

# An Introduction to Appellate Law for Non- Appellate Lawyers

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## OUTLINE

- ▶ I. Preservation
- ▶ II. The easy part
- ▶ III. The fun part
- ▶ IV. The hard part
- ▶ V. The terrifying part

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## Part I: Preservation

OR: "HOW TO LOSE YOUR APPEAL BEFORE YOU START IT"

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## Error Preservation

- ▶ Appellate courts are courts of error correction.
- ▶ So you have to notice the error BEFORE you get to the appellate court.
- ▶ Appellate judges are busy. If they can dismiss your argument because you did not properly develop it in the trial court, they WILL NOT HESITATE to do so.
- ▶ Also, preserving error makes sense. We want attorneys to raise issues in the trial court so that the issue can be properly resolved and never becomes an error.
- ▶ Ideally, you'd like to win and make the other poor lawyer appeal.

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## Error Preservation

- ▶ When do you start thinking about your appeal?
- ▶ The moment you get your case.
- ▶ You want to ensure that all of the relevant facts and arguments are in the record before the trial judge makes her ruling. That process begins when the client walks into your office.

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## Tip: Do not snatch waiver from the jaws of preservation

- ▶ Be careful not to concede a point after making it. If you think that there is any chance you will want to take the argument on appeal, then make sure you keep it preserved. If the judge rules against you, don't say something like "OK, we withdraw the objection" or "We concede the point" or similar language. Say something more like "We maintain our objection, but we understand Your Honor's position."

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## Part II: Filing the Notice of Appeal

THE EASY PART

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## How to File a Notice of Appeal

- ▶ File it in the trial court, not the appellate court
- ▶ Check the relevant state or federal local rule for timing
- ▶ If your client is on the fence about whether to appeal (can happen to a stunned criminal defendant), then file the notice
  - ▶ It is several orders of magnitude easier to dismiss an appeal than to find excusable neglect for filing one late.

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## Tips

- ▶ With very limited exceptions, you can appeal only final judgments and orders
- ▶ If there are multiple post-verdict/post-judgment rulings in your case, make sure your notice of appeal indicates which ones you are appealing
- ▶ Not all post-judgment motions for reconsideration stay the time for filing a notice of appeal
- ▶ **CHECK THE RULES!**

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## Part III: Brainstorming

THE FUN PART

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How do great ideas come into the world?

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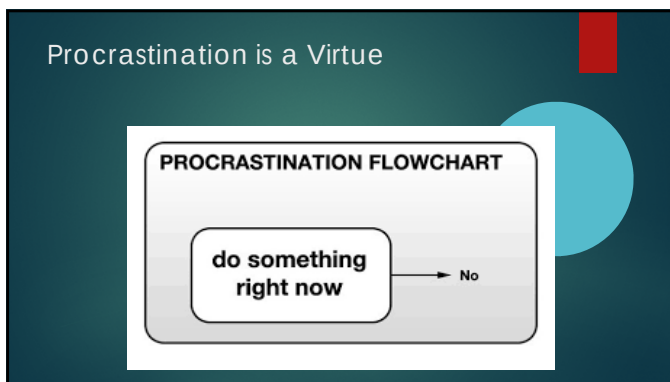
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**Percolation:**  
Bad for coffee. Good for you.

- ▶ The human brain is an AMAZING machine.
- ▶ Your brain is much smarter than you are.
- ▶ Don't just rush right into writing
- ▶ Read the filings and transcripts.
- ▶ And just THINK about the case. Without the pressure of putting pen to paper.
- ▶ Let your subconscious chew on the case while you do other things.
- ▶ R-E-L-A-X

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## You're More Likely to Win Your Case in the Shower Than the Law Library.




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## Approach the case generally

- ▶ Don't start figuring out which case explains which subsection of which rule was violated. That comes later.
- ▶ Tell me--as a human, not as a lawyer--WHAT'S WRONG.
  - ▶ Why are you appealing?
  - ▶ Why are you MAD?
- ▶ Articulate it in a general way.
  - ▶ "We didn't get a chance to show that the witness was lying"
  - ▶ "It is wrong to force a mentally disabled person to confess"
  - ▶ "My client didn't mean to do anything wrong"
  - ▶ "They had buyers remorse because they negotiated a bad deal so they breached the contract"

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## Approach the case generally, continued

- ▶ You should have a short non-legalese answer to what mistake must be corrected.
- ▶ The law makes sense. [pause for laughter]. There's almost always a way to legally articulate a common-sense notion of unfairness.
- ▶ Make sure you have a grounding in the common-sense unfairness before you begin writing.

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## Part IV: Writing the Brief

THE HARD PART

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## The big secret about writing?

► It's hard, and it kind of sucks.

