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Appellate Law

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LOST IN TRANSLATION



Collaboration Between Trial and Appellate Counsel

by Nancy Simmons

Collaboration with appellate counsel before the final judgment may be a novel notion to many litigators. I believe earlier is better than later. By waiting to collaborate until after the final judgment, a litigator may miss the opportunity to create a record that can win on appeal or withstand appellate review. In this sense, the job of the appellate attorney who accepts a case after final judgment may be compared to the unenviable job of a litigator who takes over a case after the complaint is filed but without any possibility of amendment. The opportunity to draft the allegations to support the elements of the proper cause of action may be lost. Just so, an appellate attorney who has not previously interacted with the litigator may be unable to make his case because the record cannot be altered once judgment has entered.

To avoid some of these pitfalls, I recommend collaboration during at least three portions of the district court case prior to the final judgment: (1) during pre-trial factual development to collaborate on identifying and supporting substantive issues; (2) during any dispositive stage, including dispositive motions practice and at trial, to collaborate on preserving all issues for appeal; and (3) throughout the entire proceedings to collaborate on evaluating whether and how the case might be settled rather than litigated.

The Appellate Specialist's Curse: May You Have an Interesting Issue on Appeal! Collaboration on Developing the Trial Court Record

Along the often unmarked path of pre-trial factual development, collaboration with an appellate specialist may assist the litigator by providing a solid substantive legal framework for discovery and dispositive motions. Of course, knowledge of the current substantive law in a case is not unique to appellate attorneys. Indeed, a trial attorney often specializes more in a particular substantive area than the appellate specialist. However, an appellate attorney may



be better able to see the *pattern* that emerges from an unwieldy set of facts and, most importantly, may therefore be better able to focus the facts before the court.

Litigators specialize in (and may often be unfairly criticized for) “going fishing,” which I define as the art of developing previously unknown facts in support of a cause of action. The litigator, by the very nature of litigation, often doesn’t know all of the facts when he begins. Indeed, a litigator who thinks he knows all the facts beforehand

typically isn’t a successful litigator. As he proceeds through discovery, however, a litigator is faced with the task of sorting through critical facts, relevant but not critical facts, and promising leads that have turned to little more than litigation underbrush. Facts, like life, are messy; in the courtroom or in dispositive motions practice, however, the litigator has to parse out and categorize a messy set of facts to form a coherent legal theory. Easier said than done.

The appellate specialist has a particular skill set that may benefit the litigator early on in attempting to forge a path through all the underbrush. Specifically, based on his long and typically unsuccessful experience in trying to mold the factual record *nunc pro tunc* to fit a particular dispositive legal point on appeal, the appellate specialist naturally thinks in advance in an outlined and linear format. The appellate specialist can therefore assist the litigator to corral a free wheeling deposition to nail down a particular element in a complex legal claim or to focus the statement of facts in a motion for summary judgment on a particular legal issue.

This is not to suggest that the appellate specialist is “better” at factual development of the record, far from it. For example, the litigator’s skill in “allowing” a witness to go where the witness’ thinking is taking him sometimes unearths some wonderful facts, when the appellate specialist’s focus on precision on a particular point might leave the same facts undiscovered. Collaboration instead relies on

both the litigator and the appellate specialist to make the best record, both at the trial court level and on appeal.

The Appellate Specialist's Blessing: May You Preserve the Errors against You Collaboration on Preserving Issues for Appeal

Too often, appeals are lost on the procedural issue of lack of preservation. While the appellate specialist and the litigator bring particular strengths to developing the trial court record, appellate specialists bring unique experience to the question of how best to preserve an issue for appeal, because they spend so much time on the subject. If the litigator has any concerns whatsoever about preservation, he should ask an appellate specialist for assistance, hopefully in advance of raising the particular issue before the trial court and certainly prior to final judgment. There are, however, some basic guidelines.

The standard for preservation of error is relatively clear. "In order to preserve an issue for appeal, a defendant must make a timely objection that specifically apprises the trial court of the nature of the claimed error and invokes an intelligent ruling thereon." *State v. Walters*, 142 N.M. 644, 168 P.3d 1068 (2007). To preserve an argument that relevant matters were inappropriately excluded from consideration, "the party must elicit testimony and invoke a ruling . . ." *Citizen Action v. Sandia Corporation*, 143 N.M. 620, 626, 179 P.3d 1228, 1234 (Ct.App. 2007), cert. denied, 143 N.M. 666, 180 P.3d 673 (2008).

