

Kansas Appellate Advocacy:

An inside view of common-sense strategy

By Patrick Hughes

When I meet new people at cocktail parties and the like, eventually the question comes up of what it is that I do. If I'm in a particularly ornery mood I say: "A little of this and a little of that." I explain: "Violent crime, mostly. Murder, as much as anything, although I used to do some aggravated robbery or burglary occasionally ... a battery now and again. I've done a couple of convenience store heists." As they look frantically for some other small group on which to intrude, I add, "I was involved in midwifery for awhile, after a few sour real estate deals and experiences with leasing and the oil business that didn't go too well. With one of the best gigs I got I ended up in the middle of a paternity suit. You see, the price has been high, several divorces, a few work-related injuries and of course my fair share of tax problems."

If no security guard can be readily found, the conversation continues. "Sounds like you keep busy."

"Well, filings are way up." After a quizzical look, I add "I'm a research attorney in the Kansas appellate courts. I work on all kinds of cases."¹

Appellate arguments, like cocktail party conversation, can be disconcerting to those not quite up to speed on what's going on. Many attorneys enter the Kansas appellate courts with no more than passing thought to appellate strategy and are surprised by the results. The fundamental rule of appellate strategy is much like the fundamental rule of cocktail parties: Know who you are talking to. Contrary to popular belief, knowing whom you are addressing in appellate practice is not principally a matter of knowing the predilections and idiosyncrasies of each appellate judge or justice, but comes from an understanding of the appellate system.

Who they are and how they're built²

The two principal³ appellate state courts in Kansas, the Kansas Court of Appeals and the Kansas Supreme Court, have similar functions, but they go about them in quite different manners. Indeed, from the viewpoint of effective advocacy, some of the differences may be more critical than the similarities.

The majority of appeals are handled by the court of appeals.⁴ The court of appeals consists of 10 judges,⁵ one of whom is the chief judge with power over court administration.⁶ Each judge has an executive assistant and a research attorney in his or her chambers.⁷ The court as a whole is also assisted by a central staff of research attorneys whose workload may include cases assigned to any judge. These central research staff attorneys also have some responsibilities to the court as a whole, including determining whether the court of appeals has jurisdiction over each case it is to hear, and a motions attorney has responsibility for evaluating various motions filed by the parties in the course of an

appeal. In the court of appeals the docket is managed in-house through the chief judge's office.⁸ The number of cases handled by the court of appeals is truly staggering. In 1995 the court received 2,185 case filings.⁹

Like the court of appeals judges, each of the seven Kansas Supreme Court justices has an executive-secretarial assistant and a research attorney in his or her chambers.¹⁰ The supreme court central research staff consists of only two attorneys.¹¹ Their responsibility is to evaluate and make recommendations regarding petitions for review of court of appeals decisions along with other tasks in cases of original jurisdiction. The supreme court docket is managed by the office of clerk of the appellate courts. During 1995 the supreme court had 263 cases filed.¹²

Generally, in the court of appeals a case may be handled in one of three ways: as a summary disposition case; as a summary calendar case; or as an oral argument case. Before being placed on the docket the cases to be decided by the court of appeals are screened and graded by estimated level of difficulty. In the screening process the briefs for the cases are distributed among the judges, who read the briefs they are assigned and determine both the complexity of the case and if oral argument would be helpful.

Summary disposition cases are those which essentially raise no justiciable issue. These include single-issue cases directly controlled by a recently decided case,¹³ or other cases where the lack of merit is equally obvious.¹⁴ In summary disposition cases the judges have the benefit of the parties' briefs and a short memo or proposed opinion from a research attorney briefly explaining the required disposition. Summary disposition cases are decided on special dockets, and often result in very short "rule opinions"¹⁵ that do little more than cite the controlling authority.

1. The author worked as a research attorney for the Hon. Edward Larson from August 1994 to July 1996. Justice Larson was appointed to the Supreme Court of Kansas in 1995. Prior to his appointment he served as a judge on the Kansas Court of Appeals.

2. The dry stuff.

3. In certain situations the district courts may act in an appellate capacity. See, e.g., K.S.A. 60-2103a (appeals from district magistrate judges); K.S.A. 61-2709(a) (appeals under small claims procedure act); K.S.A. 22-3609 (appeals from municipal courts); K.S.A. 22-3609a (criminal appeals from district magistrate judges).

4. Direct appeal to the supreme court is permitted in any case in which a Kansas or United States statute has been declared unconstitutional and in any criminal cases involving off-grid crimes, class A felonies or maximum sentences of life imprisonment. K.S.A. 60-2101(b); K.S.A. 22-3601(b). Appeals by the state in criminal cases under K.S.A. 22-3602(b) are also taken directly to the supreme court as are questions certified by federal courts or court of other states under K.S.A. 60-3201 *et seq.* The supreme court also has discretion to handle appeals in cases which the court of appeals has decided are outside its jurisdiction or have subject matter or legal issues of such public importance that the supreme court should take them, K.S.A. 20-3016(a) and (b); Kansas Supreme Court Rule 8.01 (1995 Kan. Ct. R. Annot. 46-47); cases the court of appeals requests to be transferred, and the supreme court accepts, which require transfer for the expeditious administration of justice because of the court of appeals caseload, K.S.A. 20-3016(a)(4); K.S.A. 20-3016(b); cases the parties themselves timely request to be transferred to the supreme court because of their importance, the caseload of the court of appeals or because the court of appeals lacks jurisdiction, K.S.A. 20-3017; Kansas Supreme Court Rule 8.02 (1995 Kan. Ct. R. Annot. 47); cases the court of appeals has already decided and that the supreme court has agreed to review on request of an aggrieved party, K.S.A. 20-3018(b); Kansas Supreme Court Rule 8.03 (1995 Kan. Ct. R. Annot. 48-52); decided court of appeals cases

reviewable as a matter of right, see K.S.A. 60-2101(b); K.S.A. 22-3602(d) (whenever a constitutional question arises for the first time as a result of the court of appeals decision); and cases in other assorted areas, see, e.g., K.S.A. 25-1450 (election contests); K.S.A. 26-504 (eminent domain); K.S.A. 55-1410 (pricing of natural gas); K.S.A. 65-4211(b) (mental health technicians licensure act); K.S.A. 66-1,164 (electric generating facilities); K.S.A. 1995 Supp. 74-8813(v) (parimutuel racing); K.S.A. 74-8815(n) (parimutuel racing). The court of appeals has exclusive jurisdiction over orders of the Kansas Corporation Commission arising from public utility rate hearings. K.S.A. 1995 Supp. 66-118a(b).

5. K.S.A. 20-3002. With the advent of the senior judges program the court of appeals 10 full-time judges are aided by part-time retired district court judges. These judges are treated as regular court of appeals judges for most internal purposes.

6. Kansas Supreme Court Rule 1.02 (1995 Kan. Ct. R. Annot. 2).

7. See K.S.A. 20-3014. The chief judge has additional staff.

8. See Kansas Supreme Court Rule 1.02 (1995 Kan. Ct. R. Annot. 2).

9. Figures are from the December 1995 caseload activity summary prepared by the clerk of the appellate courts.

10. See 1995 Kan. Ct. R. Annot. 59. The chief justice is also aided by an additional executive assistant/counsel. *Id.*

11. Reportedly, the Kansas Supreme Court has the smallest support staff of any state supreme court in the nation.

12. The supreme court also handles a large number of petitions for review, disciplinary cases, certified questions and administrative matters. The number of cases filed alone does not reflect the full stress of the court's workload.

13. See Kansas Supreme Court Rule 7.041 (1995 Kan. Ct. R. Annot. 41-42).

14. See Kansas Supreme Court Rule 7.042 (1995 Kan. Ct. R. Annot. 42).

15. Kansas Supreme Court Rules 7.041 and 7.042 (1995 Kan. Ct. R. Annot. 41-42).

Summary calendar cases are those, other than summary disposition cases, which it is determined "fail to present any new questions of law and in which oral argument is deemed

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neither helpful to the court nor essential to a fair hearing."¹⁶ The parties are notified when a case is put on the summary calendar and have the opportunity to request oral arguments nevertheless.¹⁷ Although the attorneys are not notified, summary calendar cases are decided at the same time as oral argument cases. In such cases the judges have the benefit of the briefs of the parties and a fairly extensive prehearing memorandum or proposed opinion prepared by a research attorney.

In oral argument cases the court has the additional resource of interaction with the parties' attorneys and development of the issues at a hearing. Each oral argument case is allotted a total of 30 minutes, 15 minutes to each side, unless the appellant requests more time.¹⁸

The court of appeals sits in panels of three judges when it decides cases.¹⁹ The panels travel and different panels hear oral arguments in different parts of the state.²⁰ Because of the expanding caseload the court faces, a panel often consists of two court of appeals judges and one "outside" district judge or retired judge. The summary disposition docket is handled entirely by court of appeals judges in Topeka. Sometimes special "blitz" dockets, scheduled to reduce the backlog of pending cases, employ panels consisting of one court of appeals judge and two outside judges.

The court of appeals panels will typically conference and decide cases immediately after oral arguments are finished. Prior to arguments each case is assigned to a specific judge on the panel to prepare. If that judge is in the majority on the final decision, he or she will be the one to write the opinion.

