

# Appellate News

Volume VIII - Spring 2001

## INDEX

Court of Appeals Welcomes Three New Judges .....	1
Message from the Editor .....	1
Practical Pointers for the Persuasive Pen .....	2
Appellate Practice Section Web Site .....	4

**APPELLATE  
PRACTICE  
SECTION**  
State Bar of New Mexico

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## COURT OF APPEALS WELCOMES THREE NEW JUDGES

*Bruce Rogoff, Esq.*

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**T**hree new judges have joined the Court of Appeals. They are Celia Foy Castillo, Cynthia Fry, and Ira Robinson.

Judge Castillo graduated from U.N.M. Law School, and did her undergraduate work at St. Mary's College in Notre Dame, Indiana, where she majored in Spanish and education. After law school she clerked for the Hon. Mary Walters. She then worked at White, Koch, Kelly and McCarthy in Santa Fe, where she had a general civil practice, and Foy, Foy and Castillo in Silver City, where she had primarily a civil practice but also did some criminal work. She is married to Alvino Castillo, and they have two children, ages twenty and twenty-one. She likes to travel, read, and watch women's basketball.

Judge Fry is from Albuquerque and graduated from U.N.M. Law School. She did her undergraduate work at Colorado College, where she majored in history. She worked for the Civerolo law firm for five years, and then started an appellate practice with Mary Lebeck. In recent years she has been a solo practitioner specializing in appellate practice. She is married to Albuquerque trial lawyer Daymon Ely, and they have two children, ages fourteen and ten. She likes to travel, read, and cook.

Judge Robinson was my Sunday School teacher in about 1965 or 1966, when I was just a wee lad. Later, he took mercy on me and let me clerk for him in the summer of 1980, when he was Bernalillo County District Attorney. He moved from Chicago to New Mexico in 1965 to attend U.N.M. Law School. He did his undergraduate work at Loyola University, where he majored in biology and history. After law school, he clerked for Supreme Court justices David Chavez and Paul Tackett. He has been an Assistant District Attorney and was elected Bernalillo County District Attorney in 1976. He has been in private practice with William Bingham and Richard Tanner, with J.E. Casados and Richard McBride, and in the firm of Behles, Behles, and Robinson. He has had a solo practice, as well. He has also been elected to the Democratic National Committee in Washington, and has been Chairman of the New Mexico Democratic Party. He was elected Bernalillo County Probate Judge in 1998. He is married to Paulina Robinson, who hails from Coli, Colombia, and has five daughters, ages fourteen to thirty. He likes classic and vintage cars, swimming, and reading.

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## A MESSAGE FROM YOUR HUMBLE EDITOR

*Bruce Rogoff, Esq.*

I am always looking for people to write articles for this newsletter. If you have any interest, please let me know.

# PRACTICAL POINTERS FOR THE PERSUASIVE PEN

By Andrew S. Montgomery

How to write a better brief? My advice on the subject is hopelessly obvious, yet I would not write it off on that ground. It seems that the good brief bears some resemblance to the good life. We know what's required, but we don't always get around to it. On the theory that restating the obvious may make it more convincing, here are a few suggestions.

## Pointer No. 1 - Start early.

**#1** It's 2:00 a.m. The sun will be up in five hours. The court will be closed in fifteen. The coffee has gone tepid. The computer screen flickers. The moment of reckoning is here. What to say in that all-important opening sentence of the Summary of Argument?

This is a moment to avoid. In general-calendar appeals in New Mexico courts, you will have at least 45 days to write your principal brief. Rule 12-210(B), NMRA 2001. I doubt that many lawyers devote 45 consecutive days to a brief. But if you begin writing in the first few days, you have distinct advantages over the lawyer who starts in the last few. Avoiding the deleterious effects of sleep deprivation is one. Another is that we learn as we write, and it's nice to have time to put one's learning to good use. A third is that other people, such as the clients whom we are here to serve, may review, contribute to, improve the end product – if they are given a reasonable time in which to see the work in progress.

Remember the old saw that the only good writing is rewriting? Implicitly, rewriting means something more thoughtful and painstaking than clicking on the spellcheck function. It means scrapping whole paragraphs, pages, and sections, and starting over. It means debating a point with a colleague, a client, or the bathroom mirror until the argument begins to make sense. It means the retooling, restyling, proofreading, record checking, cite

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checking, and teeth gnashing that distinguish a well-written brief from pages taking up space in the court file.

Spellcheck runs very effectively at 2:00 a.m. on the day a brief is due. For the rest, there is really no substitute for an early start.

## Pointer No. 2 - Stay late.

**#2** My best writing typically happens between the hours of midnight and 4:00 a.m. Does this contradict Pointer No. 1? Actually, no. Those magical wee hours are only magical if I am not asking myself, "How will I possibly finish this \*&!@/\$# brief?" So I prefer to work late into the night on a brief that will not be due for several weeks.

In the wee hours, odds are that you will not be interrupted by uncivil opposing counsel, or rampaging two-year-olds, or cold-calling stock brokers. Odds are, therefore, that you will be freer to think deep thoughts, to deploy your creative faculties, to reach new insights, or at least to pen a coherent paragraph or two. A variety of words are used to describe the higher level of consciousness that engenders productive endeavor, productive writing included. Some call it "flow." Some call it *Dharana*. My more prosaic notion is simply that it is easier to think and write clearly about something if you are not trying to think about two or three other things at the same time.

