

If You Could Ask Two Appellate Judges Anything

All,

I am moderating a "meet the new judges" panel at our local bar's appellate lunch on Monday. We have two new judges on our intermediate appellate court, one of whom came from private practice, and the other from the trial bench. If you could ask these new judges anything, what would you ask? What would you like the moderator to draw out? I want to make this useful to the audience (mostly appellate lawyers, though some general litigators) and I don't want to have blinders.

Thanks in advance for your input,
Dineen Pashoukos Wasyluk, Florida

what do they like to see in briefs
what do they not like to see in briefs

Josh Friedman, Illinois

What would they do when confronted with a decision of the Florida Supreme Court that seems to be binding, but is not the way they'd decide if not so constrained? Stretch to work around the precedent? Accept the precedent and move on to the next case?

James S. Tyre, California

At a recent bench/bar meeting here in MA, an appellate judge commented that "appeals are won at trial," meaning by creating the record you need for a successful appeal. I'm sure the appellate attorneys won't need any reminding of that, but the litigators might be interested to hear of specific facts that the appellate judges find most helpful in rendering a favorable decision.

Best regards,

Rackham Karlsson, Massachusetts

May I interject a question from the non-litigator side of the fence?

I listened to the Prenda oral arguments yesterday that Jim Tyre linked. I thought that appellate oral arguments were formal affairs. Are they generally as casual as those were?

Jim Pardue, North Carolina

That is a point I raise all the time when speaking with trial attorneys.

For instance, I am working on an appeal where the trial attorney used chairs to define for the jury exactly where people were sitting. They did this with each witness. It was likely very useful at trial. Unfortunately, the cold record on appeal is written rather than visual. Much of the usefulness is lost on appeal (e.g., so you were seated here and Jane was seated there!). There are a lot of examples where facts are lost in the cold record.

Objections, and preserving the record, are another major area; as well as entry of evidence (with proper foundation). And let's not forget about objection at the time of closing argument and jury instruction. Defining jury instruction, and monitoring the actual instruction for need of curative instruction, is so important; but, fatigue sets in.

This is a great topic for trial attorneys. I am not sure what an appellate judge can add, outside how they deal with such dilemmas. My guess is that it will all be dependent upon the standard of review (no need to reach the point).

Dineen, will you be posting your findings from this survey and the results from the seminar? I would be most interested to hear!

Very truly yours,

Bill Driscoll, Massachusetts

I'll take that one. '-)

It was somewhat unusual, but hardly a total aberration.

Judge Pregerson is 91 years old, and is prone to tell stories. He didn't tell nearly as many in the Prenda argument as he did in the one that preceded it on the calendar. But when you've been a judge longer than most of us have been alive, your fellow judges give you some slack.

It's rare that you see as much open hostility by all the judges on the panel as you did there (though Judge Tallman did eventually have some hard questions for Morgan Pietz, after Pregerson chided Morgan for not having his hair combed).

But generally speaking on your question of formality, it wasn't that unusual.

James S. Tyre

Hi. I'm Virginia Hinrichs McMichael and I'm new to SOLOSEZ.

I must confess that I have been reading the SOLOSEZ posts for a while now -- just never had an occasion to jump in on a discussion. I am really not very interested in Playboy or the derivation of the word "thug," but I have to concede that the recent posts on those topics have been entertaining.

I left a large Philadelphia law firm, where I was a partner for many years, and recently started my own practice. My firm is Appellate Law Group, P.C. and it is (not surprisingly) an appellate boutique. I handle civil and criminal appeals in the state and federal courts in Pennsylvania.

I am single, have two children, ages 20 & 17, and live in Haverford, PA. My son goes to Duke (go Blue Devils!) and my daughter is a junior in high school. My favorite drink is a Grey Goose martini with 3 olives. I do not have any pets, although I did have a black lab, who is, sadly, now deceased. I have never owned a ferret, iguana, or other exotic animal.

My pressing question for the appellate judges is something that will seem trivial to many of you, but is a subject of some dispute among appellate lawyers: Do appellate judges prefer citations in the text of the argument or in footnotes at the bottom of the page? Bryan Garner, the guru of legal writing (and a law school classmate of mine, I'm proud to say) advocates in favor of citations in footnotes. In fact, he dedicates a whole chapter to the issue in his book* *The Winning Brief**. But my experience is that most

lawyers put the citations in the body of the brief. Which do the judges prefer? And what do my fellow SOLOSEZ appellate lawyers think is better?

So, there you go -- my first post. It's not a life or death issue, but I'm nevertheless looking forward to hearing your thoughts.

Virginia Hinrichs McMichael, Pennsylvania

I am not an appellate judge, merely a lowly attorney but I prefer the citations in the body of the brief or opinion because when you are researching it is a giant pain to be referenced to the footnotes and then having to find the reference in the text. Similarly, when reading briefs, if the citation is in the body of the brief, it eliminates a lot of flipping back and forth. Just my humble opinion.

John Martin Miles, Georgia

Welcome to the list Virginia. And congratulations on closely following the administrivia rules. Few do so on the first attempt. My only recommendation is that you use a more complete sig. block in the event you wish to receive referrals or wish to admonish those who would shorten the name of your fair city. :)

In any event, perhaps others on this list have different views, but I prefer citing cases in appellate briefs in the body of the brief. I think it is distracting and therefore less persuasive to have to look down to a footnote (and sometimes to an earlier page when "Id." is used often) and back up to return to your place at the tiny footnote number if you can locate it. Judge Posner agrees.