The preparatory work on the cases is done by court staff — the research attorneys. Most cases assigned to court of appeals judges will be evaluated and prepared by the

research attorney working directly for the assigned judge. Those that aren't prepared by the judges' research attorneys, including almost all cases assigned to outside judges, are prepared by the central research staff attorneys.

The preparation done by the research attorneys consists of reviewing the record on appeal and establishing a complete, unbiased statement of the relevant facts; drafting a non-partisan statement of the issues to be decided; identifying the standard of review by which the court will evaluate each issue; researching the issues to find the controlling law and relevant authorities (including verifying the authorities cited by the parties); and making a recommendation as to the outcome of the case. Depending on the judge and the degree of certainty that a particular outcome will be embraced by the court, the research attorney's work may take the form of either a prehearing memorandum or a proposed opinion. Each judge on the panel receives a copy of the memo or proposed opinion about a week before oral arguments. Memoranda may range from a few pages to 60 pages or more, depending on the complexity of the case. The ultimate resemblance between the research attorney's work and the final opinion also varies with the complexity of the case and the preferences of individual judges.

After conferencing and at least tentatively deciding each case, the judge to whom the case is assigned writes the opinion, which is then circulated to the other judges for their approval or input.²¹ In the court of appeals opinions are generally handed down weekly.

Unlike in the court of appeals, where the court sits in three-judge panels to hear oral arguments over two consecutive days, the supreme court sits en banc, hearing arguments for a full week. In general calendar cases in the supreme court, unless oral arguments are waived by the parties, or the court grants an extension of time, each side is allowed 30 minutes.²² As in the court of appeals the cases are assigned beforehand among the justices for presentation in conference and opinion writing, and each justice's research attorney prepares prehearing memoranda for the cases assigned to his or her justice.²³ Copies of prehearing memoranda are generally available to any justice on the court who chooses to make use of them.

In the supreme court the cases are conferenced and decided in the week following oral argument, rather than immediately after a day's arguments are finished. The first two days of that following week are devoted to final prepa-

16. Kansas Supreme Court Rule 7.02(f)(2) (1995 Kan. Ct. R. Annot. 39).

17. Kansas Supreme Court Rule 7.02(f)(3), (4) (1995 Kan. Ct. R. Annot. 39).

18. Kansas Supreme Court Rule 7.02(e) (1995 Kan. Ct. R. Annot. 38) (20, 25, or 30 minutes available as a matter of right if requested on lower right front of brief).

19. See K.S.A. 20-3012.

20. K.S.A. 20-3013; Supreme Court Rules 1.02(c) and 7.02(c)(2) (1995 Kan. Ct. R. Annot. 2, 38).

21. The final opinion will be published if, as determined by a majority of judges or justices participating in the opinion, it:

"(a) Establishes a new rule of law or alters or modifies an existing rule;

"(b) Involves a legal issue of continuing public interest;

"(c) Criticizes or explains existing law;

"(d) Applies an established rule of law to a factual situation

significantly different from that in published opinions of the courts of this state;

"(e) Resolves an apparent conflict of authority; or

"(f) Constitutes a significant and non-duplicative contribution to legal literature:

"(1) by an historical review of law; or

"(2) by describing legislative history." Supreme Court Rule 7.04 (1995 Kan. Ct. R. Annot. 40); *see also* K.S.A. 60-2106.

Otherwise the opinion will not be included in the official reporter and may not be cited as authority, *see* Kansas Supreme Court Rule 7.04 (1995 Kan. Ct. R. Annot. 41), although it will nevertheless be available to anyone interested. An unpublished decision of the court of appeals may be ordered to be published by the supreme court upon the motion of any party or "other interested person." Kansas Supreme Court Rule 7.04 (1995 Kan. Ct. R. Annot. 40).

22. Kansas Supreme Court Rule 7.01(e) (1995 Kan. Ct. R. Annot. 37).

23. 1995 Kansas Ct. R. Annot. 62.

ration for conference after the justices have had the benefit of hearing from the parties in person. As with the court of appeals, in the supreme court the assigned justice, if he or she is in the majority, writes the opinion. The draft opinion is then circulated for comments, revisions, or concurring and dissenting opinions. Except for summer filings, supreme court opinions are generally filed on the Friday of the week the court is hearing oral arguments.

Picking your issues

The goal of an appeal is straightforward — to either secure a client relief from some judgment or to assure that the judgment remains unchanged. All tactical decisions, starting with which issues should form the basis for the appeal, should be driven by this overarching goal. Therefore the issues appellant's counsel should select are those where the appellate court has the greatest power to grant relief and those with the greatest impact on the result. In turn, where realistic, appellee's counsel should argue appellant's issues are more properly viewed as residing within the power of the trial court or jury and have no meaningful impact in the end.

Don't ask the baker for a salami

The trial court, the court of appeals, and the supreme court, are, obviously, quite different animals. Each has its own purpose, procedures and powers. The decision-makers also face different institutional pressures and different consequences from a poorly made decision. An advocate who understands these differences can shape an argument to meet the needs of the court to whom the argument is presented.

The trial court is uniquely situated to make decisions in areas where hard and fast rules are rarely seen. Questions that control the efficient conduct of trial or that are highly fact dependent, are well suited to trial court — and only trial court — resolution. Dirty pool and personality clashes are “inside baseball,” which the trial court has considerable power to deal with. The trial counsel who serves as appellate counsel often seems to forget that the time for such questions has passed, and that if he or she didn't prevail below, it's too late. Even mentioning the clashes in the trial court that were resolved below or that were properly issues for the trial court to deal with seems petty in an appellate brief and implies the writer has no more important arguments to make. On filing your notice of appeal you left the deli and went to the bakery. Don't ask the baker for a salami.

Unlike the trial court, the appellate court has the luxury of careful consideration of complex legal questions and the

opportunity to wait for the seeds of an answer to appear in a dream a week after looking at the question for the first time. Appellate judges thrive on knotty questions of law, without much concern for what the trial court decided. In the court of appeals the grist for the mill is precedent and history, and thus the request that it is most suited to respond to is a call back to basic principles — a resolution requiring the least innovation and greatest fidelity to past appellate court decisions.

The supreme court, like the court of appeals, has the greatest power to help your cause when you frame a purely legal issue. But unlike the court of appeals, its decisions usually carry not just practical finality (easily most court of appeals decisions are never reviewed by the supreme court), but technical finality as well. The elevated position of the supreme court makes it more willing to consider questions of policy, efficiency of justice and modification of precedent. To the court of appeals one argues how precedent supports one's position. To the supreme court one argues how, if it does not now, future precedent should.

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Finding a good tailor — framing issues around the standard of review

No one goes to the local discount store and expects to find the perfect-fitting suit off the rack. The department store, however, might come a little closer in fit since it offers in-house alterations. The best fit, however, will probably come from the tailor who starts from scratch. Framing an issue on appeal is a bit like buying a suit — you're likely to get a better fit the more power the entity you are dealing with has to craft the result.

Discount-store issues are resolved by asking “did the trial court abuse its discretion?”²⁴ Since this simply means “Would any reasonable person agree with the trial court?”²⁵ it is often difficult for an appellant to secure relief on such an issue. Other discount-store issues require for reversal that the conscience of the court be shocked.²⁶ On all such issues the court gives great deference to the trial court's decision and is largely unwilling to make any alterations even if it would be inclined to take the opposite view of the trial court if considering the matter in the first instance.²⁷ Of course, from an appellee's perspective, these discount-store issues are the top of the line, since the chance of reversal is so slim.

24. Examples of the numerous issues of this type include rulings on the admission of evidence, *Marshall v. Mayflower Transit, Inc.*, 249 Kan. 620, Syl. ¶ 3, 822 P.2d 591 (1991), granting of a temporary injunction, *Augusta Medical Complex, Inc. v. Blue Cross of Kansas, Inc.*, 227 Kan. 469, Syl. ¶ 1, 608 P.2d 890 (1980) and denying intervention, *Stephan v. Kansas Dept. of Revenue*, 253 Kan. 412, 415, 856 P.2d 151 (1993).

25. See, e.g., *In re Marriage of Cray*, 254 Kan. 376, Syl. ¶ 4, 867 P.2d 291 (1994): “Judicial discretion is abused when judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only when no reasonable person would take the

view adopted by the trial court. If reasonable persons could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion. All judicial discretion may thus be considered as exercisable only within the bounds of reason and justice in the broader sense, and only to be abused when it plainly overpasses those bounds.”

26. See *Ultimate Chemical Co. v. Surface Transp. Int'l, Inc.*, 232 Kan. 727, 731, 658 P.2d 1008 (1983) (review of refusal to grant new trial because of size of punitive damage award).

27. See *Saucedo v. Winger*, 252 Kan. 718, 731, 850 P.2d 908 (1993).

The tailor-shop issues are at the other end of the spectrum, where the appellate court gives no deference to the trial court's determination. Issues involving purely legal questions, such as whether to recognize a new cause of action,²⁸ statutory construction,²⁹ interpretation of written instruments³⁰ and decisions based on written or documentary evidence³¹ mark the pinnacle of the appellate court's power to change the outcome of the case. With such issues the trial court battle must be fought completely anew — one hopes with the benefit of the practice battle below.

