workshop consisting of twelve students and three faculty members. In my case, these faculty members were the ones who judged my oral argument, and one of them offered a critique of my brief.

In addition to this hands-on experience and judicial feedback, the Institute featured very practical presentations on brief writing and oral argument. After each presentation, the small group workshops convened and discussed the subject in more detail; these discussions focused on our assigned cases. The program was rounded out by several events: speeches by Chief Justice William H. Rehnquist⁶⁵ and former Acting Solicitor General Walter Dellinger, a model oral argument, and a reception at the United States Supreme Court building.

2. *1997 Appellate Advocacy Institute*

This program, sponsored by the Appellate Practice Committee of the Arkansas Bar Association, took place on September 12, 1997, in Little Rock, Arkansas. It offered a combination of lectures on a variety of topics and a practical exercise.

The exercise involved abstracting the record. A judge from the Arkansas Court of Appeals, two practitioners, and a law professor discussed the technicalities of the Arkansas rules for condensing the record, a tricky process known as abstracting. Next, the participants actually abstracted portions of a record. Lectures and panel presentations were given by current or former Arkansas appellate judges and appellate practitioners; the latter included several former state and federal appellate law

65. Chief Justice Rehnquist's remarks were published in the inaugural issue of this journal. See William H. Rehnquist, *From Webster to Word-Processing: The Ascendancy of the Appellate Brief*, 1 J. APP. PRAC. & PROCESS 1 (1999).

clerks. Topics included preserving the record for appeal; standards of review; motions practice; and procedural issues in state and federal appellate courts.

3. *Lunch with the Court of Appeals*

This program involved eight of the twelve judges on the Arkansas Court of Appeals. Sponsored by the Pulaski County Bar Association, it took place over the course of four noon hours in March 1998. The judges addressed several topics, among which were: (1) changes in jurisdictional rules; (2) brief writing; (3) pitfalls to avoid, such as failure to preserve issues for review; (4) the court's internal rules and operating procedures; (5) oral arguments; (6) motions practice; (7) abstracting the record; and (8) petitions for rehearing and review. At each session, the judges distributed written materials; at the session I participated in, there was time for questions, which the attorneys took advantage of.

The programs did have a shortcoming (or missed opportunity). Given their timing and sponsorship, they were only available to attorneys in central Arkansas. I was told later that several attorneys around the state requested copies of the materials or a repeat performance. This obviously would have been a good series of programs to videotape.

4. *1999 Fall Legal Institute, "Trial and Appellate Practice"*

As the title indicates, half of this program was devoted to appellate practice. The Arkansas Bar Association and the University of Arkansas School of Law sponsored the institute, which was held in Springdale, Arkansas on November 12, 1999.

The first session centered on oral argument. After a justice of the Arkansas Supreme Court gave a general presentation on the topic, two advocates gave a mock argument based on the record in *Palsgraf v. Long Island R. Co.*⁶⁶ All three then conducted a brief critique and question and answer session on oral argument in general. The following session split an hour

66. 162 N.E. 99 (N.Y. 1928). D. Price Marshall of the Barrett and Deacon firm in Jonesboro, Arkansas, made a heroic effort to find and obtain the original record in this case, which made preparing for the presentation all that much more interesting.

between appellate rules changes in state court and in federal court. This session was presented in a traditional lecture format; the written materials were excellent. The final session featured a former Arkansas Supreme Court justice's presentation on abstracting and a panel discussion on abandoning abstracting in favor of an appendix system for presenting the record.

5. Appellate Advocacy Presentations as Part of Larger Programs

Sometimes appellate advocacy presentations are incorporated into CLE programs that focus on particular substantive areas. Two of those that I am familiar with involved workers' compensation law and juvenile law.