The important and often forgotten piece of this standard is that the appellant must "invoke an *intelligent ruling*," not just "any old ruling." Litigators occasionally take a mistakenly parsimonious view of preservation as though preservation were a purely technical exercise. It's not. This can be avoided by *not* focusing on the narrow issue of preservation and instead on truly alerting the trial judge to the error, as though the judge *might actually rule in the party's favor*.

In *Walters*, for example, the trial attorney invoked a Confrontation Clause objection throughout the trial by asserting the first party's name in *Bruton v. United States*, 391 U.S. 123 (1968), a landmark case. This was acceptable to the Supreme Court because the trial court had already heard substantial argument and "Defendant articulated that his objections were based on 'hearsay, [the] fifth amendment, and *Bruton*,'" thereby alerting the trial court of the continuing issue. *Walters*, 142 N.M. at 650, 168 P.3d at 1074. After multiple rulings on the same point, defense counsel knew the trial judge would not actually rule in his client's favor. Had he treated his continuing objections as *pro forma* and solely for purposes of preservation, however, defense counsel may have foreclosed review on appeal because he would not have "fairly invoked" a ruling *each time the issue arose*, despite the trial court's statement that counsel had made his record and did not "need to do it over and over again." *Id.* at 650, 168 P.3d at 1074. Collaboration with appellate counsel prior to a trial where multiple objections are expected may avoid this pitfall. The trial attorney can be assisted in deciding how an *appellate court* may view the question of how and how many times a trial attorney must preserve an issue, regardless of the *trial court's* advice not to "do it over and over again."

Beyond a ruling by the trial court, the litigator must also make sure there is a *record* of what actually occurred. Sometimes "invoking a ruling" is not sufficient for effective appellate review. For example, in *Colonias Development Council v. Rhino Environmental Services*, 134 N.M. 637, 81 P.3d 580 (Ct.App. 2003), *rev'd*, 138 N.M. 133, 117 P.3d 939 (2005), the appellant challenged the hearing offi-

cer's perceived bias against public participation at a public hearing. Evidence of bias included the hearing officer's statements that the public was disruptive because parents were allowing their children to "climb on the administrative record." Preservation in the sense of "invoking an intelligent ruling" was easy enough—the appellant challenged the hearing officer's bias on the record. However, there was nothing in the record to establish whether the children were or were not acting in a way that legitimized the hearing officer's harsh response. Thus the error was preserved in the technical sense, but the existing record did not provide the appellate court any real way to review what had actually occurred.

If asked in advance of the appeal, the appellate specialist may be able to assist in how to address issues that by their nature occur "off the record." First, there may be ways to build an objective record of what is actually occurring in a way that does not simply pit the trial judge's visual observation of what is occurring before him against the attorney's visual observation of the purportedly identical scene. Second, there may be issues that simply are not reviewable on appeal in any realistic way; if so, the litigant may not want merely to vent his frustration on the record, if the reason for frustration will not later be reviewable. For example, having *any* perspective regarding what was occurring in the school cafeteria on a certain night in *Colonias Development Council* might necessarily have depended on being there. In these instances, the appellate specialist can assist the litigator in deciding strategically rather than tactically whether the judge's annoyance, or any similar issue that cannot be captured "on the record," should be vigorously pursued or abandoned in favor of the substantive merits, either before the trial court or on appeal.

Blessed Are the Peacemakers Collaboration on Judging the Settlement Value of a Case

Finally, appellate counsel may be helpful in evaluating the potential settlement value of a case once discovery is complete but before a decision on dispositive motions. By the nature of their practice, appellate specialists are typically more hard headed when it comes to judging the strengths and weaknesses of *the substantive case that has been made* for the court, any court. For one thing, after having spent so much blood and tears, litigators may lack objectivity about the strength of their specific case. For another, litigators are accustomed to carrying *facts* in their head; appellate attorneys more likely carry the *record* in their heads. Both skills are important, but before the trial court on a dispositive motion and even more importantly on appeal, the record is more likely to count.

On the other hand, "collaboration" should not consist of appellate counsel's dictating whether to stick it out or settle based exclusively on the court record. Sometimes the litigator's zeal about a client's case is also its greatest strength. In these instances, the cooling saucer of the appellate specialist's judgment may miss the heart of the matter in favor of a purely analytical judgment. Collaboration is the key.

Endnotes

¹ According to Wikipedia, "May you live in interesting times" is reputed to be the English translation of an ancient Chinese curse.

About the Author

Nancy Simmons has been a licensed New Mexico attorney since 1984 and a board certified appellate specialist since 2005. She has been in private practice in Albuquerque since 1997, focusing on appeals, civil rights and disability rights, labor disputes, and general plaintiff litigation.