<http://www.adjtlaw.com/assets/A%20Functional%20Approach%20to%20Footnotes%20in%20Briefs.pdf>

<http://tinyurl.com/o8ux673>

Craig McLaughlin, California

Thanks John and Craig. I appreciate your comments. Craig: the article in your link is great. It really sums up the pros and cons of the two approaches to citations.

Bryan Garner's views notwithstanding, I have always used the citations-in-the-body format to avoid the "head-bobbing" problem referenced in the article. It's nice to hear that others agree that it makes the brief easier to read.

And thanks for the other comment about my post. My mistake was letting too many spaces slip between my name and the signature block, so the signature block fell off entirely. I certainly won't do that again!

Virginia Hinrichs McMichael

Also my welcome to Virginia.

Adding to Craig's point, do people necessarily know in advance who will be reading the brief? What if the reader is visually impaired and uses text to voice software? Footnotes, all footnotes, are a friggin' nightmare for those who do, the technology just isn't that good. Some footnotes are necessary, of

course, but those who rely on text to voice software will thank those who minimize the number of them, curse those who use too many.

James S. Tyre

Dineen, all of the answers so far have been good ideas, but if the audience is mostly appellate lawyers, they already know a lot about making the record on appeal and other fundamentals of appellate law. So I would ask questions beyond the mechanics of appeals.

Since one of your new judges was in practice and the other on the trial bench, they both should have interesting comments about:

When you were in practice (when you were a trial judge), what bugged you most about what appellate judges did with your cases? What do you expect to do differently to avoid having a similar effect on lawyers and judges in the trenches?

Good luck,

Wendy Lascher, California

Ask them how they react to the phrase "With all due respect,"

Paul Hogan, California

More on the text v. footnotes debate:

<http://www.texasappellatewatch.com/2014/01/the-great-footnote-debate-a-response-to-bryan-garner.html>

.

Personally, I much prefer reading briefs and opinions with citations in the text.

Lisa Solomon, New York

To add about footnotes, I assume they will not be read. I use them to add something that should be said, but if never read it won't impact the strength of my brief.

There are some things bough that just need to be commented on or noted though.

Regards,

Phil A. Taylor

Questions I'd ask:

1. What part(s) of the brief is/are most significant to him
2. What part(s) of the brief is/are more significant to his clerks than to him?
3. Are there any faults or mistakes in a brief that can lose an otherwise good appeal?
4. How can advocate get the most value out of oral argument (what's most significant to the judge)
5. Are there any faults or mistakes in oral argument that can lose an otherwise good appeal?
6. Walk us through how the appeal goes from assignment to panel to decision

Patrick W. Begos, Connecticut

As a trial lawyer, I can say that many many CLEs for trial lawyers include how to make a record, and making sure to have clues in the record rather than just visual cues in court. This is something I've heard over and over again at trainings and CLEs. And most good trial lawyers pay very close attention to their record.

But not every trial lawyer is good, well-trained, or attends quality CLEs regularly.

Monica Elkinton, Alaska

I agree with Phil here. I decide based on whether I need someone to read it and whether it affects the flow of the brief.

Mitchell P. Goldstein

Welcome Virginia! I can answer the footnote vs. text question, at least for this particular Florida District Court of Appeal. The Second District HATES footnotes. Hates them. The first thing they do is have the staff attorneys move all footnotes to text before they read the brief (this Court asks for a Word copy of the brief, and if you don't send it, it converts it from .pdf. Footnotes mess with that and make it harder. The staff attorneys use the word document to cite check, and the judges the marked up version!). My husband, following Gardner, did a footnote-style brief and they bounced it and ordered him to put all citations in the text, even

though there is nothing in the rules about this and it was not a space/page limit issue. I asked judges this question at a prior CLE and they said it breaks of the reading flow, and also makes it harder for staff attorneys to do their cite checking with the program they use.

I honestly don't like it either, for the same reasons. I WANT to know what you are relying on for this proposition, and I don't want to hunt for it.

Thanks, all, for the suggestions. I've pulled together a list and will report how it goes!

Best,

Dineen Pashoukos Wasylik

Thanks to you and everyone else on the list who has contributed to this discussion about whether citations belong in the body of the brief or in footnotes. I am surprised to see it generated such interest. I thought this was a rather arcane issue of interest only to appellate lawyers.

After reading the posts and the linked articles, it appears that there is a consensus among judges and lawyers alike: keep the citations in the body of the brief.

So I have decided to keep doing it the way I have always done it -- citations in the body, not the footnotes. (Sorry, Bryan Garner, I respect your expertise, but your opinion is clearly in the minority on this issue.)

It's been fun engaging in this discussion with the SOLOSEZZERS. I look forward to many more.

Virginia Hinrichs McMichael

I personally agree with Garner that putting the cites into footnotes allows for better narrative flow. That said, the number one format concern in any brief you write is that you don't want the presentation to get in the way of the content. If the judge doesn't like the format, then it's wrong, period.

Kevin W. Grierson, Virginia
