

**APPELLATE PRACTICE: A VIEW FROM
THE OTHER SIDE OF THE PODIUM**

**ELMO LANG MEMORIAL
CONTINUING LEGAL EDUCATION SEMINAR**

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By: James H. Heidelberg

INTRODUCTION

Appellate practice is an exciting part of the practice of law. It teaches you the law, not only for that case, but for other cases you will encounter in your practice. Handling an appeal by writing a brief and orally arguing a case is intellectually stimulating and is important because you are able to not only serve the client's interest in the case you are handling, but you are also making an important contribution to Mississippi jurisprudence because the result of any case you handle on appeal has applications for years to come as precedent.

Appellate practice has become a "specialty" for a number of reasons. First, as we all know, the number of cases that are actually tried before juries has dramatically decreased. If there are less trials, there are less appeals. However, there are also a number of appellate proceedings that deal with motions and legal issues of a procedural nature before they reach a jury verdict or a final determination by a judge as the trier of fact.

Present day appellate procedure and appellate court rules have also dramatically decreased the number of opportunities to argue cases orally because the rules now provide that it is the court's election as to whether it wishes oral argument. Some are of the school of thought that oral argument is a waste of time and it really adds nothing to the decision. As a practitioner who has handled more than 95 cases before the Mississippi Supreme Court, Mississippi Court of Appeals, Fifth Circuit and the U.S. Supreme Court and argued over 40, I disagree with this strongly. Oral argument is an event that focuses the parties and the court on your case and transforms it from just "another file." The dynamics of an interchange between lawyers and the court has very often determined the outcome of a case.

The following are some "tips" I have learned over the years which I consider important in handling any appeal. Remember "Young men know the law, Old men know the exceptions." (Oliver Wendall Holmes)

THE OTHER SIDE OF THE PODIUM

1. Read and know the rules.

- This seems simple, but you should become familiar with the Mississippi Rules of Appellate Procedure. Make sure you have a current version because they are periodically amended. The Rules are not very long and are well organized, and have excellent forms to assist you in pursuing an appeal in Appendix A, clarify what Mississippi statutes are modified or supplemented by the Mississippi Rules of Appellate Procedure in Appendix 2, and have a good index to answer questions.
- Use Luther T. Munford's "Mississippi Appellate Practice" which is an outstanding publication and is the "Bible" for lawyers in appellate practice in the state. It is organized well and updated in a timely fashion and indexed topically to answer any question you might have about an appeal in Mississippi. It also has an excellent set of forms.
- **If in doubt, call the clerk.** I have always found that the clerks at the Mississippi Supreme Court are helpful and can provide you assistance should you need it. The Court also has a Supreme Court website at "www.mssc.state.ms.us/". This website directs you to many topics, including an up-to-date decision list, general docket list, calendar and access to the clerk's office and appellate rules. It can be accessed directly or through the Mississippi Bar website at "www.msbar.org/".

2. Time is vitally important and designate your record correctly.

- Time is very important on appeals. Consult the Rules and utilize the charts in the Rules and the publications to make sure that you timely have all notices, briefs and motions before the Supreme Court. Do not wait until the last day to place it in the mail. The court will probably follow other courts' leads and will more than likely have all briefs and documents filed electronically in the near future.

- **Take the time to carefully review the designated appeal record when you receive it.** This is not something to be left to a secretary or clerical person because you should know the case better than anyone. The time to review the record is not in the middle of preparing the brief when you cannot find the pleading or testimony that is important to your case. Supplementing or redesignating the record is time consuming and the court frowns upon this procedure.