- It takes time
- It can be anti-climatic
- You can't do it in the shower

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## Focus on the Facts!



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## The Facts are *Your* Area of Expertise

- ▶ Appellate judges are brilliant people who learn and think about law for a living. They are the experts in law.
- ▶ YOU are the expert in the facts of your case.
- ▶ The facts are what make your client's case unique.

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## Judges Are Humans

- ▶ Despite some evidence to the contrary, scientists are pretty sure that appellate judges are human; as such, they like a good story.
- ▶ Facts are what will win your case. John Roberts has said that when judges discuss old cases, they don't say "Remember that case about the limited equitable exceptions to Rule 18(b)(4)(C)(iii)?" They say "Remember that case about the guy who wanted to paint his house the color of his dog?"

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In other words, your Model Is the New Yorker. Not Harvard Law Review




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## Do not feel constrained

- ▶ There is no "right" way to present the case to the Court.
- ▶ How does it make sense to present the facts?
  - ▶ Chronologically?
  - ▶ By witness?
  - ▶ If your case calls for it, be creative
    - ▶ Use charts
    - ▶ Use bullet points
    - ▶ Use diagrams
    - ▶ Use maps
- ▶ Whatever helps the reader understand your position, helps you.

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**The Wizard of Oz.** (8-10 p.m., TCM)  
 — Transported to a surreal landscape, a young girl kills the first person she meets and then teams up with three strangers to kill again.

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## Time and storytelling

You can (and should) become the master of time.




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## All stories happen over time. Use it to your advantage.

- ▶ When does the story begin? When does the story end?
  - ▶ Does the story begin when your client walked into the 7-11 with a gun? Or when he was 7 years old and he saw his step-father attack his mother with a tire iron?
  - ▶ Does the story end when you client was evicted? Or 12 months later when county inspectors condemned other apartments in the same complex.

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## All stories happen over time. Use it to your advantage.

- ▶ Use judgmental terms instead of dates.
  - ▶ "Less than a week later . . ."
  - ▶ "Over two years passed before anyone complained about . . ."
  - ▶ "Hung up the phone and immediately called . . ."
- ▶ Again, think New Yorker. Write a story that people WANT to read. It is a story, not a grocery list.

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## Good Legal Writing is Good Writing

- ▶ Show don't tell.
  - ▶ Don't just say "Mr. Smith has a 85 IQ." **Show** that when the police officer arrested him for a serious crime, Mr. Smith asked if he would be home in time to watch Scooby Doo.
  - ▶ Don't just say "both parties thought they had a contract to buy medical supplies." **Show** that the seller turned down another potential buyer the day after the agreement.
  - ▶ Don't just say "The child was neglected." **Show** how the seven-year old didn't know how to open a book when he was given one.

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## Do not take a kitchen sink approach

- ▶ How do you get noticed and approved? Momentum matters.
- ▶ Do not bury your best argument surrounded by lots of weak arguments.
- ▶ You will NOT overwhelm the appellate court. A Judge and her staff of clerks have the time and patience and resources to deal with whatever you throw at them.
- ▶ And, on the chance that you do overwhelm the appellate court, then it will rule against you. No judge will reverse a district court based on the idea that "I'm not sure what happened, but I expect that it is bad."

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## Good Legal Writing is Good Writing, continued

- ▶ Use descriptive subject headings and introductory paragraphs.
- ▶ The Judge should not have to be 15 pages into your brief before she figures out what your case is about.
- ▶ EXAMPLE: "When two armed police officers got out of a marked patrol car, approached Mr. Jones, and yelled at him 'Empty your pockets!' and he complied, that constituted a 4<sup>th</sup> Amendment search and seizure. The trial court erred in finding that Mr. Jones was instead simply responding to a voluntary request. The officers' demeanor and visible weapons demonstrate that Mr. Jones did not feel free to leave or disobey but was instead submitting to the orders of law enforcement officers."

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## Good Legal Writing is Good Writing, continued

- ▶ Subject headings and sub-headings are a great way to get free points with the reader.
- ▶ Make them argumentative.
- ▶ Don't just say
  - ▶ "The January 15<sup>th</sup> meeting."
  - ▶ "The January 25<sup>th</sup> phone call."
- ▶ Do say
  - ▶ "On January 15<sup>th</sup>, Mr. Smith ended a four-hour meeting with Mr. Jones with a handshake and the words 'We have a deal.'"
  - ▶ "On January 25<sup>th</sup>, hours after learning about another potential buyer, Mr. Smith called Mr. Jones and, to Mr. Jones' surprise, attempted to continue negotiating."

