The Journal of Appellate Practice and Process

Volume 11 | Issue 2 Article 5

2015

Preface

Robert S. Shafer

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Recommended Citation
Robert S. Shafer, *Preface*, 11 J. APP. PRAC. & PROCESS 397 (2010).
Available at: https://lawrepository.ualr.edu/appellatepracticeprocess/vol11/iss2/5

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THE JOURNAL OF APPELLATE PRACTICE AND PROCESS

WORDS TO THE WISE ADVOCATE

PREFACE

Robert S. Shafer*

All good appellate lawyers are masters of their cases—each a universe of compelling fact and law. But immersed as we are in our cases, we must eventually ask ourselves the question, "How do I get through to the people who will decide my case?" The answer lies here before us in two articles that reverse the usual roles, allowing an appellate judge and two former law clerks to get through to us instead.

In this special section, the judge and the clerks are speaking, and we are deciding. The only question presented is whether we will see ourselves as they see us and heed their good advice. And it is indeed good advice: As Judge Roth of the Third Circuit and her former law clerk, Mr. Walia, tell us directly, albeit too modestly, "[W]e think that we know what we're talking about."

Judge Roth and Mr. Walia home in on the core element of every appeal, which is the appellate brief. They remind us that the goal of the brief is to persuade and to persuade *quickly*. We can lose sight of that goal because we write from our own

* Partner, Friday, Eldredge & Clark, LLP, Little Rock, Arkansas. Mr. Shafer concentrates his practice on appellate advocacy in state and federal courts, representing clients in industries such as banking and financial services, transportation, and energy.

perspective: We forget that appellate judges are generalists. We don't think about the amount of reading that they do for each court sitting and find it hard to believe that our brief must do its persuading in one reading. Just one reading! Meditate on that sobering reality for a moment, and then let Judge Roth and Mr. Walia tell you how to succeed. As they point out, we must in essence learn to write from the judges' perspective.

Surprisingly, they tell us too that the part of the brief that can be most improved is the standard of review, comparing it to the stadium where the appellate game will be played. Then they remind us that our arguments, and indeed our entire appellate brief, must be developed within that standard. Our recitation of the case should focus on the legally relevant facts. We should add carefully selected facts to provide human interest. Then our argument should progress in a direct line from legal rule to explanation to application of the rule to the facts.

Along the way, the judge and her former clerk offer tips for good writing. They point to appellate principles that can narrow or decide the case, namely waiver, harmless error, and judicial estoppel. And we hear once again the appellate judges' plea for brevity. Here, then, is the formula for a *quickly* persuasive brief.

Ms. Hughey, who clerked for Judge Schall of the Federal Circuit, addresses Federal Circuit practitioners in particular, but hers is an outline for a strong brief and an effective oral argument in any appellate court. It deserves to be taped on every appellate lawyer's refrigerator until its advice and insights are fully digested.

After describing the decisionmaking process in the Federal Circuit, Ms. Hughey tells us how to avoid the most common mistakes that appellate lawyers make. At least as important, she presents a treasure trove of comments from Federal Circuit judges on effective—and ineffective—writing and oral argument. Her article essentially summons the members of the Federal Circuit bench into a tutorial for our benefit. She lets them tell us how to write the reference brief—the one that the judges and law clerks will turn to as a reliable guide to the facts and the law. The judges quoted here also remind us that oral argument is actually oral *discussion* of the issues that *they* want to talk about. So go with the judges' questions! And be prepared

for the hypothetical question that is intended to explore the outer reaches of the rule that you propose should govern the appeal.

If we would be wise appellate advocates, we must look at appellate life from the standpoint of the judges and their clerks. In the pages that follow, Judge Roth, Mr. Walia, and Ms. Hughey guide us through that shift in perspective.

Little Rock
April 12, 2011