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In between these two extremes are a range of department-store issues in which the appellate court places less reliance on the trial court's decision or the expertise of some agency than in an abuse of discretion case, yet does not act as independently of that decision as in an issue involving a purely legal determination with no deference to other authority. In these issues the appellate court will not decide the question completely anew. Questions of suppression of evidence,³² sufficiency of evidence,³³ whether probable cause existed,³⁴ allegedly erroneous jury instructions³⁵ and construction of statutes already interpreted by an agency having power to implement them³⁶ are among the many that fall in the mid-range area of the court's willingness to independently re-evaluate an issue resolved below.

Thus, in both appellate courts the resolution of many cases turns not so much on the facts of the case as the standard of review. The better the appellant is able to identify issues that depend on purely legal conclusions, the more independence the court is willing to exercise from the trial court or other authority, and thus the more likely relief for the appellant becomes. The centrality of the standard of review is evident in the requirement that the discussion of each issue in the brief begin with a citation to "the appropriate standard of appellate review" and that the appellee respond to that proposed scope of review.³⁷

Because of their potential impact on the eventual out-

come, the rules prescribing the appropriate standard of review are of critical importance in selecting the issues to be appealed. Similarly, the rules prescribing when an error that has been identified under the standard of review requires reversal must also be considered in selecting the issues worth appealing. Identified errors that are harmless will not warrant reversal.³⁸ The precise articulation of the test used to determine if an error is harmless varies depending on the nature of the error,³⁹ but in essence the question is whether the substantial rights of a party are prejudiced.⁴⁰

Related to this rule is the rule that if the trial court erred in reasoning, but nevertheless reached the correct result, its decision will be affirmed.⁴¹ The rule that error created at the invitation of the complaining litigant forms no basis for appellate relief has a similar effect.⁴² If an identified error clearly falls into one of these categories, raising it on appeal is pointless.

Because of the pivotal role that the scope of review can play in the outcome of a case, arguments over which standard should be applied may become more critical than arguments over the issues on which the appeal was taken. Glossing over the question can be fatal to your case. Where the parties apparently failed to identify the correct standard of review, one author has argued that the court resolved the dispute under the wrong standard.⁴³ Thus, the failure to properly address the applicable standard of review may cause an advocate to lose an otherwise winnable case.

Given its importance, the section of the brief dealing with the standard of review should be given careful thought. Yet that section does not stand alone and the argument on the merits must take full advantage of the standard of review advocated. For example, in an appeal from a trial court order granting summary judgment, the appellate court applies the exact same standard as the trial court and owes the trial court decision no deference.⁴⁴ Thus, it does the appellant little good to concentrate on errors in reasoning in the trial court's decision. Instead, the appellant might largely ignore the trial court and concentrate on arguing why, under the standards governing summary judgment, such judgment was inappropriate. Although typically an appellate brief should have a different approach from a trial court filing, in this case it might resemble the opposition to a motion for summary judgment very closely. In short, if review in the appellate court is *de novo*, treat it that way.

28. *Klaus v. Fox Valley Systems, Inc.*, 259 Kan. 522, 912 P.2d 703 (1996). *Klaus* is a good example, however, of how even purely legal questions may involve deference to other entities. In *Klaus* the court refused to recognize a claim for loss of parental consortium, choosing to defer to the Legislature because of the complexities that would arise from such recognition. 259 Kan. at 530.

29. *E.g.*, *State v. Donlay*, 253 Kan. 132, Syl. ¶ 1, 853 P.2d 680 (1993).

30. *Dutta v. St. Francis Regional Med. Center, Inc.*, 254 Kan. 690, 693, 867 P.2d 1057 (1994).

31. *Giblin v. Giblin*, 253 Kan. 240, Syl. ¶ 4, 854 P.2d 816 (1993).

32. *State v. Vandiver*, 257 Kan. 53, Syl. ¶ 6, 891 P.2d 350 (1995).

33. *State v. Timley*, 255 Kan. 286, Syl. ¶ 13, 875 P.2d 242 (1994).

34. *State v. Gilbert*, 256 Kan. 419, 424, 886 P.2d 365 (1994).

35. *Allman v. Holleman*, 233 Kan. 781, Syl. ¶ 2, 667 P.2d 296 (1983).

36. *See Kansas Bd. of Regents v. Pittsburg State Univ. Chap. of K-NEA*, 233 Kan. 801, 810, 667 P.2d 306 (1983).

37. Kansas Supreme Court Rules 6.02(e) and 6.03(d) (1995 Kan. Ct. R. Annot. 30, 31).

38. *E.g.*, K.S.A. 60-2105; K.S.A. 60-261; *Tamplin v. Star Lumber &*

Supply Co., 251 Kan. 300, 308, 836 P.2d 1102 (1992).

39. *See, e.g.*, *State v. Johnson-Howell*, 255 Kan. 928, 944-45, 881 P.2d 1288 (1994) (error of constitutional magnitude); *Chamberlain v. State*, 236 Kan. 650, 656-57, 694 P.2d 468 (1985) (ineffective assistance of counsel claims); *Cerretti v. Flint Hills Rural Electric Co-op Ass'n*, 251 Kan. 347, 353, 837 P.2d 330 (1992) (jury instructions).

40. *See* K.S.A. 60-2105; K.S.A. 60-261.

41. *See Dickerson v. Kansas Dept. of Revenue*, 253 Kan. 843, Syl. ¶ 3, 863 P.2d 364 (1993); *State v. Donlay*, 253 Kan. 132, 134, 853 P.2d 680 (1993).

42. *See, e.g.*, *Cott v. Peppermint Twist Mgt. Co.*, 253 Kan. 452, Syl. ¶ 3, 856 P.2d 906 (1993); *State v. Prouse*, 244 Kan. 292, 298-99, 767 P.2d 1308 (1989); but *see State v. Higgins*, 243 Kan. 48, 51, 755 P.2d 12 (1988) (rule cannot be used as pretext for violation of a defendant's constitutional right without justification).

43. *See* Steve Leben, "Challenging and Defending Agency Actions in Kansas," 64 Journal of the Kansas Bar Association No. 5, 22, 27 (1995).

44. *See Mitzner v. State Dept. of SRS*, 257 Kan. 258, 260-61, 891 P.2d 435 (1995).

Where the standard of review is contested by the parties it might also be important to carry insurance. The brief should address not only why the court should adopt your suggested standard of review and decide in your favor but also address, at least summarily, why even the standard of review suggested by the other side does not change the result.

Finally, as in other areas, in the supreme court the standard of review can be more flexible because of the court's inherent power. If the advocate successfully persuades a majority that it ought to reach a given result, the standard of review might not present as great a barrier as it would in the court of appeals.⁴⁵

Get real!

Creative lawyers can easily generate multiple issues in the appeal of most cases. Sometimes attorneys seem to view their appellate briefs as minutes from brainstorming sessions listing every possible argument without regard to whether it is actually likely to prevail. While there is something to be said for such zealous advocacy, there is considerably more to be said for establishing priorities and selecting and developing only those issues and legal theories with a realistic probability of being accepted, and of changing the result reached in the trial court.

Adding issues or theories outside the court's latitude of acceptance — that is, with no realistic probability of success — risks harm to the more critical issues of an appellant's case.⁴⁶ First, the allocation of time and energy expended to resolve the case may well shift to the appellant's detriment. The supreme court has more than 200 pending cases. The court of appeals has in excess of 2,000. Although the courts endeavor to resolve every issue the parties raise with careful deliberation, one might expect that if a court must address only three significant issues in a case it would be likely to deal with them in greater depth and detail than if it must also answer seven minor points with little possibility of actually changing the outcome. Having too many issues could cause the best to get lost in the crowd.

Including loser issues may also damage the advocate's overall credibility and persuasive effect. Arguing such issues implies that the appellant believes them to be important to securing relief and that the appellant believes them to be roughly equivalent in importance to what may be more critical arguments.

Not only should ineffective issues be weeded out in an effort to increase an advocate's persuasive power, but the relief sought for the errors that are appealed should be real-

istic for the same reasons. If the theory of the case that would maximize a client's relief is unlikely to be adopted, but some lesser form of relief is merited, an argument regarding the lesser form of relief will have more influence in the final outcome of the case.⁴⁷ Developing the maximizing theory instead of one leading to more realistic relief is a waste of time as it is likely to be disregarded out of hand. An advocate whose arguments are immediately rejected has little influence in shaping the ultimate form of the opinion. In addition, if the court must reject the competing unacceptable theories of both sides, its discussion of its own theory is likely to be brief and may overlook factors the parties could have brought to the court's attention had they pursued more realistic relief.

In sum, it is important in selecting issues to pay close attention to the likelihood that each alleged error will actually be determined to be error as well as the importance of that error to the overall resolution of the case. The persuasive power of an advocate's argument will be enhanced by carefully prioritizing the issues that could potentially be raised and presenting only those with a real likelihood of securing a favorable outcome. In this era of cost consciousness, such forethought also holds promise to make an advocate's practice more efficient.