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## Good Legal Writing is Good Writing, continued

- ▶ You can do the same thing with argument sub-headings
- ▶ Here's an example from a brief I wrote, preceded by a less-convincing structure

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- A. *North Carolina's Indecent Liberties crime and ACCA*
  - 1. *The categorical approach*
  - 2. *Section 14-202.1*
  - 3. *Applying the categorical approach*
  - 4. *Applying the modified categorical approach*
- B. *This Court's recent decision in United States v. Thornton*

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- A. *North Carolina's Indecent Liberties crime does not constitute a violent felony post-Begay.*
  - 1. *If the elements of a criminal statute constitute a single crime, then the Sixth Amendment requires sentencing courts to apply the categorical approach in determining whether a prior conviction under that statute operates as an ACCA predicate.*
  - 2. *Because § 14-202.1 describes a single crime, the district court should have applied the categorical approach in assessing whether a conviction under that statute operates as an ACCA predicate*
  - 3. *Considered categorically, a conviction under § 14-202.1 is not an ACCA violent felony.*
  - 4. *Even if one could apply the modified categorical approach, a conviction under § 14-202.1 still does not constitute an ACCA violent felony.*
- B. *This Court's recent decision in United States v. Thornton further demonstrates that a conviction under § 14-202.1 does not constitute an ACCA violent felony.*

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## Good Legal Writing is Good Writing, continued

- ▶ A good rule of thumb: If you eliminate everything from your brief but the headings and sub-headings, does it still make an argument outline that makes sense and is at least superficially persuasive?
- ▶ If so, include the subheadings in your table of contents.
- ▶ If not, should it be re-worked?

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## Your colleagues can help

- ▶ Are you not the best grammarian in the world?
- ▶ Do people talking about commas splices and misplaced modifiers just annoy you?
- ▶ Here's the thing about writing geeks
  - ▶ We LOVE this stuff
  - ▶ If you have a colleague with good writing skills to catch things like comma splices and the like, ask if she minds giving it a once-over

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## Your colleagues can help, continued

- ▶ John Roberts says that after you finish a brief, you should be able to give it to an educated person outside of the case (think, an administrative assistant or paralegal, or an attorney who does not practice in your area), and that person should be able to answer two questions
  - ▶ 1. What is this case about?
  - ▶ 2. Why do we win?
- ▶ If an educated person cannot answer those questions, then your brief is likely too jargon-filled or too unclear or otherwise too hard for a judge to follow.

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## Part V: Oral Argument

THE TERRIFYING PART

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## Oral Argument

- ▶ Most Judges go into oral argument with their minds made up based on the briefs.
- ▶ This does not mean that the Judges are being unfair by not listening to you
- ▶ A learned judge with the benefit of three different briefs, time to consider the issue, and a research staff of clerks *should* be able to reach a result without the benefit of 30 minutes of oral argument.
- ▶ Accordingly, the judges will almost always decide on a preliminary disposition of the cases directly after oral argument and *before lunch*. They do not spend days and days hashing out the oral argument and re-reading the transcript.

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## Oral Argument

- ▶ So, even though oral argument is sort of the crown jewel of appellate practice, the real action takes place on the briefs and before oral argument.
- ▶ Make sure not to save any arguments for oral argument in order to "surprise" your opponent.
  - ▶ In addition to running into some thorny waiver issues, you will also, if successful, surprise the appellate court. And they will not like that.
  - ▶ Most importantly, however, you will have not had all of your arguments on the table during the actual decision time.

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## So why have oral argument? And what can you do to help yourself?

### ► ANSWER THE EXPLICIT QUESTIONS

- Sometimes, the Judges will use oral argument to ask very specific questions that they have. They will go in just wanting to know a couple of things that are not clear on the briefs or record: "When did the officer return the defendant's license and registration to him?" "How big was the closet? Could an officer reasonably think that a person could fit in it?" "Did defense counsel have time to object at trial?"
- These facts may be the key to the Court's thinking. Don't just answer these questions—engage them.

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## So why have oral argument? And what can you do to help yourself?

### ► KNOW YOUR RECORD COLD

- You are the master of your facts. If the judge has a question about your record, know the answer and know where to find it so you can point her there.

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## So why have oral argument? And what can you do to help yourself?

### ► KNOW YOUR AUDIENCE

- As we've discussed, you want to be persuasive and narrative in your appeals. But you also need to know that the appellate court is a court of legal error correction, not a place to re-try your case.
- I once heard an appellate judge tell an attorney, "Counsel, your jury argument did not win in front of the jury; what makes you think that it's going to win here?"

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## Your outline works for you; you do not work for your outline.

- ▶ Do not be so committed to your outline that you cannot follow a line of questioning.
- ▶ Your argument should be modular. You should have multiple pieces that you can pull out when needed.
- ▶ John Roberts used flash cards with anticipated questions on the front and answers on the back. Mix them up and quiz yourself.
- ▶ The best oral arguments are conversations, not lectures.