Finality in State Trial Courts

by Jocelyn Drennan



After a trial court rules on an issue, a question which often arises is whether the ruling or decision is appealable. The answer depends upon whether the ruling is final. Arriving at the answer requires case-specific analysis. This article provides guidelines for navigating the analysis and identifies options for pursuing an appeal of a non-final ruling.

Informal, non-final rulings are not appealable. “No appeal will lie from anything other than an actual written order or judgment signed by a judge and filed with the clerk of the court.” *State v. Lohberger*, 2008-NMSC-033, ¶ 6, 144 N.M. 297, 187 P.3d 162.¹ An order or a judgment “is generally not final for purposes of appeal if it contains neither decretal language nor provisions directing the entry of judgment.” *Burris-Awalt v. Knowles* (In re Guardianship of Ware), 2010-NMCA-083, ¶ 8, 148 N.M. 616, 241 P.3d 617 (internal quotation marks & citation omitted); but see *id.* (lack of decretal language not conclusive). Decretal language has been described as that which “carries the decision into effect by ordering that something happen, or when appropriate, by entering judgment for a sum certain in favor of one party” (*Khalsa v. Levinson*, 1998-NMCA-110, ¶ 13, 125 N.M. 680, 964 P.2d 844) or which signals that a document is “intended to be the appealable final order of dismissal.” *Lohberger*, 2008-NMSC-033, ¶ 31.

“Generally speaking, for purposes of an appeal, an order or judgment is not considered final unless all issues of law and facts have been determined and the case disposed of by the trial court to the fullest extent possible.” *Sunwest Bank v. Nelson*, 1998-NMSC-012, ¶ 6, 125 N.M. 170, 958 P.2d 740 (internal quotation marks, citation & brackets omitted); see also *Lohberger*, 2008-NMSC-033, ¶ 19 (similar final judgment rule for a criminal case). Consequently, interlocutory rulings which “may be revised at any time prior to final judgment” (*Sims v. Sims*, 1996-NMSC-078, ¶ 59, 122 N.M. 618, 930 P.2d 153), ordinarily are not appealable.²

Certain post-judgment motions may render a ruling non-final. If, for example, the trial court has not entered an order which expressly rules on a timely motion to alter or amend a judgment that was filed before a notice of appeal, the pendency of the motion renders the underlying ruling non-final; e.g., *Dickens v. Laurel Healthcare, LLC*, 2009-NMCA-122, 147 N.M. 303, 222 P.3d 675 (involving a Rule 1-059(E) NMRA motion). Other examples appear in Rule 12-201(D) NMRA which mentions motions filed pursuant to Section 39-1-1 (1917), Rule 1-050(B), Rule 1-052(D), and, more generally, Rule 1-059.

The definition of a final judgment is flexible. The flexibility arises from the need to balance competing policies. One policy is to avoid piecemeal appeals which impede efficient resolution of disputes. *City of Sunland Park v. Paseo Del Norte Ltd. P’ship*, 1999-NMCA-124, ¶ 8, 128 N.M. 163, 990 P.2d 1286. The other policy is to avoid depriving a party of meaningful review. *Kelly Inn No. 102, Inc. v.*

Knapison, 113 N.M. 231, 240, 824 P.2d 1033, 1042 (1992), holding limited on other grounds by *Trujillo v. Hilton of Santa Fe*, 115 N.M. 397, 851 P.2d 447 (1993).

Consequently, in analyzing finality, the Supreme Court and the Court of Appeals give the term “a practical, rather than a technical construction.” *Id.* at 236, 824 P.2d at 1038. They look not to the form of a judgment or an order but rather its substance. *Khalsa*, 1998-NMCA-110, ¶ 12; accord *State v. Ahasteen*, 1998-NMCA-158, ¶ 10, 126 N.M. 238, 968 P.2d 328. “[T]he practical effect” of a court’s determination on the rights and interests of a party may influence the determination. *San Juan 1990-A, L.P. v. El Paso Prod. Co.*, 2002-NMCA-041, ¶ 17, 132 N.M. 73, 43 P.3d 1081. But, ultimately, the determination lies within the discretion of the reviewing court.

To help guide the analysis, the Supreme Court laid down the following precept. “Where a judgment declares the rights and liabilities of the parties to the underlying controversy, a question remaining to be decided thereafter will not prevent the judgment from being final if resolution of that question will not alter the judgment or moot or revise the decisions embodied therein.” *Kelly Inn No. 102*, 113 N.M. at 238, 824 P.2d at 1040.