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Developing the issues

To whom it may concern: addressing your brief

An appellate brief is one of the most laborious, expensive, and least read pieces of writing known to mankind.⁴⁸ It is not written to be understood by the person in line in front of you at the grocery store. It is not intended to be made into a major movie deal a few years down the road. It is not even meant to impress a client or an adversary. It is meant to win a case — to persuade a bare majority of a few highly experienced, professional and impartial lawyers of some technical point of law. This unique type of document requires a unique approach to writing.

A cleverly written, grammatically precise, interesting and

45. See *Jensen v. Runft*, 252 Kan. 76, 843 P.2d 191 (1992) (court essentially reweighs the facts in determining the best interests of the child despite abuse of discretion standard of review).

46. See generally Myron Moskovitz, *Winning an Appeal*, 9, 58-60 (1992).

47. For example, in a case involving the construction of a complex contract or statute, one side might present an extreme interpretation that would maximize the benefit to the appellant, while the other side might defend an equally extreme position maximizing the benefit to the appellee. If an impartial observer, such as the court's research staff or the judge, discovers a more realistic middle-ground interpretation of the contract or statute, the arguments of both parties will be largely ignored, and thus ineffective. Within the middle-ground interpretation there may still remain minor questions about which the parties could disagree and which might impact the result in measurable ways. If the parties'

arguments deal solely with the extremes, they will have offered the court no aid in dealing with these more minor issues and lost the opportunity to influence the outcome of the case. See *TMG Life Ins. Co. v. Ashner*, 21 Kan. App. 2d 234, 242-246, 898 P.2d 1145 (1995) (court rejects extreme constructions of contracts proposed by both appellant and appellee and adopts a middle position it finds more reasonably reflects the meaning of the language used). As another example, an appellant might have a good argument that damages should be modified to correspond to the evidence, see *Maboney, Inc. v. Galokee Corp.*, 214 Kan. 754, 522 P.2d 428 (1974), and an argument that the trial court improperly admitted some evidence and a new trial should be ordered. The bulk of the appellant's effort should be devoted to the former where the standard of review is more favorable and the chance of relief more likely.

48. Unpublished judicial decisions compete closely for this distinction.

clear brief that immediately grabs the reader's attention and gently guides through a compelling and emotional story, climaxing in an egregious error, is a great read. Matched

The same principle of forthrightness should also apply to the law used to support the argument in the brief.

against a barely decipherable piece of technical drivel, most readers would have no trouble deciding the case. Appellate judges like a great story as much as anyone. However, at the end of the day, if the law and facts are on your side, barely decipherable technical drivel is usually enough. To become a great writer is a worthy goal. Its accomplishment is much appreciated by those with no choice but to read your work. Attempts at great writing pursued without careful thought to exactly who the audience is, however, are often more damaging than helpful.

At trial you, the advocate, control the evidence that reaches the jury.

The jurors are not allowed to read the petitions or complaint and begin their own investigation into the underlying matters. They have no budget with which to hire their own private investigator to find out whether you've told them the whole story. And so at trial you tell the story your way, with your evidence, and your opponent selects other evidence favorable to his or her own theory of the case. The jury may never learn of neutral evidence that establishes the full context of the events giving rise to the dispute. In fact there may even be evidence damaging to your case that the jury never sees because it is inconsistent with the theory of the other side, or the other side has merely neglected it or decided for some other reason not to pursue it.

As a result of the jury's limited knowledge, you might well craft your closing argument in a way that leaves out parts of the case you don't like, parts that in fact might defeat your case if indeed they are true. In doing this you may often win.

But consider what would happen if you made such an argument to an inquisitorial body with the power and ability to go out and verify whether you are telling the whole story and that could actually find out if the facts you rely on are true. When the investigator made the first major find of a material fact detrimental to your position or discovered that what you claim happened never actually did, your credibility would be shot. Why believe your story if it's based on an incomplete view of the evidence or things that aren't true?

On appeal the advocate faces just such an inquisitorial body. The whole world of facts on which your argument could be based is contained in the record on appeal and can be verified.⁴⁹ The court approaches the dispute armed not just with the arguments of the advocates, the decision of the trial judge and the record on appeal but with the added tool of a professional inquisitor — the research attorney. The

court uses a research attorney, with no allegiance to either side, to read through that record to find out if the advocates have given the full and complete story.⁵⁰ If they haven't the court will find out, and the advocate's credibility, and persuasive effort, will be hampered.⁵¹

Yet still some, following the basest instinct of the adversarial system, write briefs based on slanted and incomplete fact statements. Such briefs are extremely convincing, but only until the full record has been reviewed and the weaknesses exposed. Then they lose their credibility.⁵² The saving grace in most such cases is that both sides may have done the same thing, and the court is more interested in correctly deciding cases than punishing poor advocacy, so, you might say, all things considered there is no harm done.

"Do no harm" may be a credo of the medical profession, but most attorneys would prefer to go the additional step of doing some good. Thus while the common practice of slanting the facts at the expense of a complete view of the record may not cause the advocate to lose many cases, it will do little to secure a favorable decision.⁵³

The same principle of forthrightness should also apply to the law used to support the argument in the brief. Of course failure to draw attention to controlling law adverse to your position may be an ethical violation,⁵⁴ but even when it does not rise to that level, the failure to be candid about the limitations of the precedent you cite can be damaging to your persuasive ability.⁵⁵ Initially an appellate court might well presume the advocates who have brought the case through a trial are experts on the area of the law within which they frame their dispute. Thus, the fact that an appeal is taken carries with it the presumption that the question raised is a meritorious one that requires careful scrutiny and measured deliberation. Nothing crushes this presumption faster than the appearance of overreaching by an advocate relying on specious legal authority without dealing directly with its limitation.

In an adversarial system one expects each side to put forth its very best, most persuasive case. If that case appears to rely on sleight of hand or the hope of pulling the wool over the court's eyes, the advocate is making a tacit admission that there is no meritorious argument to be made on the client's behalf.⁵⁶ It is better to admit no authority supports your position, but argue it nevertheless should be adopted than to argue that it is supported by authority that does not, in fact, say what you report it does.

So too with a discussion of an adversary's position. The court will endeavor to understand it whether you correctly represent it. An advocate who responds only to what he or she wishes the other side argued, instead of what the court is likely to conclude the opponent is trying to say, has made an empty argument of no use to the court in resolving the case.

In sum, the appellate court will become aware of the weaknesses of your case, whether you deal with them directly. If the advocate ignores his or her own weaknesses he or she loses the opportunity to provide a rationale for the court to decide the case favorably despite those weaknesses. Moreover,

49. See text accompanying notes 86 through 98 below.

50. Some judges also read the entire record.

51. See Moskowitz, note 46 above, at § 1.3.

52. See John C. Godbold, *Twenty Pages and Twenty Minutes*, in Appellate Practice Manual 84, 92 (ABA 1992).

53. See generally, Ruggero J. Aldisert, *Winning on Appeal, Better Briefs and Oral Argument* § 6.09 (1992).

54. MRPC 3.3(a)(3).

55. See Moskowitz, note 46 above, at § 35.

56. See comment to MRPC 3.3.

the failure to see the appellate court as an independent actor in the appeal causes the appellant to miss the opportunity to warn the court of potential mistakes it might make in its own research and set the direction that research will take.

**... there
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decision.**

**Choosing a maxim — Is the third time
a charm or does success beget success?**

By the time you reach the court of appeals your theory of the case has already been considered by one court and either accepted or rejected. By the time a case has reached the supreme court on a petition for review three more judges will have weighed in. Thus, it may be that an appellant will come to the supreme court with an argument that has already lost twice, before a total of four judges. Will the third time be a charm? Appellees would prefer to believe that success begets success.

Using the exact same argument before the trial court and the appellate court creates at least three potential barriers to effective advocacy. First, it means appellants are likely to face more judges who tell them they are wrong. Second, it ignores the differences between the courts and the fact that by their nature different courts will respond to different arguments. Third, it allows trial counsel's blindspots to be perpetuated on appeal.⁵⁷

Although trial courts do at times make clear and obvious errors, most often, with the benefit of hindsight, their decisions can be seen as the logical culmination of the facts and arguments presented to them. It is not unusual to find those same arguments presented to another group of judges culminate in the same outcome.

While the fact that most cases are affirmed is not likely to change, there are some things an advocate can do to escape the momentum of the trial court's decision. Most importantly, appellate counsel needs to understand why the prior court did what it did and gain a fresh perspective on the issues involved before moving to the next court. This is true even though the standard of review for the issue requires no deference to the trial court. Although new issues not presented to a lower court generally cannot be argued for the first time on appeal,⁵⁸ new legal authority can be considered, in some cases new legal theories can be argued,⁵⁹ and

certainly the organization and presentation of the argument can be clarified and improved. Despite these opportunities for improvement, trial counsel often label slightly modified trial court filings as appellate briefs. Thus appellants sometimes recycle the losing argument without really responding to the reasons why it lost.

This practice is obviously disadvantageous for appellants, but appellees can suffer too from using the same text even though it carried the day before. Recycling trial filings into an appellee's brief often results in a brief that fails to respond to refinements the appellant has made in its arguments. Moreover, it ignores the fact, discussed above, that appellate decision-makers are different, the factors involved in the decisions are different, and the arguments likely to be persuasive may be different as well. Finally, there is no bar to the appellee arguing the trial court was correct for some other reason than that it used.⁶⁰

Of course, in some cases, an argument rejected by the trial court may have been better suited to appellate court determination in the first place and may require little change to be an effective appellate brief.