The 1998 Workers' Compensation Law Institute, sponsored by the Workers' Compensation Law Section of the Arkansas Bar Association, included an hour-long presentation on appellate practice in workers' compensation law cases. A practitioner discussed the mechanics of such appeals. A judge on the Arkansas Court of Appeals focused on recurring problems specific to these types of cases, such as filing deadlines and arguing the standard of review. Questions were encouraged and answered.

A similar program took place at the Children and The Law II Conference, sponsored by four organizations involved with juvenile law. A judge on the Arkansas Court of Appeals, which handles the majority of juvenile law cases, discussed recent opinions of note; he touched on procedural as well as substantive issues. A practitioner then covered procedural matters that were specific to juvenile case appeals, in areas such as appealable orders, motions for anonymity for juvenile appellants, and the standard of review.

B. Evaluating the Programs

Overall, I think that programs such as these do a good job of exposing the bar to appellate practice issues, and suggesting solutions to these issues. Of the knowledge and skills identified, brief writing and oral argument receive a good deal of attention. On the other hand, some matters of preliminary concern seem to

go undiscussed, and knowing why brief writing and oral argument are important in their own ways (as opposed to the technical skills) may not receive enough emphasis.

Brief writing is a popular and repeated topic. The Eleventh Appellate Practice Institute was an extraordinarily effective program: There are no substitutes for actually writing a brief and then having it critiqued by an appellate judge. This feedback is unique, but may not be that difficult to replicate locally. Arkansas appellate judges are obviously willing to present CLE programs on appellate advocacy; it may be that enough of them would be interested in a similar brief writing exercise here. If not an entire brief, then maybe a portion would be an acceptable alternative; the abstracting exercise at the 1997 Appellate Advocacy Institute, for example, could be a model for an exercise in drafting a statement of the case. The point is that learning by doing, with feedback (judicial or otherwise), is a good way to promote competent brief writing.

The same comments hold true on oral argument presentations. Why not team local appellate judges, active and retired, with acknowledged expert appellate advocates, for an oral argument exercise similar to that at the Eleventh Appellate Practice Institute? Much would depend on the participants' preparation; but that is true of real life, and a participant's failure to prepare could make a good object lesson in the consequences. Even without such a program, it seems that hearing from appellate judges on the topic, as at the Lunch with the Court of Appeals and 1999 Fall Legal Institute programs, is a good thing. Mock oral arguments may be less helpful.

Some aspects of the preliminary concerns identified in Section II.A above do receive some attention. Lectures on standards of review and their application, preserving the record, and appellate rules issues are standard fare. I do not personally recall many extended discussions of equally important matters, such as whether an appeal should be brought at all, or narrowing the number of issues raised on appeal. These are topics that, out of self-interest or otherwise, appellate judges would seem agreeable to addressing.

My one concern is that we are not explaining and emphasizing why certain matters are important. Maybe this is academic, but it seems to me that understanding the role of the

brief, or the effect of credibility on persuasion, or the reasons to welcome questions from the bench would help appellate advocates understand why they should enhance their competence in these areas. Having the skills is important; knowing why these skills are important would seem to promote even greater competence.

As a practical matter, three points merit emphasis. These programs are more effective when appellate judges are involved. I think that is why the Lunch with the Court of Appeals program, for example, was so successful: Appellate advocates want to hear the “consumer” say what works and what does not. Second, while they take more work, hands-on exercises at brief writing, record development, and oral argument are invaluable. Finally, feedback, judicial or otherwise, is good. A favorable opinion may be an indication that the advocate’s brief was successful—it persuaded—or it may be an indication that the judge did a lot of work on the case. Feedback in an exercise is not that ambiguous.

CONCLUSION

Promoting competence in appellate advocacy serves two very important goals: It helps appellate courts in their decision making, and it serves the needs of clients. For these reasons alone, we should be promoting competence in the knowledge and skills that lead to competent appellate advocacy. Assuming CLE programs can enhance competence, some thought should be given to planning and structuring programs that promote competence in all areas of appellate advocacy. It is my hope that this essay has provoked such thought.