Distilled, the following guidelines emerge:

- Analyze each ruling individually.
- Identify and review all potentially applicable statutory provisions and judicial rules, including local rules, and the accompanying annotations.³
- Ensure that a statutory provision, rule, or principle, as the case may be, applies equivalently in civil and criminal cases. If not, look for an alternative route to appeal.
- Research case law within New Mexico which may clarify how statutory language and rules operate or that otherwise may help answer whether a ruling is final.

- Look to secondary sources (e.g., appellate and procedural treatises, law reviews), and case law from courts elsewhere (federal and state) for guidance.
- Consider consulting counsel who practices appellate law for guidance.

If in doubt, the safest course is to file a protective notice of appeal. The consequences of filing a premature notice of appeal are far less damaging than filing a notice of appeal too late. When a party files a notice too early, if the final order is entered during “the early pendency of the appeal,” the appeal may ripen, enabling the reviewing court to exercise jurisdiction. *Healthsource, Inc. v. X-Ray Assoc. of N.M.*, 2005-NMCA-097, ¶¶ 11-15, 138 N.M. 70, 116 P.3d 861; see also *State v. Boblick*, 2004-NMCA-078, ¶¶ 6-7, 135 N.M. 754, 93 P.3d 775 (exemplifying similar approach in a criminal case). Absent such circumstances, an order dismissing a premature appeal may provide guidance on the order or judgment which must be entered before a right to appeal arises.

Even if a trial court’s ruling is not final, options exist for pursuing an immediate appeal. Whether a party may avail itself of an option again requires issue-specific analysis. When more than one option appears potentially viable and worth pursuing, thought should be given to the sequence in which the options should be pursued. Options for pursuing an immediate appeal include the following:

- Seek leave to pursue an interlocutory appeal. Counsel can ask a trial court to include language in an order which certifies an issue for interlocutory appeal. The ideal time to request such language, if circumstances permit, is immediately after the trial court announces its ruling, to save the time and trouble of later seeking to amend the court’s order to include the requisite language. Counsel must comply with the statutory provision which applies (NMSA 1978, § 39-3-3(A) (1972) and § 39-3-4(A) (1999)), and an appellate rule of procedure (Rule 12-203 NMRA). Interlocutory appeals, which stay the underlying proceedings pending the outcome of the appeal unless the appellate court otherwise orders (Rule 12-203(E)) are seldom granted.
- Consider whether stipulating to a final judgment is a possibility; e.g., *Gates v. N.M. Taxation & Revenue Dep’t*, 2008-NMCA-023, 143 N.M. 446, 176 P.3d 1178 (filed 2007) (parties’ agreement to dismiss remaining, undecided claims converted trial court’s partial summary judgment ruling into a final, appealable order).
- Evaluate whether a partial final judgment creates an opening. Rule 1-054 NMRA. Keep in mind, however, that a reviewing court may find that the requirements are not met; e.g., *Khalsa*, 1998-NMCA-110, ¶¶ 18-24 (Rule 1-054[B] scenario).
- Apply for a writ of error. The collateral order doctrine, “whose reach is limited to trial court orders affecting rights that will be irretrievably lost in the absence of an immediate appeal,” guides the availability of the writ. *Carrillo v. Rostro*, 114 N.M. 607, 613, 845 P.2d 130, 136 (1992) (internal quotation marks & citation omitted). The Supreme Court left an opening for use of the writ to evolve but the writ primarily has been used when immunity from suit is at issue.⁴ Three criteria must be met. *Handmaker v. Henney*, 1999-NMSC-043, ¶ 9, 128 N.M. 328, 992 P.2d 879; see also Rule 12-503 NMRA (procedural requirements).
- Petition for an extraordinary writ. The Supreme Court possesses authority to grant writs of mandamus, superintending control, prohibition, habeas corpus, injunction “and all other

writs necessary or proper for the complete exercise of its jurisdiction.” N.M. Const. art. VI, § 3; see also Rule 12-504 NMRA (procedural requirements).