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## How many advocates appear




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## LISTEN, LISTEN, LISTEN

- ▶ This is HARD to do.
  - ▶ You are nervous.
  - ▶ You have 4 points left to make and 6 minutes left to make them.
  - ▶ You think you know where the judge is going and you start formulating your answer before he finishes asking the question.
- ▶ You need to stop yourself. You need to LISTEN to the question—both spoken and unspoken.

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## LISTEN, LISTEN, LISTEN

- ▶ What assumptions is the judge making? Does the question betray a misunderstanding of facts or procedural history?
  - ▶ If so, you need to correct. "Your Honor, the July 20<sup>th</sup> phone call happened after the parties drafted the second agreement, but **before** they signed it."
- ▶ Why is the judge asking this? Why is it important? What might this question indicate about the path he is taking through the case?
  - ▶ "Yes, Your Honor, Officer Jackson didn't file a timely police report. And, similarly, his dashcam was not working, so we have no contemporaneous documents or evidence to support his version of the arrest"

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## RELAX

YOU WON'T DO AS BADLY AS THESE FOLKS

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QUESTION: Are the same?

MR. CAMPAÑE: Yes.

QUESTION: And--

QUESTION: Sir--I'm sorry.

MR. CAMPAÑE: And she further--

QUESTION: And you object to that. You'd be here even if they weren't pushing the Red Jin or whatever this sectarian is.

MR. CAMPAÑE: Absolutely, because that's not truthful. I want to tell--

QUESTION: Well, that--but isn't there another reason--

MR. CAMPAÑE:--that you ought to buy green plums and give them to your wife, and you're thinking to yourself right now you don't want to give your wife diarrhea, but green plums--

QUESTION: Green plums? I would never give my wife a green plum.

(Laughter)

QUESTION: Sir, Campaigne--

QUESTION: I've never even seen a green plum.

QUESTION: I thought plums--

(Laughter)

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## Lesson?

- ▶ Don't accuse a Justice of giving his spouse diarrhea

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of Independence, do not guarantee enforceable rights.”); *Black v. Simpson*, 2008 WL 544458, at \*2 (W.D. Ky. Feb. 27, 2008) (“There is no private right of action to enforce the Declaration of Independence.”); *Borzuch v. Frank*, 2006 WL 3254497, at \*8 (W.D. Wis. Nov. 9, 2006) (“the Declaration of Independence is not binding law”); *Coffey v. United States*, 939 F. Supp. 185, 191 (E.D.N.Y.1996) (“While the Declaration of Independence states that all men are endowed certain unalienable rights including ‘Life, Liberty and the pursuit of Happiness,’ it does not grant rights that may be pursued through the judicial system.”). See also *Dred Scott v. Sandford*, 60 U.S. 393, 407 (1856) (describing the Declaration’s description of unalienable rights as merely “general words used in that memorable instrument” and holding that the Declaration did not have a legally binding effect)

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## Lesson?

- ▶ Italicize see also cites.
- ▶ Use a semi colon and not a period to group similar signals.
- ▶ Don't freakin' cite Dred Scott in 2016.

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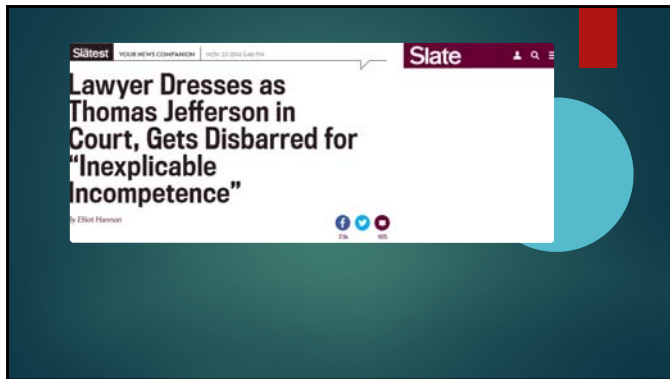
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Lesson?

- ▶ Make sure your competence is explicable.
- ▶ Dress as Alexander Hamilton (much hipper choice).

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Finally, stand on the shoulders of giants

- ▶ SCOTUSBlog.com and Oyez.org let you read and listen to the best appellate advocacy in the country for free.
- ▶ <http://legaltimes.typepad.com/files/garner-transcripts-1.pdf> are the (free) transcripts of Bryan A. Garner's conversations with SCOTUS justices about how to win appeals
- ▶ *Point Made* by Ross Guberman (Oxford University Press) gives a tone of great legal writing advice and uses examples from top advocates to illustrate its point.

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