PRACTICE PREFERENCES

Florida Second District Court of Appeal

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INTRODUCTION

The following guidelines are intended to help facilitate what the judges of this court collectively believe are best practices in appellate advocacy before the Second District Court of Appeal. They are arranged under headings that reflect three subject areas within appellate practice: (i) Notices, Motions, and Records; (ii) Briefs and Brief Writing; and (iii) Oral Argument.

These are, of course, simply suggestions. Nothing within this publication can create any enforceable rights—for or against anyone. And nothing in this publication is intended to supplant or modify any promulgated rule or law. Rather, proper appellate practice in this court remains rooted in adherence to the Florida Rules of Appellate Procedure, the Florida Rules of Judicial Administration, the Florida Rules of Professional Conduct, and this court's administrative orders. Thus, it is assumed that the reader will have familiarized himself or herself with all of the applicable procedural rules and administrative orders.

NOTICES, MOTIONS, AND RECORDS

1. Notices of Appeal. A notice of appeal should always identify the date and the nature of the order being appealed within the notice itself.

In civil and family law cases: (a) the appellant also must include a copy of the order under appeal in its entirety, as well as any orders on motions that would toll the rendition of the order under appeal (i.e., orders on timely and authorized motions for rehearing); (b) prior to filing, counsel should carefully review the order and applicable law to ensure that the order being appealed is indeed an appealable order. For example, not infrequently, our court receives notices that attempt to initiate appeals of orders simply granting a motion to dismiss or a motion for summary judgment, which are not, ordinarily, appealable final orders (to be appealable, such an order would need to actually enter judgment or dismiss the case with finality).

In criminal proceedings: (a) the appellant, if appealing from an order denying a motion to withdraw a plea, should identify in the notice of appeal the nature of the motion that preceded it (e.g., a Fla. R. Crim. P. 3.170(*l*) motion or a rule 3.850 motion); (b) if counsel in a criminal proceeding has failed to file a timely notice of appeal within thirty days of the judgment or order, the attorney may file a late notice of appeal along with an affidavit explaining the reasons for the delay (which presumably were not attributable to the client), rather than immediately filing a petition for belated appeal.

2. Conferral and Consent on Motions. Absent emergency circumstances and when appropriate, counsel should confer with opposing counsel regarding the subject of the motion before filing it. When a certificate of conferral (indicating when and how counsel conferred and whether consent was obtained) is included, counsel should furnish specific details on the timing and means of communication that were utilized. A generic statement that an unsuccessful attempt to contact opposing counsel was made will not satisfy the requirement to confer.

Consistent with principles of professionalism and a lawyer's duties to his or her client, consent on administrative matters, such as a motion to continue oral argument, should be extended whenever possible.

3. Motions for Extensions of Time. The court recognizes that some cases may require additional time to fully prepare the record and the briefs than what is allowed under the Rules of Appellate Procedure. While initial requests for an extension of time to file an initial or answer brief will often be granted (particularly if it is stipulated or unopposed), counsel should avoid multiple, seriatim requests for extensions of time.

The filing of a motion for extension of time is a request, which may or may not be granted. An order from this court setting a deadline in which to file a brief, or stating that no further motions for extension will be considered, should (like all court orders) be followed scrupulously.

Pursuant to this court's administrative order 2013-1, parties may file a stipulated notice for a specific extension of time for filing briefs. In the alternative, if a motion for extension of time is filed, counsel must confer with opposing counsel before filing it and must include a certificate of conferral. The moving party should include a specific due date on which the brief or response will be due if the extension is granted.

Because an order granting an extension of time for the preparation of the record or index or filing of transcripts automatically extends the time for service of a brief (Fla. R. App. P. 9.300), it is not necessary to file a separate motion for extension of time for that purpose. Also, an appellee need not request an extension of time to file an answer brief when the initial brief has not been served.

4. Motions to Withdraw as Counsel. Motions to withdraw as counsel that do not conform to Fla. R. App. P. 9.440(b) will ordinarily be denied without prejudice. Motions to withdraw filed by counsel in criminal appeals must also comply with Fla. R. App. P. 9.140(d). A practitioner in a criminal case who files a notice of appeal and fails

to comply scrupulously with the applicable rules and/or directions of the court may be subject to sanctions.