Using trial court filings as the basis for appellate briefs has another drawback. Before considering trial briefs the trial court may have been steeped in the facts and theories and closely familiar with, if not instrumental in, the development of the case. As a result, trial briefs often lack the context an appellate court requires to fully understand each side's perspective on the arguments. Furthermore, the intimacy the parties have developed with the case may cause blind spots that only a new, fresh look at the case will reveal. For example, in one recent case the parties litigated up to the supreme court a dispute regarding the construction of a particular statute. Never did the parties realize they had been applying the wrong version of the statute, one not in effect when the dispute arose. In another case, the failure of the parties to get a fresh view of the case to check for blind spots resulted in the dismissal of the appeal for lack of jurisdiction after oral arguments. Had the appellee's counsel carefully reviewed the case, the client could have been saved some expense.

Doing tricks over the net

Invoking jurisdiction

No matter how good the argument, no matter how much justice cries out for reversal on appeal, if appellant's counsel fails to invoke the jurisdiction of the appellate court no relief

57. See generally Dennis J.C. Owens, *New Counsel on Appeal?*, in Appellate Practice Manual, 61 (ABA 1992). Owens suggests that trial counsel can be too blinded by personal failure to effectively prepare and present the appeal. Owens advocates the position that it is usually the better practice to secure a new attorney on appeal. Among other arguments, Owens writes:

"Why change lawyers? The chief reason is simple: An appellate attorney can do a better job because he or she is a specialist. Such a lawyer knows the appellate court's rules, customs and judges. More importantly, appellate lawyers know how to write a brief and make an oral argument, and do both efficiently and quickly. There is more to this than just repetition and familiarity. The way you argue and write appeals is different from the same tasks at the trial level." *Id.* at 62.

58. E.g., *Veatch v. Beck*, 252 Kan. 1081, Syl., 850 P.2d 923 (1993).

59. *Johnson v. Kansas Neurological Institute*, 240 Kan. 123, 126, 727 P.2d 912 (1986). New theory can be raised in:

"(1) Cases where the newly asserted theory involves only a question of law arising on proved or admitted facts and which is finally determinative of the case;

"(2) cases where consideration of a question raised for the first time on appeal is necessary to serve the ends of justice or to prevent the denial of fundamental rights;

"(3) cases where a judgment of a trial court may be upheld on appeal even though the court may have relied on the wrong ground or assigned a wrong reason for its decision."

240 Kan. at 126.

60. See *Prairie State Bank v. Hoefgen*, 245 Kan. 236, Syl. ¶ 3, 777 P.2d 811 (1989) (trial court affirmed if ruling is correct for any reason).

will be forthcoming. "The right to appeal is statutory and is not a right vested in the United States or Kansas Constitutions. An appellate court has jurisdiction to entertain an appeal only if the appeal is taken within the time limitations and in the manner provided by the applicable statutes."⁶¹

Jurisdiction is, of course, fundamental to court action. Nevertheless, it is a consideration many appellate counsel ignore. The pitfalls of jurisdiction are few, but nevertheless come up with some regularity.

Not every action of a trial court or an administrative agency is appealable.⁶² The full permissible scope of appellate jurisdiction is set out by statute. Thus the first step to securing jurisdiction is to identify the statutes that regulate jurisdiction in a given case.⁶³ It is critical to remember in the process that, where a statute provides for an appeal, the appeal is governed by that statute rather than general statutes providing a right of appeal.⁶⁴ After identifying the statutes, the second step is to comply with them.⁶⁵ Pretty simple.⁶⁶

Once the appellant has identified some appealable order,⁶⁷ two common jurisdictional failings are untimely appeals⁶⁸ and the failure to include the aspect of the judgment appealed from in the notice of appeal. The time limits for filing a notice of appeal are jurisdictional and late filings are generally ineffective to raise questions before the appellate courts.⁶⁹ Absent a timely notice of appeal the court has a duty to dismiss the case on its own motion.⁷⁰ The rules for computing time are set out by statute and their application is clarified by decided cases.⁷¹ Likewise, the notice of appeal, listing the part of the judgment appealed from, is jurisdictional and the failure to bring the issues within the notice of appeal prevents appellate court resolution.⁷² Broad language in the notice of appeal encompassing all aspects of the case assures that issues discovered while drafting the brief are within scope of the notice of appeal, and thus, the court's jurisdiction.

Advocates must also be aware that changed circumstances since the trial court ruling may have rendered appellate issues moot, and thus outside the court's jurisdiction.⁷³ Additionally, for there to be proper jurisdiction in the appellate court, there must be proper jurisdiction at the previous levels of the proceedings.⁷⁴ Thus, not only are the statutes governing appellate jurisdiction important, but jurisdiction throughout the process should be verified. This problem may be particularly pronounced in administrative law. Another common problem in administrative law appeals is the failure to exhaust administrative remedies. The cure is close familiarity with the statutes governing the administrative remedies and a good understanding of the exceptions to the exhaustion requirement.⁷⁵

**The parties
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The fact the parties agree an appeal should be heard does not resolve a problem with jurisdiction. The parties cannot consent to jurisdiction when it is otherwise lacking.⁷⁶

A recent case illustrates the danger of pushing the limits when invoking jurisdiction. In *Jones v. Continental Can Corporation*,⁷⁷ a workers compensation case, the commissioner of insurance filed a notice of appeal just beyond the 30 days permitted by statute, and relied on the three-day mailing rule of K.S.A. 60-206(e) to argue the appeal was timely. The supreme court held that although K.S.A. 60-203(e) applied to workers' compensation appeals from 1979 until 1986, and K.S.A. 77-613(d) allowed an identical three-day mailing extension from 1986 until 1993, both before 1979 and after 1993 there was no three-day mailing rule that applied to workers' compensation cases. Therefore, the appeal was dismissed. The supreme court noted that its own rules,⁷⁸ which were argued to permit a three-day extension, could not expand the court's jurisdiction.

61. *Resolution Trust Corp. v. Bopp*, 251 Kan. 539, 541, 836 P.2d 1142 (1992). But see criminal exceptions in *State v. Ortiz*, 230 Kan. 733, 735-36, 640 P.2d 1255 (1982); *State v. Medina*, 256 Kan. 695, 701, 887 P.2d 105 (1994). For civil exceptions to requirement of timely notice of appeal, see *Johnson v. American Cyanamid Co.*, 243 Kan. 291, Syl. ¶ 1, 758 P.2d 206 (1988).

62. See, e.g., *Holton Transport, Inc. v. Kansas Corp. Commission*, 10 Kan. App. 2d 12, 690 P.2d 399 (1984) (remand to administrative agency for additional fact findings not appealable); *Oertel v. Phillips*, 197 Kan. 113, 415 P.2d 223 (1966) (order granting new trial not generally appealable); *Donaldson v. State Highway Commission*, 189 Kan. 483, 370 P.2d 83 (1962) (denial of motion to dismiss not appealable); *Bates & Son Constr. Co. v. Berry*, 217 Kan. 322, 537 P.2d 189 (1975) (order vacating default judgment not appealable).

63. E.g., K.S.A. 60-2101; K.S.A. 60-2102; K.S.A. 60-2103; K.S.A. 22-3602; K.S.A. 22-3603; K.S.A. 22-3608; K.S.A. 66-118b; K.S.A. 74-2426(c)(3); K.S.A. 74-529(a); K.S.A. 77-623; K.S.A. 38-1591(a); K.S.A. 38-1681; K.S.A. 59-2401(a); K.S.A. 61-1705; K.S.A. 25-1450.

64. *Clay Township, Reno County v. Pebley*, 207 Kan. 59, 63-64, 483 P.2d 1101 (1971).

65. As liberally construed in the furtherance of justice. *Whitehead v. State of Kansas Labor Dept.*, 203 Kan. 159, 162, 453 P.2d 11 (1969).

66. In theory.

67. Assuming the appellant is the person entitled to appeal the order, another complete area of inquiry. See, e.g., *Miller v. Insurance Management Associates*, 249 Kan. 102, 815 P.2d 89 (1991); *Jones v. Bordman*, 243 Kan. 444, 759 P.2d 953 (1988); *In re Waterman*, 212 Kan. 826, 512 P.2d 466 (1973).

68. Late appeals are the problem. Premature notices of appeal, filed

subsequent to announcement by the judge of the judgment to be entered, become effective upon entry of final judgment. Kansas Supreme Court Rule 2.03 (1995 Kan. Ct. R. Annot. 8-9).

69. See *Brown v. Brown*, 218 Kan. 34, 542 P.2d 322 (1975); *Tobin Constr. Co. v. Kemp*, 239 Kan. 430, 437, 721 P.2d 278 (1986); *State v. Ji*, 255 Kan. 101, 102, 872 P.2d 748 (1994); and cases cited in note 61 above. Note also that cross-appeals must be timely filed and that an appellee must cross-appeal adverse rulings to obtain appellate review. See *Love v. Monarch Apts*, 13 Kan. App. 2d 341, 343-44, 771 P.2d 79 (1989); *Chetopa State Bancshares, Inc. v. Fox*, 6 Kan. App. 2d 326, Syl. ¶ 3, 628 P.2d 249, rev. denied 229 Kan. 669 (1981).

