10-1-2001

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Alumni Association

On appeal

A Rochester CLE program details ideas and techniques for dealing with the Court of Appeals

A Continuing Legal Education seminar on a most appealing topic—"New York Appellate Practice and Procedure"—drew a substantial audience to hear keynote speaker Herald Price Fahring, a panel of appellate-court justices and other presenters with valuable advice on practicing in the Court of Appeals.

The fall event was held in Rochester’s Villa D’Este Ballroom. It was presented by UB Law School and the UB Law Alumni Association, with sponsorship from The Daily Record and West Group.

Fahring, who has done his share of appellate work in the course of a celebrated career in constitutional and criminal law, noted that the New York State Court of Appeals hears more than 2,000 cases a year—"a staggering caseload," he said. His talk centered on ways to make the process easier on the justices, and thereby more favorable to one’s client.

For example, he said, in writing an appellate brief, frame the question tightly and concisely, even while presenting it in a way “that will compel an answer that favors your side.” A one-paragraph introduction to the questions presented, he said, is a useful way to impress upon the court the importance of the case and the number of people their decision will affect.

A one- or two-page statement of the case should follow, Fahring said. "In a snapshot, this gives the court the gist of the case," he said. "It should be straightforward. This is not the place for strong advocacy."

He also stressed clarity of language, saying, "If the judges do not understand our grievance, how can they remedy it?" He advocated "short words, short sentences, short paragraphs, lots of white space. We can use the best techniques of fiction writing to maintain interest," he said, including "picturesque language" and subheads to divide a mass of material into more easily graspable pieces.

Charts especially, Fahring said, are welcomed by the appellate justices simply because they stand out from the masses of verbiage they must read every day. "We live in a visual culture," he said. "The image has taken over. A chart has the power to convey information to the reader much more effectively and efficiently than a narrative."

Most judges will cheer any device that will help them understand the case better." But despite that, he said, "The dominant force of the brief is language. A brief is made up of words, and language is still the greatest of all human persuaders. The English language has 600,000 more words than any other language, and it is important to find the best, strongest words to address the harm and the hurt that our client has suffered. That takes an awful lot of work and concentration, and there are no easy answers to that."
He gave as an example a well-written brief he had read that argued this way to overturn a statute: "If an obituary is to be written for this law, let it be done here and now."

In closing, Fahrlinger argued for appellants and respondents to go beyond the clichés of the profession. "Habit is our worst enemy," he said. "We have to develop an attitude not to be afraid to take chances."

The Hon. David O. Boehm, retired associate justice of the Appellate Division, gave a well-received plea for professional ethics in practice at the appellate level. He noted that while the common assumption in bygone days was that the lawyer was entirely the agent of his client, that is no longer true; rather, today's attorney must follow his own ethical standards and conscience. "Appellate work is not just the job of the court," he said. "It is a combined responsibility that is shared between counsel and the court to disclose, develop and produce a right result in a particular case."

Likewise, he said, litigants have an obligation to include all the evidence in the brief, even if it appears unfavorable to their case. "This is especially difficult if you are the appellant," he said. "But you do not want the panel seeing damaging evidence for the first time in the respondent's brief." Including all the evidence, he said, also gives the appellant the opportunity to discredit or minimize the damaging impact of contrary evidence in the brief.

Carl Darnall, clerk of the Appellate Division, Fourth Department, spoke with humor about some of the nuts-and-bolts aspects of filing and carrying out an appeal, including such matters as time limits for filing and the practicalities of scheduling arguments.

One important task, he said, is preparing what the court calls a "complete record on appeal." This is to encompass copies of all papers, including the order of judgment being appealed, the notice of appeal, pleadings, motions and exhibits. Excepted from this record, he said, are memoranda of law and transcripts of oral arguments. The complete record on appeal must be sent to the opposing counsel for review, a process called "stipulation," before it is filed with the Appellate Division.

More nuts and bolts: The type size should be 11 points ("and believe me, these judges know when the type is too small"); paginate the pages consecutively and simply; do not use Minuscript renderings of multiple pages; bind the brief on the left-hand side, not the top; and "avoid metal fasteners that have sharp points or ends that can cause multiple stab wounds when the judge is reviewing your record. The last thing you want is a judge bleeding on your record."

Craig Peterson, chief court attorney of the Appellate Division, Fourth Department, ended the afternoon's instruction with a review of issues regarding the Appellate Division's jurisdiction and the scope of its review. He noted that the appeals court can review both questions of fact and questions of law, and he discussed the significant differences between criminal and civil appeals.

In deciding whether to take a case to appeal, Peterson said, an attorney must consider four questions: Is this an appealable paper? Is the case reviewable? Am I an aggrieved party — that is, my client did not receive all the relief he asked for? And finally, has it been less than 30 days since my opponent has served notice of an appeal?

Hon. Eugene F. Piggott Jr., presiding justice of the Appellate Division, Fourth Department, presided over a roundtable discussion of appellate briefs and oral arguments that included several associate justices of the appellate court.

Attended were entitled to claim 3.5 CLE credit hours.