- If an interlocutory ruling compels an action, incur contempt of court. While perhaps not the ideal option, a contempt ruling in a civil case gives rise to an immediate appeal allowing review of the underlying order. *Chavez v. Lovelace Sandia Health Sys., Inc.*, 2008-NMCA-104, 144 N.M. 579, 189 P.3d 711; see also NMSA 1978, § 39-3-15(A) (1966). In the circumstances specified in Section 39-3-15, an appeal may be pursued in criminal contempt and habeas corpus proceedings.
- Consider whether the “sufficiently aggrieved rationale” applies. The rationale may apply if “the consequences of an order ‘are sufficiently severe that the aggrieved party should be granted a right to appeal to alleviate the hardship that would otherwise accrue if the appeal were delayed.’” *Burris-Awalt*, 2010-NMCA-083, ¶ 13 (quoting *State v. Durant*, 2000-NMCA-066, ¶ 8, 129 N.M. 345, 7 P.3d 495).
- Evaluate whether Article VI, Section 2 of the New Mexico Constitution, which states “that an aggrieved party shall have an absolute right to one appeal,” provides a basis for seeking an immediate appeal. *State v. Heinsen*, 2005-NMSC-035, ¶ 9, 138 N.M. 441, 121 P.3d 1040.

In assessing which, if any, of these options to pursue, counsel should research each potentially applicable option thoroughly. Case law, for example, may provide ideas on how to craft an argument which will persuade the Supreme Court or the Court of Appeals to grant discretionary review of an issue.

Do not despair, but understand that this article provides but a glimpse into the complexity that may be involved in analyzing whether a trial court ruling is final and, absent a final order or judgment, identifying options for seeking immediate review. Keep the guidelines in mind and, always, err on the side of caution.

Endnotes

¹ *Accord Lohberger*, 2008-NMSC-033, ¶ 20 (oral ruling insufficient); *High Ridge Hinkle Joint Ventures v. City of Albuquerque*, 119 N.M. 29, 37, 888 P.2d 475, 483 (Ct. App. 1994) (court’s letter to parties, same).

² Routine discovery rulings, see *Bartow v. Kernan (In re Bartow)*, 101 N.M. 532, 534, 685 P.2d 387, 389 (Ct. App. 1984), and evidentiary rulings, see *In re Larry K.*, 1999-NMCA-078, ¶ 11, 127 N.M. 461, 982 P.2d 1060, fit within this principle.

³ Key statutory provisions to review include: NMSA 1978, § 39-3-2 (1966) (final judgment requirement for a civil case); *id.* § 39-3-3 (1972) (same, criminal case). Key rules to review include: Rule 1-054(B) NMRA (partial final judgments); Rule 1-058 (entry of orders and judgments); Rule 1-059 (new trial and motion to amend/alter judgment), Rule 1-060 (relief from order or judgment); Rule 12-201 (appeal as of right).

⁴ See *King v. Allstate Ins. Co.*, 2004-NMCA-031, ¶¶ 13-16, 135 N.M. 206, 86 P.3d 631; *cf. State v. Augustin M.*, 2003-NMCA-065, ¶¶ 40-44, 133 N.M. 636, 68 P.3d 182 (not used for denial of motion to quash indictment) *with State v. Robinson*, 2008-NMCA-036, ¶ 1, 143 N.M. 646, 179 P.3d 1254 (used for order disqualifying prosecutor’s office).