5. Notices of Supplemental Authority. The need to file a notice of supplemental authority should be rare. The procedure should be reserved for extraordinary circumstances or situations where a new case or legal authority has just been published that might impact a fully briefed (but not yet decided) appeal. Preferably, notices of supplemental authority should not be used to include citations to cases or authorities that had been decided, published, and available prior to the briefing. In no event should a notice of supplemental authority be utilized to attempt to avoid the page limits of a brief.

6. Orders to Show Cause on Finality. If it appears that an order on appeal may not be subject to appellate review, the clerk may issue an order to show cause why the appeal should not be dismissed. Counsel are encouraged to carefully review any authorities cited within the show cause order. If a show cause order is issued, it is often necessary (and more expedient) for the appellant to obtain an amended order from the lower tribunal rather than attempting to convince the appellate court that the order under appeal is sufficiently final or amenable to appeal.

BRIEFS AND BRIEF WRITING

1. Be Brief. Brevity is important. Appellate arguments are often more honed, more focused, and perhaps more persuasive, when they are shorter than the rules' limitations. Appellate judges must read and process thousands of pages of legal arguments and appellate records. Succinctness in the recitation of facts, in argument, and in word choice, wherever practicable, is not only appreciated, it will likely improve the quality of the appellate brief.

2. Distill the Facts. In a brief's statement of the facts section, it is important to distill the recitation down to only those facts that are relevant to the brief's legal arguments. An appellate judge should not be put in a position of having to speculate why a party described a series of facts or events from the record that have little to do with the issues argued on appeal. Ideally, the statement of the facts should be in the form of a narrative instead of a page-by-page condensation of the witnesses' testimony.

3. Cite the Record Thoroughly and Carefully. Every recitation of fact must include a citation to the specific page or pages in the record that support that recitation. Citing to a broad range of pages for discrete factual or procedural points is discouraged.

4. Separate the Issues. Rule 9.210(b)(5) requires initial briefs to include "argument with regard to each issue" raised within the appeal. Though not explicit in the text, we find that the best way of fulfilling the rule's mandate is for appellants and petitioners to separately address each issue they wish to raise in the argument section

of their appeal. While there may be some overlap, litigants and counsel should make every effort to separate the issues they wish to argue and then strive to keep them separate as the argument is developed in the brief.

5. Track the Issues Raised. In furtherance of point #4, appellees and respondents are strongly encouraged to follow the appellant/petitioner's order and categorization of the issues within their answer and response briefs. Many judges in our court prefer to review the sequence of arguments raised by the parties issue by issue. If an appellee or respondent does not draft a brief or response to correspond with the issues raised by the appellant or petitioner, it is very difficult, if not impossible, for the judges to consider the arguments in sequence.

6. Write an Effective Summary of Argument. The summary of argument section serves as a roadmap of the arguments on appeal. A carefully crafted summary of the argument section should be a concise and persuasive overview of the arguments that does more than simply recite the various headings or subheadings within the brief. It should set forth the best reasons a party should prevail under the particular standards of review, law, and facts.

7. Keep a Nature of the Case Statement ("Introduction") Very Brief. If the statement of the case and facts begins with an introduction about the nature of the case, the introduction should be limited to a very brief, non-argumentative statement about the case and the issue or issues presented on appeal. Outlines of substantive arguments are more proper in a brief's summary of argument section. *See* point #6.

8. Footnotes are Strongly Discouraged. Appellate briefs ought to convey concise factual recitations and legal arguments in a format that should be relatively easy to read and follow. Generally speaking, the use of footnotes undermines these goals. With the advent of personal electronic devices, which most of the judges of our court now utilize for reading, footnotes are especially problematic and distracting. Moreover, using footnotes for citations to the record or to a legal citation, as is the common practice with scholarly legal writing, hampers our ability to effectively use hyperlinks to directly access the case or record citations provided in your brief.

Be extremely sparing with your use of footnotes in briefs. Under no circumstances should a party ever attempt to use footnotes as a means of exceeding the page limits of a brief (a violation of which may result in the court's striking the brief).

ORAL ARGUMENT

1. Make a Proper Request. The Second District Court of Appeal has historically extended oral argument to most litigants involved in an appeal of a final order as long as they have made a proper request for it. Because the scheduling of oral argument is a function of the clerk's office, it is important to make any request for oral argument in a separate filing. Note that Fla. R. App. P. 9.320 was amended, effective January 1, 2015, so that the time for serving the request for oral argument in appeals is "not later than 10 days after the last brief is due to be served."