3. **Be sure your case is “final for appeal.”**

- It may sound simple, but make sure your case is “appealable.” The court has noted the importance of Rule 54(b) of the Mississippi Rules of Civil Procedure in several recent opinions. This rule provides that unless there is a final judgment as to “all of the claims or parties,” a judgment is not appealable. In other words, all of the claims and all of the parties must have a final judgment before the case is “appealable.” You should always ask for “Rule 54 express determination” which must be expressly stated in the judgment to make the case appealable if there are any other remaining claims or remaining parties. It would be quite embarrassing to you to have to tell your client you thought a case was appealable, that you spent the time, money and effort to appeal and brief the case, only to have the court decline to hear it because it was not final for appeal purposes.
- Remember it is discretionary with the trial court as to whether it will enter a Rule 54(b) designation on a judgment. If you receive a judgment without a Rule 54 determination and there are remaining parties and claims, you should express this clearly to your client and advise them you should stay involved in the litigation until there is a final conclusion. If you do not do so, you may be faced with having to handle an appeal of a case that you have not been involved with for many years and the proceedings between the time of your judgment and the “final appealable” judgment puts you at a great disadvantage.

4. Prepare your briefs in the form required by the Rules.

- Rule 28 of the Mississippi Rules of Appellate Procedure sets out the form to be followed in preparing a brief. This is an excellent and orderly organization to prepare the brief and make your arguments by. The clerks and the judges of the court are familiar with this procedure which is mandated by the Rule. A brief in a form that does not follow this Rule will be more difficult for the clerks and the judges to follow.
- Your brief should be organized as follows:
 1. Certificate of Interested Persons
 2. Tables
 3. Statement of Issues
 4. Statement of the Case
 5. Summary of Argument
 6. Argument
 7. Conclusion

5. Your “Summary of Argument”: Why you should win.

- **The “Summary of Argument” is the most important part of your brief.** Rule 28(a)(5) states the summary of argument should “seldom exceed two and never five pages.” You should always write the summary of argument first, and try to make it no more than two pages.
- Try to not cite cases in your Summary of Argument unless they are totally dispositive of the case; you can do that in the “argument” section. The Summary of Argument is your first and best opportunity to tell the court why you should win your case. Tell the court in a clear and concise fashion with as little “legalese” as possible.
- Let’s be realistic. Appellate judges are extremely busy and customarily will review the Summary of Argument first. You want to make their first impression of your case clear, concise and powerful. If a judge does not

buy your Summary of Argument, a long and lengthy argument section with numerous case cites, etc., will not likely win the case for you.

6. What to put in your brief.

- Know and set out clearly the facts and procedure that are important to your case. The court needs to completely understand how and why the case is before it.
- More than likely only one judge on an appellate panel will be assigned the task of reading the entire record. That judge usually assigns the reading of the entire record, particularly if it is lengthy, to a law clerk. Therefore, you most likely will be in a position of arguing your case to an appellate court where none of the judges have read the entire record themselves.
- I am convinced that I have won cases before appellate courts because I was able to point out a factual or procedural misunderstanding that one or more of the judges had in the case. Do not merely rely on legal arguments and neglect being knowledgeable about what went on procedurally and factually at the case below. You do not want to be embarrassed by having to answer to a court that you do not know what occurred procedurally or factually in the case you are arguing. If you believe there is some fact or procedure that is vitally important, have the page and cite to the record ready to answer a question if asked.
- **Simply put, just say it!** I have never been told by a judge that my brief was too short. Appellate writing and appellate argument are simply communication. The best communication of ideas and argument usually wins. You want to make your arguments clear, concise and understandable to the judges and, just as importantly, to the clerks that support the judges.
- Of course, the emphasis should be on the legal arguments that support your position. Try to tell the court what the law is, but also try to convince the court why the law is right, and your position is the correct

one. Always try to use the most recent Mississippi authority. If needed, use Fifth Circuit court authority, but unless a ruling is contrary to the large number of jurisdictions, string-citing cases for effect does not add to the convincing power of your brief past a certain point.