70. See *Giles v. Russell*, 222 Kan. 629, Syl. ¶ 3, 567 P.2d 845 (1977).

71. See, e.g., K.S.A. 60-206; K.S.A. 61-1705; *Danes v. St. David's Episcopal Church*, 242 Kan. 822, 825-26, 752 P.2d 653 (1988); *Hundley v. Pfuete*, 18 Kan. App. 2d 755, 858 P.2d 1244 (1995).

72. See K.S.A. 60-2103(b); *State v. Grant*, 19 Kan. App. 2d 686, 691, 875 P.2d 986, rev. denied 255 Kan. 1005 (1994).

73. See, e.g., *Allenbrand v. Zubin Darius Contractors*, 253 Kan. 315, 855 P.2d 926 (1993).

74. *City of Overland Park v. Barron*, 234 Kan. 522, Syl. ¶ 1, 672 P.2d 1100 (1983); *Thompson v. Amis*, 208 Kan. 658, 661, 493 P.2d 1259, cert. denied 409 U.S. 847 (1972).

75. See, e.g., *Kansans for Fair Taxation v. Miller*, 20 Kan. App. 2d 470, Syl. ¶ 7, 889 P.2d 154, rev. denied 257 Kan. 1092 (1995). See generally K.S.A. 77-601 et seq.

76. See *Varner v. Gulf Ins. Co.*, 254 Kan. 492, Syl. ¶ 3, 866 P.2d 1044 (1994).

77. No. 75,333 filed July 12, 1996.

78. See Supreme Court Rule 9.04(c) and Supreme Court Rule 1.05(c).

In short, jurisdiction is a complex area in which counsel should not take avoidable risks. The stakes are high and there is no safety net below. A careful reading of the statutes

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and relevant cases in the area in which the appeal arises and attention to deadlines will solve many of the common errors in properly invoking jurisdiction.

Getting the issues before the court

Some authorities credit the appellate counsel's written and oral arguments with winning and losing cases — as if appellate courts were media critics attempting to identify the most talented lawyer. At least in Kansas, such a view is fundamentally myopic. Good draftsmanship and effective presentation are important,⁷⁹ but are unlikely in all but the rarest cases to overcome the established underlying legal principles that will ultimately govern the decision in light of the facts developed in the case. Thus, the most critical aspect of preparing an appellate case is not writing an award-winning brief or presenting an enchanting oral argument.

As a rule, our appellate courts have little active interest in rendering poor decisions and will not do so simply because one or both of the parties did a poor job presenting its case. It is often difficult, if not impossible, to tell how good the briefs and oral argument

were from reading the opinion. If the parties failed to investigate how other jurisdictions have handled a novel question of law they raise, the court will do so through the judge's own investigation and the research attorney's prehearing memoranda. Similarly, if the parties dispute the construction of some statutory enactment, but fail to delve into its legislative history, the court will not use the parties' omission to justify its own. Instead the court, whose concern with the outcome of the case is broader than that of the parties to a given dispute,⁸⁰ will fill in the gaps in the parties' briefs. And so, even poor briefs can give rise to great opinions. (Some would argue the corollary is also true at times, that great

briefs have been known to give rise to poor opinions). Those who have regularly practiced before the court may sometimes wonder how the court ever came to write a decision on the basis it chose that may never have been thought of by the parties, much less argued.

This is not to say that a mere reference in the brief to the issue being raised is enough to ensure it will be considered and resolved by the court. The court may, especially if the merit of the argument is not immediately apparent, ignore an issue raised without supporting authority or argument.⁸¹ Nor is this to say that poor legal research or simplistic reasoning should be all that an advocate tries for because the court will do its own research anyway. The court's own research may not (and likely will not) be comprehensive and may miss authority supporting your position while discovering new authority for your opponent. Poor research may also hurt your credibility and give you a reputation for laziness. However, it is nice to know that one works with a safety net when making appellate arguments and compiling relevant authority. Thus these aspects of appellate practice, often thought to be the most crucial, are not where an otherwise winnable case is likely to be lost. It is the areas where the attorney works without a net that are the most dangerous.

While the court will research and develop arguments the parties raise, it will not, except in extraordinary circumstances, raise issues the parties have not.⁸² Even when the court's review of the record on appeal reveals a ground for reversal, the court will not generally consider it if the parties did not at least name the issue in the briefs⁸³ and make some argument.⁸⁴ Likewise, except where the trial court has reached some unsound legal conclusion, the appellate court will not generally consider an issue that was not raised before the trial court.⁸⁵ Thus if an objection was not made, or an argument was not included in the briefs, the appellate courts will not save the attorney from his or her oversight.

There's no net under the record

In a similar vein, the appellate court's decisions are based solely on the record on appeal.⁸⁶ It is the appellant who has the burden to provide a record adequate to establish the claimed error.⁸⁷ Where there are important aspects of the case of which no record was made, or where a record was made but not included in the record on appeal, the attorney has again fallen with no net below.⁸⁸ Assertions in a brief are not enough.⁸⁹ In addition, some attorneys forget that an appendix to a brief does not substitute for a record on

79. From the perspective of one who reads many briefs and watches many arguments, I can also say these attributes make a case more enjoyable.

80. *Johnson v. Kansas Neurological Institute*, 240 Kan. 123, 126, 727 P.2d 912 (1986). (Appellate courts serve two functions: resolving the current dispute and using the current case as a vehicle to establish precedent for the future.)

81. See *Enlow v. Sears, Roebuck, & Co.*, 249 Kan. 732, 744, 822 P.2d 617 (1991). (Appellant argued jury instruction was erroneous but did not specify which instruction or what the error was.)

82. See, e.g., *Pope v. Ransdell*, 251 Kan. 112, 119, 833 P.2d 965 (1992); *State v. Pratt*, 255 Kan. 767, Syl. ¶ 4, 876 P.2d 1390 (1994); but see *K.S.A. 1993 Supp. 21-4627* (on appeal from imposition of Hard 40 sentence court authorized to notice unassigned errors); *Johnson v. Kansas Neurological Institute*, 240 Kan. 123, 127, 727 P.2d 912 (1986) (when issue is raised *sua sponte* by the court, parties should have opportunity to respond).

83. E.g., *Seal v. Seal*, 212 Kan. 55, 510 P.2d 167 (1973).

84. See *McKissick v. Frye*, 255 Kan. 566, 578, 876 P.2d 1371 (1994).

85. See, e.g., *Plummer Development, Inc. v. Prairie State Bank*, 248 Kan. 664, Syl. ¶ 3, 809 P.2d 1216 (1991) (general rule in civil cases); *State v. Johnson*, 253 Kan. 75, 91, 853 P.2d 34 (1993) (general rule in criminal cases); *In re Conservatorship of Marcotte*, 243 Kan. 190, 196, 756 P.2d 1091 (1988) (exceptions); *State v. McCloud*, 257 Kan. 1, 10, 891 P.2d 324 (1995) (exceptions); *State v. Collier*, 259 Kan. 346, 350, 913 P.2d 597 (1996) (exception in Hard 40 cases).

86. See Kansas Supreme Court Rules 3.01-3.09 (1995 Kan. Ct. R. Annot. 16-23). See generally James F. Hewitt, *Preserving and Assembling the Record on Appeal: Getting Through the Minefield*, in Appellate Practice Manual 5 (ABA 1992).

87. *McCubbin v. Walker*, 256 Kan. 276, 295, 886 P.2d 790 (1994); *State v. Richardson*, 256 Kan. 69, 84, 883 P.2d 1107 (1994).

88. E.g., *First National Bank & Trust Co. v. Lygrisse*, 231 Kan. 595, 603, 647 P.2d 1268 (1982) (where record regarding issue is not produced, court will not consider it).

89. *Smith v. Printup*, 254 Kan. 315, 353, 866 P.2d 790 (1994).

appeal.⁹⁰ Although the supreme court rules in limited circumstances permit additions to the record on appeal of facts that never became part of the record below,⁹¹ a recent decision has brought into focus how narrow this exception is, holding this rule does not permit the record to be impeached.⁹²

If the appellant wishes to contest omissions in the trial court's findings of fact, he or she must make a record contesting the adequacy of the findings, or face a rebuttable presumption the trial court found all necessary facts.⁹³ In addition, typically a party may not raise an issue on appeal that was not presented to the trial court.⁹⁴ Thus, the appellate courts will not review questions the record does not affirmatively show were raised.⁹⁵ Similarly, an issue is abandoned before the supreme court, even if considered by the court of appeals, if not included in the petition for review.⁹⁶

In addition, the record must not only be available to the appellate court, it must be easily accessible and, thus, failure to key factual allegations to the record has led to the presumption that alleged facts are unsupported in some cases.⁹⁷

Finally, the record is important because it may be the only part of the final decision outside the appellate court's control. A court can invent new law where the present law is unclear or contrary to the result the majority wants to reach. The court cannot invent new facts.⁹⁸ The advocate's greatest power is the ability to develop the facts of the case. The facts the advocates develop limit and define the parameters within which the appellate courts can work.