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TEN

Tips for Oral Argument

by Edward Ricco



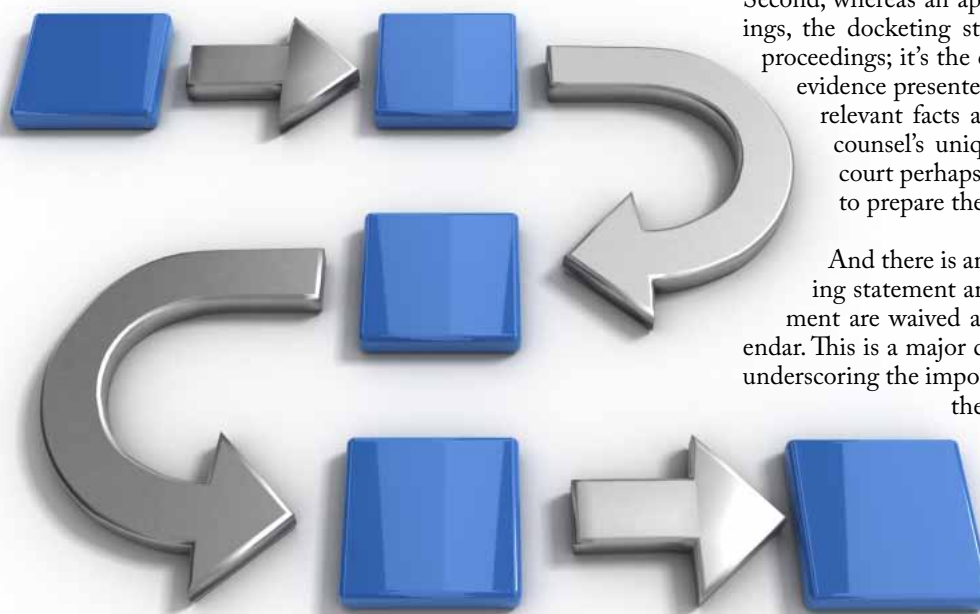
- 1.** Prepare thoroughly. Master the record and the law. Thorough preparation instills confidence which projects credibility—the most important attribute of an oral advocate.
- 2.** Try to observe or find out in advance about the physical setting and procedures of the court in which you will be arguing. Learn what you can about your panel members' interests, demeanor, and questioning style.
- 3.** You are talking to appellate judges who want help with the case. Put yourself in their place and think about what you would want to know to reach a decision. Give a legal argument, not a jury argument. Aim to have a conversation with the court.
- 4.** Do not replay the brief. Select the issues that can be presented well orally and restructure the argument on those issues to suit the oral format.
- 5.** Speak from an outline that is too spare to tempt you to read. Know what are your “must make” points and use the outline to be sure you cover them.
- 6.** Anticipate questions. What is your best case and your response to your opponent's best case? What beneficial policies are promoted or deleterious results avoided if the court adopts your view? What happens if a crucial fact is changed hypothetically? Is the rule you propose self-limiting so it cannot be extended to situations where the result would be undesirable? Is your opponent's position only the first step on a slippery slope? If you can think of a question you cannot answer, you are not ready.
- 7.** Listen to the court's questions. Answer them immediately and succinctly, then elaborate if necessary. Be honest if you don't know the answer. Remember that a question may be intended to help you.
- 8.** If you are the appellee, listen to the questions asked of your opponent. Listen to your opponent's argument. Use what you hear to shape your own argument.
- 9.** Keep rebuttal short and focused.
- 10.** Do not overstay your time or be reluctant to sit down early.

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Edward Ricco heads the Appellate Practice Group at the Rodey Law Firm.

Effective Docketing Statements

by Scott M. Davidson



Second, whereas an appellate brief refers to transcript of proceedings, the docketing statement stands in place of a transcript of proceedings; it's the court's primary source of information about evidence presented in the trial court. It's up to you to state all relevant facts and proceedings in the district court. (Trial counsel's unique position to recall events in the district court perhaps explains why the Rules require trial counsel to prepare the docketing statement.)

And there is an important commonality between a docketing statement and a brief. Issues not in the docketing statement are waived as long as your case is on the summary calendar. This is a major difference between state and federal appeals, underscoring the importance of carefully choosing issues to raise in the docketing statement.

Docketing statements have three main parts: (1) statement of facts material to appeal (Rule 12-208(D)(3)); (2) statement of issues, how they arose and were preserved (Rule 12-208(D)(4)); and (3) authorities for and against your client's position, including standard of review (Rule 12-208(D)(5)). In addition, there are a dozen or so specific additional requirements, which are spelled out in Rule 12-208. Read and be familiar with this rule as you draft your docketing statement. In fact, you should use Rule 12-208 as a (partial) checklist for your docketing statement.

(1) Statement of facts. This is where you should spend most of your time. Since there is no transcript of proceedings, you need to fill in the blanks and tell the Court of Appeals what happened in the relevant proceedings.

Explicitly organize this section to make it readable by using headings liberally. Make sure you don't have any argument in this section because it doesn't belong here.

(2) Statement of issues. This section has three parts: (a) the statement of each issue, (b) how the issues arose, and (c) how the issues were preserved in the district court.

(a) Statement of each issue. Each issue should be stated as a question or several sentences, followed by a question for complex issues. Even though this section will be short, it frames the appeal, so it's worth taking care to state the issue as clearly and persuasively as you can.

(b) Statement of how issues arose. This is a golden opportunity to focus the Court's attention on the key parts of the proceedings. As "unnecessary detail" is forbidden by Rule 12-208(D)(4), you should explain how the issues arose. For instance, if the appeal involves a motion denied by the district court, you should summarize your motion and how it was resolved. Refer to key cases cited in your motion. This will both clarify the procedural background and drive home the points you made below. There's a line between describing the grounds for your motion and arguing your motion; stay on

Your client lost in the district court and wants you to appeal. You've filed a notice of appeal and now you're in the New Mexico Court of Appeals faced with filing a docketing statement. You haven't filed one before or it's been a very long time.

You need to know the rules, but you need more. You also need to know how to make the docketing statement persuasive. It can determine which track your appeal takes, making or breaking your appeal.