7. After you file your brief remember you can use a “28(j) letter.”

- Rule 28(j) of the Mississippi Rules of Civil Procedure, “Citation of Supplemental Authorities,” is vitally important. This Rule allows you to supplement your brief with newly discovered cases or cases that have been decided subsequent to the filing of your brief.
- Very few practitioners use this Rule and it should be used more often. The Rule does not allow you to reargue your case, but the letter allows you to notify the appellate court of a new case and to reference the court to the page of the brief or the point argued “without argument.”
- You can even use a 28(j) letter after oral argument should the situation occur.
- The Fifth Circuit Court of Appeals is particularly sensitive to counsel who cite or argue cases not in their briefs during oral argument that have not supplied the court a 28(j) letter. They may stop you from arguing the case or disregard it.

8. If the appellate court calls for oral argument you are fortunate and the court must see something very significant in your case, so prepare accordingly.

- Due to present day procedure, only a very small number of cases are actually argued before the Mississippi Supreme Court, the Mississippi Court of Appeals, and/or the Fifth Circuit.
- Again, read the record thoroughly and become familiar with the facts and procedures so you can answer questions the court asks. Remember that it

is generally the job of the court clerks and not the judges to read the record or the entire record. The judge will probably receive a memo from a clerk, therefore, his information as to the record will be “thirdhand.”

- As to the very significant cases you rely on, know which judges of the court you are arguing before, and which judges participated in writing the opinions for the majority and the dissent. Be ready to distinguish the case for a judge that voted against your position, and also be ready to tell a judge that agrees with you why he was right in his prior opinion that is applicable to your case.
- Be ready to present your argument whether you are never asked a question by the court or whether the court questions you during your entire allotted period of time.

9. Interlocutory Appeal

- Interlocutory appeals are still relatively new to Mississippi practice and the provisions for them are incorporated in Rule 5 of the Mississippi Rules of Appellate Procedure.
- Whether the court will hear your interlocutory appeal is discretionary with the Supreme Court, so consider these special circumstances that the court reviews in determining whether or not to take an interlocutory appeal by permission. They are: (1) materially advance the termination of the litigation and avoid exceptional expense to the parties; or (2) protect a party from substantial and irreparable injury; and/or (3) resolve an issue of general importance in the administration of justice.
- Interlocutory appeals under Rule 5 are extremely valuable to Mississippi jurisprudence no matter what side of a case you are on. If there is a legal issue that will eventually decide your case, it benefits everyone to have it decided early on, rather than after years of litigation.
- Interlocutory appeals are good tools if used properly. They are not to be

used when you simply do not like the way a judge ruled at the trial level. That is what an appeal is for at the conclusion of the case.

- The present danger of interlocutory appeals is a misuse and/or overuse by lawyers who misunderstand the purpose of the Rule. The volume of interlocutory appeals has frustrated the court and led to the court declining to hear interlocutory appeals that should be heard. Make every attempt to express the importance of the interlocutory appeal as an important precedent, rather than merely a narrow application to your case.

10. Federal Appellate Courts

- Cases tried in Mississippi federal district courts are appealed to the Fifth Circuit. The Fifth Circuit is much more strict as to time, guidelines and deadlines, and brief forms. Its procedures are much more detailed than the Mississippi Supreme Court and the Mississippi Court of Appeals. Pay particular attention to the technical requirements of the Fifth Circuit and make sure you obtain up-to-date Fifth Circuit Court Appellate Rules, in addition to the Federal Rules of Civil Procedure. The Fifth Circuit has a great number of local rules and internal operating procedures that will govern your appeal.