If an attorney who will present oral argument has not been listed previously on the brief, please inform the court as soon as possible by filing a notice of appearance.

2. Best Practices in Oral Argument. Oral argument affords counsel and pro se litigants an opportunity to directly interface with the three-judge panel assigned to their appeal. Our court generally allows twenty minutes of time to each side for oral argument in an appeal. Ideally, oral argument will be somewhat akin to a question-and-answer session. Thus, the allotted time should not be used to make a speech but to address the panel's questions or issues.

With that in mind, we would offer these general observations about how counsel and pro se litigants can maximize their oral argument opportunity: (a) always introduce yourself and who you represent (for example: "May it please the court. My name is _____, and I represent the_____."); (b) if you are the appellant/petitioner, indicate whether you wish to reserve any rebuttal argument time (no more than five minutes); (c) if multiple parties will be arguing for a side, indicate how you would like to divide the time before proceeding into argument; (d) have an outline of your key points, as well as transition points, prepared in some form; (e) speak slowly and clearly, at a proper volume; (f) always answer a judge's question forthrightly, candidly, and completely; (g) try not to delay answering a question; (h) never interrupt the judge who is asking the question; (i) try to avoid simply reading notes or prepared remarks in response to a question; (j) do not ask a panel judge a question unless it is for clarification; (k) always be conscious of your remaining time.

3. Know the Case, the Briefs, and the Law. Because any issue that has been raised in the briefs might be the subject of a concern or question from the panel, it is imperative for counsel to thoroughly know the case, the record, and the procedural development of the underlying litigation. Equally important, anyone presenting oral argument should have a thorough mastery and recollection of all of the arguments contained in the briefs. Finally, counsel should be thoroughly familiar with and prepared to discuss any aspect of the cases and legal authorities that were cited in the briefs.

4. Be Mindful of the Audience. An appeal is assigned to a three-judge panel who will be referencing a written record and briefs. Thus, oral argument before an appellate panel is categorically different from closing argument before a jury: dramatically raising or lowering voice volume, facial gestures, pausing for effect, waving a "key" piece of evidence, thumping the podium, and the like are often more irritating than persuasive.

5. Practice Beforehand. It is always a good idea to practice oral argument with a colleague prior to appearing before the court. This can help sharpen counsel's responses to likely questions, as well as help to identify questions that might be raised during oral argument. Using a timer or a clock to track the allotted time constraints can also be a useful part of this exercise.

6. Be Professional. Never make personal attacks on the trial judge, the lawyers, the parties, or the witnesses, whether directly, indirectly, or sarcastically, during oral argument. While opposing counsel or an opposing party is presenting argument, remain dignified and avoid making any facial gesture, heaving a sigh, shaking the head, and the like, all of which are distracting and unprofessional. Attorneys should counsel their clients about appropriate courtroom behavior if they anticipate a client's attending oral argument.

There is almost never any reason to interrupt or object when the other side is presenting their argument. Ordinarily, the judges assigned to your panel will readily recognize arguments that are outside of the record or otherwise improper.

In the rare instance where a demonstrative aid will be utilized during oral argument, counsel should, prior to the date of oral argument, notify opposing counsel to disclose the demonstrative aid and contact the court marshal's office.

Finally, be extremely sparing with attempts at humor during oral argument; more often than not, it will be inappropriate given the seriousness of legal proceedings in general.

7. Be Brief (if you can). Similar to the page limits of written briefs, it is not necessary to utilize every minute of allotted time in oral argument. If you have adequately touched upon the points needed to be considered and fully answered all of the panel's questions, it is perfectly acceptable to inquire if there are any further questions and conclude oral argument.

8. Be Mindful of the Panel's Job. Recognize that the judges fully prepare for oral argument and are open to thoroughly considered arguments that are supported by the record and the law. Do not assume that a question necessarily reflects a judge's final conclusion as to the case. Listen to questions and respond as directly as you can. The judges want to make a correct legal decision, and their questions are intended to help them achieve that goal.

CONCLUSION

It is our hope that this list of practice preferences will provide helpful guidance to litigants and their counsel. We anticipate keeping this web link updated and possibly expanding it over time.