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Alumni Association

Argument at appeal



Mickey H. Osterreicher '98, Hon. Jerome Gorski and Buffalo News reporter Dan Herbeck.

*26th annual
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The challenges and rewards of appellate advocacy were the day's hot topic at UB Law School's 26th annual Alumni Convocation, held Nov. 3, 2001, in the Hyatt Regency Buffalo.

The morning-long Continuing Legal Education program, which attracted a near-overflow crowd, also examined the ethical implications of high-profile cases. The two topics featured speakers from the bench, the bar and the media.

Lucinda M. Finley, the Frank G. Raichle Professor of Trial and Appellate Advocacy and a veteran of the federal appellate advocacy process, spoke in detail about some of the differences lawyers should expect to find in the federal appellate courts as opposed to state courts. Finley has argued cases in six of the 12 federal circuit courts, and has appeared before the U.S. Supreme Court as well.

One key difference between federal and New York State appellate practice, Finley noted, is that the federal system adheres to the "final judgment" rule for when a case can be appealed. With some exceptions, she said, the appeal can take place only after lower-court appeals have been exhausted. By contrast, she said, "Basically, New York law says you can appeal almost anything at any time" – an attorney can approach the Appellate Division with an appeal of any final or any interlocutory order.

By way of practical advice, Finley spoke of the art of writing an appellate brief. For one thing, she counseled, "Do not put too many issues into a motion for appeal. It is a rare appeal that covers more than four or five factors, and one or two or three is generally better."

Because appellate courts have word-count limits on briefs they will accept, she advised leaving plenty of time for editing briefs before they are filed.

"The two most important things I can possibly say about writing a good brief," Finley said, "are, one, establish a theme and weave that theme throughout both your statement of facts and your argument, and two, the most important part of your case is the statement of facts: It should be used to advance your position. The statement of facts is your first chance to persuade."

"The worst way to present the facts is as a chronology. You are telling a narrative, you are telling a story, and you want it to be a coherent story with a coherent theme and logical organizational factual development."

"Use other people as resources," she said. "Bounce your ideas and briefs off other people. If you can get a smart non-lawyer to understand your case, that is a good sign you have written a clear and persuasive brief."

Carl M. Darnall, chief clerk of the New York State Appellate Division, 4th

Department, spoke in detail of a number of procedural issues that can make or break an appeals filing. The clerk's office schedules appeals, he said, first by issuing a scheduling order that gets the case on the court docket some months in the future, and includes a deadline for the respondent to file a brief. "If you cannot appear on that date for oral argument," he advised, "notify the office in writing within 15 days. Once that case is scheduled for oral argument, it is very difficult to get the case moved."

He said that rebuttal is not permitted in the oral argument phase, but attorneys have five days to submit a written statement.

Darnall noted the Rochester-based Appellate Division's "Have Gavel, Will Travel" program, which takes the entire process on the road to several New York State counties, three or four times a year. "Your oral argument might be scheduled in the Oswego County Courthouse or the Chautauque County Courthouse," he said. "In every term, we have had an attorney scheduled to argue in that county show up in Rochester. So pay attention to these notices. They are very important."

Darnall also pointed out that, in addition to printed material, attorneys may submit CD-ROMs that include hyperlinks. "I predict this is a precursor to electronic filing, which some Southern states have adopted as a practice now," he said. "I think you will eventually see this happening nationwide."

Eugene F. Pigott Jr., presiding justice of the Appellate Division, 4th Department, spoke from the perspective of a



Denise E. O'Donnell '82



David G. Brock '72 and John M. Curran '84

judge who has seen the mistakes lawyers routinely make in petitioning for appeal.

"Presenting your case in an objective fashion will help," he said. "Hyperbole will get you nowhere. If you have seven points and they are sincere, that is fine. But if you are going to orally argue, the best thing that I can recommend to you is to say, 'I have seven points in my brief. I would like to argue Points 1 and 3 and rest on my brief in the others.' Take a breath, and if we disagree with your choice of topics, we will let you know. If not, we know you are going to make two points and then sit down."

He, too, pleaded for clarity and brevity in appellate briefs.

"Make sure that documents are readable and that everything can be seen," Pigott advised. "Make sure your pictures are viewable. When you put in an accident report, put in the key. You can really frustrate a judge if it says the weather condition was 2 and the judge does not know what the 2 means.

"The brief is, of course, our first introduction to the case. None of us are Hemingway, or else we would be making our living that way, but we are better than a lot of the briefs I have seen. You can write with some degree of liberality."

As an example of a compelling brief, Pigott spoke of one that "begins with the Fire Department in Utica putting out a car fire in a mall parking lot. The fire popped the trunk open and there were two dead bodies. The rest of the brief traced those bodies back to the crime. It really held our interest."

Also presenting at the Convocation were Samuel L. Green, senior associate justice for the Appellate Division, 4th Department; Christopher J. Burns and Jerome

C. Gorski, associate justices for the Appellate Division, 4th Department; Denise E. O'Donnell, former U.S. attorney who is now a partner in the Buffalo law firm Hodgson Russ; John M. Curran, a partner in the Buffalo law firm Phillips, Lytle, Hitchcock, Blaine & Huber, LLP; and Dan Herbeck, a reporter for *The Buffalo News* and co-author of a best-selling book on Oklahoma City bomber Timothy J. McVeigh.

The event was followed by presentation of the 2001 Edwin F. Jaeckle Award to James L. Magavern; see the story on page 2 for details.