COLOR, LENGTH, FILING AND SERVICE REQUIREMENTS
FOR APPEALS TO MS SUPREME COURT/COURT OF APPEALS

DOCUMENT	FRONT COVER	LENGTH	TIME DAYS	COPIES FILED (INCLUDING ORIGINAL)
Appellant's Brief	Blue	50 pages	40	4 (10 for death penalty cases)
Record Excerpts	White	Mandatory excerpts + no limit on optional pages essential for understanding the issues	21	4
Appellee's Brief	Red	Same as Appellant's Brief	30	4 (10 for death penalty cases)
Reply of Brief of Appellant (also Reply Brief of Appellant/ Brief of Cross-Appellee)	Gray (If cross-appeal, red)	25 pages (But if response to cross-appeal included, same as Appellant's Brief)	14 (if cross-appeal, 30)	4 (10 for death penalty cases)
Reply Brief of Cross-Appellant	Gray	25 pages	14	4
Motion for Rehearing	White	25 pages	14	11 (MSSC) 12 (MS COA)
Petition for Writ of Certiari	White	10 pages (plus copy of opinion and judgment of the Court of Appeals and copy of Motion for Rehearing filed in the Court of Appeals)	14 (NO additional 3 days as provided in Miss. R. App. P. 26(c))	11
<i>Amicus Curiae</i> Brief	Green	15 pages	7	4 (10 for death penalty cases)

Additional Electronic Disk Filing. With all briefs, a copy on an electric disk (includes both CDs and floppy disks) must be filed with the brief. The disk's label must contain the style of the case, the number of disks, i.e., "1 of 2, 2 of 2, etc.", and the language format. All disks must be in an electronic language capable of transference to other systems (ASCII, WordPerfect, Ami-Pro, Word, etc.). Miss. R. App. P. 28(m).

RULES REMINDER
FOR APPEALS TO MS SUPREME COURT/COURT OF APPEALS

<u>Form of Briefs</u> <i>Miss. R. App. P. 32</i>	<u>Contents of Principal Briefs</u>
Paper Size	<p>8 ½ x 11 inches All pages must be numbered</p>
Line spacing of text	<p>Double</p>
Line spacing of foot notes, headings and lengthy quotations	<p>Single</p>
Margins	<p>1½ inches on left; 1 inch on top; ¾ inch on bottom; ½ inch on right</p>
Minimum type size	<p>Text: 12 pt Foot notes: 11 pt</p>
Duplication	<p>One side of sheet</p>
Binding	<p>Lies flat when opened</p>

Cover. Miss. R. App. P. 32(a).

Caption, name of the court and number of case; Style of case; Nature of the proceeding (e.g., Appeal; Interlocutory Appeal; Petition for Writ of Prohibition) and name of court or commission below; Title of document (e.g., Brief for Appellant, Record Excerpts); Names, bar numbers, addresses and business telephone numbers of counsel representing the party on whose behalf the document is filed; and Statement on the cover of a brief filed by each party that oral argument is or is not requested.

Certificate of Interested Persons. Miss. R. App. P. 28(a)(1).

Contains all persons, associations of persons, firms, partnerships, or corporations which have an interest in the outcome of the particular case. Governmental parties need not supply this certificate.

Statement Regarding Oral Argument. Miss. R. App. P. 34(b).

Concise statement of the reasons that oral argument will be helpful to the court. Unless a party desiring oral argument complies with this requirement, he shall not be heard orally except by special permission or order of the appropriate appellate court.

Table of Contents. Miss. R. App. P. 28(a)(2).

Table of Authorities. Miss. R. App. P. 28(a)(2).

Table of cases (alphabetically arranged), statutes, and other cited authorities with references to the pages of the brief where each is cited.

Statement of Issues.* Miss. R. App. P. 28(a)(3).

Identify the issues presented for review. Each issue shall be separately numbered within the Statement.

Statement of the Case.* Miss. R. App. P. 28(a)(4).

Shall first indicate the nature of the case, course of the proceedings and disposition in the court below. Statement of facts relevant to the issues presented for review with appropriate references to the record shall follow.

Summary of the Argument. Miss. R. App. P. 28(a)(5).

Should seldom exceed 2 pages and never 5 pages.

Argument. Miss. R. App. P. 28(a)(6).

Conclusion. Miss. R. App. P. 28(a)(7).

Precisely state relief sought.

Certificate of Service. Miss. R. App. P. 25(d).

*Appellee need not restate this section unless the Appellee is dissatisfied with the Appellant's statement.