To make matters worse, you don't have a lot of time to get up to speed because it's due in 30 days. Rule 12-208(B) NMRA.

For the lawyer who does this rarely or not at all, here's a quick guide to preparing a persuasive docketing statement.

Who files it? As trial counsel, you are. Rule 12-208(A). This doesn't mean you can't consult with an appellate attorney. In fact, it's a good idea to consult with experienced appellate counsel due to the differences between trial and appellate advocacy. You can prepare the docketing statement together.

What makes a docketing statement different from an appellate brief?

There are two key differences and one important similarity you should focus on.

First, you are not allowed to make brief-style arguments. A docketing statement sets forth the facts, identifies issues and standards of review, and cites authorities pro and con. While these are also found in a brief, the Rules place obstacles that preclude attorneys from persuading in the usual way. In particular, although you have an ethical duty to advocate for the appellant, the Rules specifically forbid brief-style argument.

the right side of this line here by avoiding argument.

(c) Statement of how issues were preserved.

How is this different from the statement of how the issues arose? Sometimes it's not that different, such as when you filed a motion, which both raises and preserves the issue; but in other cases they're separate and distinct; for example, when the opposing party filed a notice of intent to introduce evidence, and you're appealing the court's admission of that evidence. In this instance, although the issue arose from their notice, you preserved the issue on appeal by your objection to it in the district court. Either way, you can provide the procedural context while advancing your appeal by telling the story from your perspective.

(3) **Authorities.** You are required by rule to state not only the authorities in favor of your position, but also the authorities against your position. Rule 12-208(D)(5).

Don't hurt your credibility with the Court by failing to list authorities on the other side. If the opposing party cited authorities in the district court, these are the authorities you need to cite as being against your position. If they did not cite any, that does not relieve you of this obligation. It's your job in your research of the issue to identify the authorities that are potential obstacles for your client's position.

You are prohibited from arguing: "Argument on the law shall not be included, but a short, simple statement of the proposition for which the case or text is cited shall accompany the citation." Rule 12-208(D)(5). This is one of the features that makes a docketing statement unlike a brief. While you are rule-bound not to present "argument on the law," you are duty-bound to advocate for your client.

There's a way to negotiate between this rock and a hard place—use parentheticals to persuasively present your side of the case. For cases in favor, use parentheticals to show how the cited cases are close to your case; for instance, cite to facts in common, quote helpful language, etc. For cases against, use the parenthetical to highlight the aspects of the case that you would use in argument to distinguish it. For instance, in a parenthetical to a case cited by the other side, mention distinguishing facts or that the case is unpublished or that the relevant statement was in dicta or that the panel was divided, etc. This is a part of the docketing statement that feels like an outline for the argument section of a brief. In the parentheticals, you're providing the information that your argument would be built around if you were allowed to present brief-style argument. Nothing precludes you from advocating through these parentheticals, provided you don't slip into argument. Also, in your citation to the case, you can cite to other cases that have distinguished or questioned it.



This section also requires citation of authority for the standard of review. In the vast majority of cases, the standard of review is non-controversial. If so, this section becomes merely ministerial—just cite a recent case that's on point and briefly state the applicable standard of review via parenthetical. If the standard of review is legitimately a subject of debate, make sure to list all relevant authorities, even if they are treatises or other non-controlling authorities that provide good reasons for a standard of review that's more favorable to you.

Ministerial requirements of a docketing statement. Aside from these substantive parts, the docketing statement also has a number of ministerial parts that are required. Rule 12-208(D)(1) (nature of proceeding); 12-208(D)(2) (information to show appeal is timely); 12-208(D)(6) (were proceedings tape recorded or not); 12-208(D)(7) (information about any prior or related appeals); 12-208(D)(8) (copy of order appointing counsel if applicable).

The process in the Court of Appeals after your docketing statement.

The Court will look at your docketing statement and the record proper to decide which calendar to place it on. Most cases are assigned to the summary calendar where the Court of Appeals applies well-settled legal principles to your case. If so, the universe of discourse is bound by your docketing statement and the record proper. At this stage, there are no transcripts of proceedings or tapes of hearings. Your statement of facts and proceedings stand in for these.

More often than not, the court proposes summary affirmance. If your case falls into this category, you have 20 days to file a memorandum in opposition. How to prepare an effective memorandum in opposition is beyond the scope of this article, but it is worth emphasizing that when the Court states on the cover page of the proposed disposition that it's just a proposal, the Court means it. They want to hear from you and the memorandum in opposition is your chance to tell them what about the facts or proceedings the court has misunderstood and what about their proposed resolution is incorrect.