Technical precision — getting those blasted ducks in a row

The number of procedural obstacles to having an issue addressed by the court can seem daunting. The supreme court rules prescribe the typesetting, margins, format, and organization and structure of the briefs.⁹⁹ Footnotes must comply with footnotes rules,¹⁰⁰ cover colors must comply with cover color rules,¹⁰¹ and the docketing statement must comply with docketing statement rules.¹⁰² Yet a perusal of the annotations to these rules reveals no cases denying a party relief because the table of contents was incomplete or the reply brief had a yellow cover instead of grey, even

though such errors from time to time occur.¹⁰³

Likewise, the failure to abide by certain time requirements after an appeal is timely perfected is not jurisdictional, and thus automatically fatal, but does unnecessarily delay the appellate process.¹⁰⁴

In short, the undeniable prerequisites to effective appellate advocacy that must necessarily take precedence over all other technical and strategic considerations are invoking jurisdiction, making a record and bringing the critical issues to the court's attention. It is in those areas the advocate works without a net.

From the appellee's perspective, attacking procedural defects in the appellant's brief is likely to be wasted effort in ultimately securing a favorable outcome. Attacking jurisdictional defects is much more fruitful.

Oral argument

Briefs are permanent. When a judge wants to look at them, they are on the shelf, waiting. They are read carefully and critiqued before the advocate utters a syllable aloud. While the opinion is being drafted they provide a ready reference and a blueprint.

Oral arguments, if they are granted at all, come and go. They fade from memory and run together. In time they are no more than a few notes jotted down in haste. Nevertheless, since some would view no discussion of appellate advocacy as credible without mentioning oral arguments, they are mentioned here in passing.

The conversation begins

You got your invitation to the party. You tried to show up at the fashionable time. You've poured yourself a drink and hold it in your hand so you don't look as out-of-place as you feel. You scan the room for a few friends, but none are

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90. *Cline v. Tittel*, 20 Kan. App. 2d 695, 702-03, 891 P.2d 1137 (1995).

91. Kansas Supreme Court Rule 3.04 (1995 Kan. Ct. R. Annot. 20); see also Kansas Supreme Court Rule 3.05 (1995 Kan. Ct. R. Annot. 21) (parties may have an appeal on agreed statement rather than a record on appeal).

92. *State v. Collier*, 259 Kan. 346, 364, 913 P.2d 597 (1996).

93. See *Galindo v. City of Coffeyville*, 256 Kan. 455, 467, 885 P.2d 1246 (1994).

94. *Jones v. Hansen*, 254 Kan. 499, 867 P.2d 303 (1994).

95. *In re Johnson*, 210 Kan. 828, 834-35, 504 P.2d 217 (1972).

96. *Seebree v. Bd. of County Commissioners of Shawnee County*, 251 Kan. 776, 840 P.2d 1125 (1992).

97. Kansas Supreme Court Rule 6.02(d) (1995 Kan. Ct. R. Annot. 29-30); *McCaffree Financial Corp. v. Nunnink*, 18 Kan. App. 2d 40, 48, 847 P.2d 1321 (1993); *Kenyon v. Kansas Power and Light*, 17 Kan. App. 2d 205, 836 P.2d 1193 (1992); but see *Jack v. City of Olathe*, 245 Kan. 458, 462, 781 P.2d 1069 (1989) (violation merely noted); *Roe v. Diefendorf*, 236 Kan. 218, 689 P.2d 855 (1984) (clear and ascertainable, though unconventional, citation to the record sufficient).

98. *Craig v. Hamilton*, 221 Kan. 311, 559 P.2d 796 (1977) (appellate courts recite but do not find facts); *Steck v. City of Wichita*, 179 Kan.

305, 295 P.2d 1068 (1956) (appellate court cannot go outside the record in order to make a final determination of the merits).

99. Kansas Supreme Court Rules 6.02, 6.03, 6.04 (1995 Kan. Ct. R. Annot. 29-32).

100. Kansas Supreme Court Rule 6.07(a) (1995 Kan. Ct. R. Annot. 33).

101. Kansas Supreme Court Rule 6.07(b) (1995 Kan. Ct. R. Annot. 33).

102. Kansas Supreme Court Rule 2.041 (1995 Kan. Ct. R. Annot. 11-15).

103. See *Szoboszlay v. Glessner*, 233 Kan. 475, 480-81, 664 P.2d 1327 (1983) (procedural requirements of supreme court rules may be waived); *Kansas Bankers Sur. Co. v. Scott*, 200, 589 P.2d 575 (1979) (denying appeal on technical procedural ground not favored); *Welch v. Kansas City*, 204 Kan. 765, 465 P.2d 951 (1970) (rules relating to size of pages in the record should be complied with); *Emond v. City of Wichita*, 185 Kan. 720, 347 P.2d 256 (1959) (rules of appellate procedure should be meticulously followed, but failure to do so no grounds for reversal absent prejudice to opponent).

104. See *Crumpacker v. Crumpacker*, 239 Kan. 183, 184, 718 P.2d 295 (1986) (time limit for serving and filing briefs not jurisdictional); *In re Lakeview Gardens, Inc.*, 227 Kan. 161, 605 P.2d 576 (1980) (failure to timely pay docket fee and timely designate record not jurisdictional where no prejudice).

to be found. You feel alone, the only one standing by yourself. You decide to join some small clique of strangers and intrude on their conversation. But what do you say? After a few necessary formalities, what do you talk about?¹⁰⁵

In the court of appeals the presiding judge is usually direct about where you should begin your oral arguments. You are admonished, "We've read your briefs and reviewed the record and are familiar with the facts of this case." What was said of selecting the issues to appeal may be said of oral argument as well. Keep your goal in mind. Use scarce resources in the areas most likely to make a difference to the outcome of the case. If the outcome of the case hinges on a few critical facts, devastating to the arguments of the other side, by all means recite, repeat and reiterate those facts. Nevertheless, the presiding judge means what the presiding judge says. To translate, "Don't waste any of your 15 minutes telling us the background for the issues. We know it. Concentrate on things that will make a difference."

The supreme court makes no admonition comparable to the court of appeals. The astute observer should conclude that it therefore expects its more leisurely 30-minute arguments to begin with an orientation to the facts of the case. As with the brief, a chilling, dramatic story with colorful villains and tragic victims might be entertaining, but really fails to do much to influence the result. A well-organized short statement of the background of the case, highlighting the major events and touching on those facts unpleasant to your client's position is all that is required. Too much detail gets lost in the string of words reciting it and draws time and attention away from the real issues. Too partisan a statement is met with great skepticism. Except where it is the injustice of the facts on which your case must turn, your goal should be to prepare the court for the things that will make a difference. But what makes a difference?

"Thank you for allowing me to read my brief."

Oral argument is a wonderful opportunity that many otherwise skilled lawyers seem to squander. Some see it as a chance to read the essential elements of the briefs — the carefully crafted sentences of which they are so proud — into the record.¹⁰⁶ Sometimes they seem to hope that if they do this fast enough, they won't be interrupted by the pestering questions that judges like to ask when you take a breath.

From an appellate court's perspective, oral argument has one central goal — to make sure its decision is the best one. Judges want to make sure they understand the factual and legal context within which their decisions will operate. They want to make sure they understand the implications a decision will have in other cases and in the everyday practice of law. To ensure they do understand, they use oral argument to measure their grasp of the case against that of the parties. As a result, the appellate courts are not passive participants in oral argument but are pursuing their own agendas and

using the attorneys as vehicles to do so. The attorneys who can best serve the court, and in turn best use the opportunity to serve the client, are not those who have prepared speeches, but those who have prepared to participate in a discussion.

Judges, like the rest of us, do not like to be wrong. Together with their staffs they typically take measures to reduce the possibility that they will be. In taking these measures, judges, especially those who read not just the briefs of the parties beforehand, but also the prehearing memorandum, may know facts about the case neither party has included in the briefs and will almost always be familiar with legal precedent, legislative history, or theoretical and jurisprudential considerations beyond those the advocates have raised. Equally importantly, most judges will be aware of the proposed resolution of the case suggested by the research attorney, may have reached tentative conclusions of their own and may already have a strong feeling for how the ultimate opinion might read.

Thus, oral arguments can test the advocate's ability to think on his or her feet. The court may ask the attorneys to comment on some precedent, history or jurisprudential consideration sprung on them for the first time at oral argument. Sometimes the court's questions are directed toward helping your argument along and sometimes they are asked only to give you the chance to persuade the court that these new considerations aren't fatal to your case.¹⁰⁷ Answering questions thoughtfully and carefully (and as asked) can be the most critical aspect of oral argument. It can be a considerable embarrassment to sit down and realize you just argued against a theory that supports your client's position. It is imperative that the advocate know not only the facts particular to his or her own case, but also know the full legal context in which the dispute is to be resolved. The advocate should be prepared to discuss not only what the law should be, but also what the law has been and how it developed. The advocate should be versed not only in that statute upon which a present dispute hangs, but also the full statutory scheme in which that statute is found and other statutes in *pari materia*.¹⁰⁸

Oral argument has several purposes for the advocate. It presents the chance to make sure the court understands what he or she attempted to write in the brief. Further, the advocate has the opportunity to address weaknesses in the other side's case. Oral argument serves as an opportunity to establish priorities — to highlight the critical points on which your client's case turns and to point out areas in which, while you believe you are right, an adverse ruling will not necessarily deprive you of the ultimate result you seek.