Of course, there are those who put a premium on the health benefits of sleep. If you are such a person, you can still find conditions conducive to uninterrupted thought, but you may need to look a bit further. Retreat to a remote nook of the law library. Better yet, retreat to a medical library, where you will less likely be recognized. As a last resort, you can work at your desk during daylight hours, but the prospects for success will be remote unless you do disconnect the telephone, the fax machine, the electronic mail, and the Gameboy. The concept is simple – lose yourself in your work, and you will find your way to a better brief.

## Pointer No. 3 - Think more.

**#3** If you have found the right time and place to get some thinking done, there is no good reason not to follow through and do it. How to think effectively? Pretty much as one would do anything else effectively – with careful and thorough preparation. An important first step is a detailed outline that is itself thoughtfully organized. A good second step is a set of notes pulling together all of the building blocks for the brief. Generally, this should include a list of the material facts on which the outcome of the case depends and an annotated list of the cases to be cited. I would guess that the quality of my own legal writing is

*continued on page 3*

directly proportional to the amount of time I have spent on preliminary tasks such as these. And it should not be surprising, though it may be, that the whole experience of brief writing is easier and more fun if you first take the time to slog through the preliminaries.

Some people hate outlines, believing that they hobble the creative impulse. I am not entirely unsympathetic to this point of view; I confess that I think of outlining as a necessary evil. I readily acknowledge, too, that outlines have a nasty tendency to take control of a brief. It is the lawyer, after all, not the outline, that should write the brief. The key, however, is to maintain a coherent idea throughout of what you are saying and how and why you are saying it. If you lose sight of that objective, the end product may or may not have intrinsic value as a work of artistic expression, but it will probably be of little use to the judges who are deciding the case.

**Pointer No. 4 - Say less.**

**#4**

At last year's appellate practice seminar, Chief Judge Pickard gave a presentation on how to be brief. It was a discussion informed by her having read many briefs that were anything but.

The admonition to keep a brief short and simple may be the most oft-repeated of any. Yet the Chief Judge evidently has seen the advice disregarded often enough to warrant reminding practitioners of it again. And so shall I, though with less authority.

In thinking about why brevity might be advantageous, I find it useful to consider parallels between the written word and the spoken word. Picture yourself on public transport listening to the passenger in the next seat who drones on for 35 pages. Imagine that he repeats each point for emphasis, that he quotes so-and-so at great length, that he piles on the verbiage to impress you with his authority. It is unclear why appellate judges should be expected to have the patience that most humans lack for the long-winded passenger.

Repetition is part of the problem. When someone tells the same story a few times, it is often taken as a sure sign of senility. A similarly adverse inference is justified when the repetition is done in writing. But, in fact, the problem is larger than one of mere

repetition. It is not a solution to make many, many arguments once apiece. The page limit set by New Mexico's appellate rules is 35 pages, Rule 12-213(F), NMRA 2001, and the Court of Appeals has warned that it virtually never grants permission to exceed that limit. Importantly, however, 35 pages is generally far longer than a brief need be, and therefore far longer than it should be. The most basic problem with prolixity, whether in an airplane passenger or a brief writer, feeds an impression of immodesty. It subtly but effectively relates that one should be thankful for 35 pages of received wisdom. There are many messages that a lawyer may want to convey subliminally to a judge. This is not one of them.

Better to come at it from the opposite perspective: It is the court's time, not mine, that is precious, so I had better have a good reason for every fact, every procedural event, every case, statute, or commentary with which I burden the court's attention. Out with the footnote detailing "interesting" developments in a somewhat related field of law. Out with the snide recapitulation of who said what to whom in connection with the plaintiff's seventh set of interrogatories. Out with the

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block quotations of the supplemental authority from a remote jurisdiction on a point recently reaffirmed by the Supreme Court of New Mexico. Take only as much of a court's time and attention as you need to make your point. You will not only save the court time. Invariably, you will make yourself better understood.

I have offered four pointers for a better brief. Just as the possibilities in brief writing are endless, the advice that could be given is surely endless as well. Having just preached the gospel of brevity, however, I am reluctant to go on expounding. I will say that, as far as I am concerned, my advice is tried and true. More than that, it is sufficiently basic and unsophisticated that it cannot be too far wrong. My four pointers clearly are not the be all and end all of a good brief. But I think they make for a good start.

Visit the Appellate Practice Section on the web at:  
<http://www.nmbar.org/membersonly/appellatepractice/appellate.htm>



# Appellate Practice

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of the State Bar of New Mexico

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## Welcome to the Appellate Practice Section

The State Bar of New Mexico Appellate Practice Section is an organization of lawyers and judges who handle appeals or are interested in appellate law. Our purpose is to provide our members, the judiciary, the State Bar and the public with information and dialogue concerning issues affecting appellate law. We are interested in the changing nature and development of the common law, and provide practicing lawyers with an opportunity to share ideas, legal research and networking to provide the highest possible quality of legal services, assisting appellate judges in rendering the highest quality opinions.

## News Appeal APPELLATE PRACTICE SECTION

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