What if my case is assigned to the general calendar? If you are lucky enough to get your appeal assigned to the general calendar, then you're in an ordinary appellate posture. Transcripts of proceedings will be filed with the Court, and there will be a briefing schedule for the usual opening brief, answer brief, and optional reply brief.

About the Author

Scott Davidson is a solo practitioner who practices civil and criminal appellate law and post-conviction law in federal and state courts. He teaches appellate practice as an adjunct professor at the UNM School of Law.

Top TEN Rules of Appellate Brief Writing

by Sue Herrmann



- 1. Remember your audience.**
Judges read reams of paper every day. Don't bore them. Focus and persuade them that your position is correct.
- 2. Know the appellate rules.**
Build your credibility by following the rules of appellate procedure. Use correct citations to the record and cases and set out the appropriate standard of review.
- 3. Develop a theme for your brief.**
A consistent and powerful theme makes the Court want to rule in your favor.
- 4. Tell a story.**
People like stories. Characterize the facts in light of the issues and your desired outcome. The statement of facts should follow a logical sequence, not a dull chronology.
- 5. Organize your brief.**
A simple outline eliminates gaps in logic, allows you to prioritize facts and cases, illustrates the path you want to take the reader on, and shows where you need appropriate transitions. Use point headings to guide the reader in reading the brief and to direct him or her to your conclusion.
- 6. Be honest.**
Credibility with the Court is crucial. Deal with bad facts and bad cases. If possible, use them in your favor. Use critical facts that reinforce your theme and emphasize why your case is different.
- 7. Write persuasively.**
Use the active voice. Keep sentences short and direct. Having to reread a sentence breaks the flow of your argument. Use simple words and compelling language.
- 8. Have other people help.**
Brainstorm your case with others and have them read your brief. What is persuasive to one person may leave another flat. Their comments will amaze you.
- 9. Don't get personal.**
Courts do not like attacks on opponents. It's okay to say they are wrong, but not that they are lying.
- 10. Be concise.**
Judges often say that the best briefs are shorter than the page (or word) limit. Use footnotes sparingly and only when absolutely necessary.

About the Author

Sue Herrmann is a former appellate defender for the State of New Mexico.

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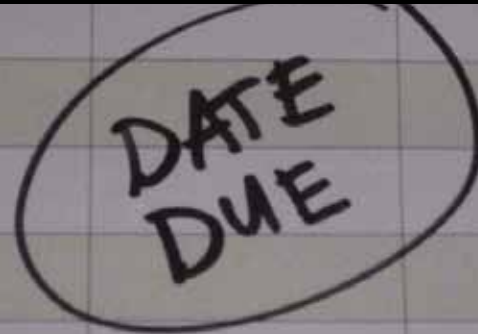
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Deadline:
December 31**

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30

31

1



A date you do not want to miss.

- All New Mexico attorneys must complete 12 hours of Continuing Legal Education annually, to include 10 hours of general credits and 2 hours of ethics/professionalism. The deadline for completion is December 31, 2011.
- Up to one year of live credits earned in 2011 may be carried over for 2012 (self-Study does not apply).
- Attorneys may check their status online at www.nmmcle.org or by calling 505-821-1980.
- The deadline for completion is December 31, 2011.
 - Attorneys who do not complete their credits by December 31, 2011 will be assessed a late sanction of \$100.
 - On April 1, 2012 attorneys who have not completed 2011 credits and have not paid any assessed late sanctions will be assessed an additional \$250 sanction.
 - As of May 1, 2012, attorneys who have missed both deadlines, and have not completed 2011 credits and have not paid any assessed sanctions will face possible suspension by the NM Supreme Court.

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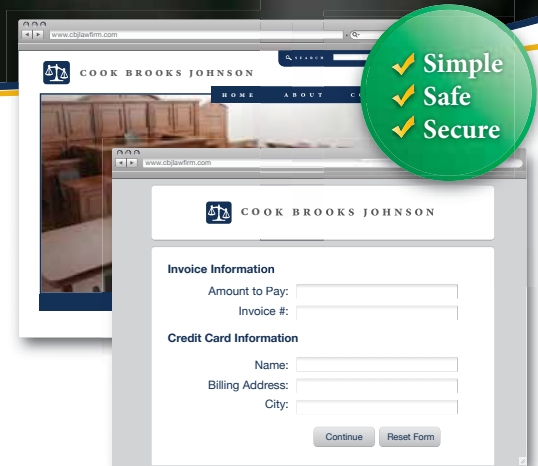
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