Oral argument is largely the chance to fix your case. If a

**Too
much
detail
gets lost
in the
string of
words
reciting
it ...**

105. This discussion focuses on the subject matter of oral argument. The skills required for an effective oral presentation are beyond the scope of this article. It is sufficient to note here that it does not matter what you say if it is not loud enough or clear enough to be heard and understood. That said, as with great writing skills, great speaking skills are nice but don't change the underlying facts of the case and governing precedent.

106. The Kansas Supreme Court and Court of Appeals are courts of record, K.S.A. 20-101; K.S.A. 20-3001, although their proceedings are not transcribed.

107. See Moskowitz, note 46 above, at § 4.3.

108. See Moskowitz, note 46 above, at § 4.2; James L. Robertson, *Reality on Appeal*, in Appellate Practice Manual 119-126 (ABA 1992).

judge who has already read your brief and a memo explaining it asks a question that shows he or she just doesn't get your argument it's a clue — he or she just doesn't get your argument. Rather than giving a short reply before plunging back into your notes, seize the opportunity to try to start over again and identify where you lost the court (and if you're not careful, your case).

***One justice,
well-versed
and skillful,
may over the
course of
discussion
bring three
more along.***

Oral argument is also a chance to make the court want to decide in your favor. By and large in the court of appeals it doesn't much matter how egregious the facts are, even if you make the judges want to help you, they often lack the power. The court of appeals judges are accountable pretty directly to the supreme court. The specter of being overruled for failing to follow precedent or interpreting it too broadly is only one floor away (for some judges it's just down the hall). The court of appeals judges end up deciding most cases the way they have to.¹⁰⁹

However, the situation in the supreme court is dramatically different. Except in rare cases where the U.S. Supreme Court agrees to review some question of federal law passed on by our court, it need not fear reversal. Instead, its watchdog — the media and the public at large — is sometimes less disciplined and less informed than a reviewing court. The editorials and articles about supreme court cases are not avoided but the justices are widely read, connected to the outside world, and deeply interested in the effects of their decisions and responses to their dissents.

The judiciary is ultimately responsible to the people. Problematic decisions of the trial court incur the wrath of the public only until the court of appeals renders a ruling. The court of appeals then takes the heat only until the supreme court weighs it. After that, the buck stops.

Add to this the supreme court's power and responsibility for modifying the common law, and its efforts to secure the efficient administration of justice, sometimes by reversing its own inefficient doctrines (and limited only by constitutional barriers including the separation of powers), and the result is a forum where precedent is nice, but it's also nice to convince the court that it should want to do what you advocate.

Thus, technical argument that the court is bound to reach an ugly result is likely to be persuasive to the court of appeals. More practical arguments that the result, if within constitutional bounds, isn't all that ugly are most likely to resonate with the supreme court. Oral argument is the chance to emphasize the one that fits.

Finally, oral argument is the time when the advocate must pass on the torch of advocacy and convince at least one judge to carry the client's cause into the court's conference. This is easier to do in the supreme court where it is fairly certain who will hear and decide your case from before the briefs are written, although the parties will have enough advance notice of the panel members in the court of appeals to tailor their oral arguments.

A man was hunting prairie chickens with a friend one day when a flock flew up from the tall grass. The man lifted the barrel of his gun and, without aiming, fired a round. It missed. His friend asked, "Why didn't you aim at one of the birds first?" The man replied, "One prairie chicken is not enough for a meal."

As much as an advocate would like, at oral argument, to persuade all the supreme court justices of the merit of his or her position, it is unnecessary. A majority persuaded by the time the opinion is published is enough to carry the day. One justice, well-versed and skillful, may over the course of discussion bring three more along. But if no justice accepts your cause, no persuading will be done.

This win-one-justice strategy is especially useful if that one justice has written the seminal case that could support your position.¹¹⁰ Having once before confronted the questions in detail, and having struggled to produce an opinion which would stand as precedent, that justice might be expected to be the resident expert in the area. Win that justice to your position and you've secured a powerful ally. Lose that justice and you've secured a powerful foe. Know before oral argument who on the court has the expertise in the area. Use oral argument in part to win that justice.

"Timing is everything"

Effective advocacy is timely advocacy. Few clients will be well served by justice delayed. In criminal cases it has happened that by the time an opinion is rendered on the propriety of a sentence, the sentence is nearly fully served. An attorney can do little about the backlog of cases that may delay his or her own client's case. Nevertheless, an advocate can do several things to avoid causing further delays pushing final resolution of the matter into the future.

First, the backlog of cases in the Kansas Court of Appeals is longer than that of the Kansas Supreme Court. As of Jan. 1, 1996, the court of appeals had 2,108 cases pending, up nearly 30 percent from one year earlier.¹¹¹ The supreme court had 258 cases pending, up only 2 percent from the previous year. In fiscal year 1994-1995 the supreme court reduced its backlog, while the court of appeals backlog grew by almost 500 cases. Attempting to get your case transferred immediately to the supreme court might therefore produce a quicker

109. See *Kastner v. Blue Cross and Blue Shield of Kansas*, 21 Kan. App. 2d 16, 894 P.2d 909 (1995).

"It is well established that this court is without authority to overrule decisions rendered by the Supreme Court." *Downes v. IBP, Inc.*, 10 Kan. App. 2d 39, 40, 691 P.2d 42 (1984), *rev. denied* 236 Kan. 875 (1985). Furthermore, "[t]his court is duty bound to follow the law as established by Kansas Supreme Court decisions, absent some indication the Supreme Court is departing from its previously expressed position." *Grubin v. City of Overland Park*, 17 Kan. App. 2d 388, 391, 836 P.2d

1222 (1992) (quoting *Batt v. Globe Engineering Co.*, 13 Kan. App. 2d 500, 507-08, 774 P.2d 371, *rev. denied* 245 Kan. 782 [1989])." 21 Kan. App. 2d at 29-30.

110. This strategy is more difficult before the court of appeals because the chance that a judge on the panel wrote an important case cited in your brief is slim.

111. Figures are derived from the January 1996 and January 1995 caseload activity summaries prepared by the clerk of the appellate courts.

resolution, and a more final one to boot.¹¹²

Second, like some airlines, the court of appeals offers "stand-by seating." As the court travels it attempts to hear cases originating in the part of the state where the panel is sitting. If there are insufficient cases to fill a docket, the court may schedule cases from outside the area to fill the oral argument schedule. Thus, letting the court of appeals know you are willing to have your case heard on the first available docket anywhere in the state may advance the oral argument date of your case. It might give you a chance to take a relaxing scenic drive as well.

Third, the appellate courts have procedures designed to permit the postponement of a case for the convenience of the parties, such as moving for an extension of time to file briefs.¹¹³ By using these devices sparingly and only in the unusual case, your client is likely to get a more timely resolution of the case. In addition, speed begets speed. Since

one party's deadlines are sometimes measured from the other party's action,¹¹⁴ the whole process is expedited by one party acting as quickly as possible.

The cocktail party comes to an end

Appellate practice is like a cocktail party. Anyone can go, but it takes an invitation and a good deal of experience milling around to make the most of it. If you don't know who you're talking to and address your conversation accordingly, you're likely to put your foot in your mouth.

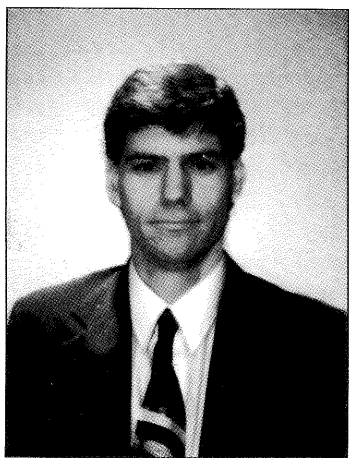
In appellate practice, as in all practice of law, preparation — intelligent, informed preparation — is the key to successful advocacy. The hope of this article is that an understanding of how the court operates and the common mistakes appellate counsel make from an insider's perspective may help an advocate's preparation be better informed.

112. K.S.A. 20-3017; Kansas Supreme Court Rule 8.02 (1995 Kan. Ct. R. Annot. 47). This strategy is perhaps more theoretical than practical. It is unlikely the supreme court would permit the transfer of many more cases than it presently does. Therefore, such requests should be made sparingly and only when there is a real possibility of immediate supreme court review because of the unique factors in an individual

case that would require supreme court intervention.

113. Kansas Supreme Court Rules 5.03 and 5.02 (1995 Kan. Ct. R. Annot. 26-27).

114. See, e.g., Kansas Supreme Court Rule 6.01(b) (1995 Kan. Ct. R. Annot. 29) (appellee's brief due within 30 days of service of appellant's brief)



About the Author

Patrick Hughes is a law clerk for the Hon. Mary Beck-Briscoe on the U.S. Court of Appeals, 10th Circuit. Hughes served as a research attorney for the Hon. Edward Larson on both the Kansas Court of Appeals and the Kansas Supreme Court. Hughes earned his J.D. from the Washburn University School of Law, magna cum laude, in 1994. He plans to enter private practice at the end of his term with Beck-Briscoe in August.

(Article appeared in the February/March 1997 issue of "The Journal of the Kansas Bar Association")